

**A COMPARISON OF MERGER REGULATION IN SOUTH AFRICA AND COMESA
BY**

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. It has not been submitted for any degree at University or academic institution. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

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SUMMARY

The preamble of the Competition Act No. 89 of 1998 recognises the injustices of the past which resulted in excessive concentrations of ownership and control within the national economy. The Act further provides as its main objective the regulation of trade practices which affect our national economy. Section 12(1)(a) of the Act prohibits any anti-competitive trade practices which are likely to substantially lessen or prevent competition. The Act defines a merger as a process 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. The Competition Authorities are enjoined to evaluate mergers before they get approved. This is so because once the merger gets approved without being properly assessed the consequences maybe undesirable and anti-competitive. The concept of merger regulation is problematic and in this dissertation I probe into the South African merger regulation regime and compare it with that of Common Market for Eastern and Southern Africa (COMESA). The dissertation will analyse the regulation of mergers in South Africa and COMESA. The dissertation will also look at the shortcomings of merger regulation of COMESA and South Africa. In conclusion it will be argued that even though South Africa is not a member state of COMESA its merger regulation facilities are more fully advanced compared to that of COMESA. Last but not least, an analysis of how proper regulation of mergers can contribute to good economic growth will be undertaken.

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Chapter One: Background

1. Introduction

1.1 Merger regulation in South Africa

The South African Competition Act of 1998 enjoins the Competition Commission of South Africa to act as the “Watchdog” of certain trade practices within the relevant markets.¹ Merger regulation forms part of the purpose of the Competition Act which is to promote and maintain competition in the Republic in order

- (a) “ to promote the efficiency, adaptability and development of the economy;
- (b) to promote consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- (f) to promote a greater spread of ownership, in particular to increase the ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”

In terms of section 3(1) of the Competition Act, it applies to all economic activity within, or having an effect within, the Republic, except-collective bargaining within the meaning of section 23 of the Constitution, and the labour Relations Act;² a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.

Mergers are becoming a strategy of choice for companies attempting to maintain a competitive advantage over other companies.³ Corporations spend a lot of money every year in pursuit of this strategy and they are in permanent search for the best transaction in order to satisfy their needs.⁴

¹The Competition Act No.89 of 1998.

²Labour Relations Act (Act No.66 of 1995);

³Radu Ciobanu “The Social, Cultural and Political Factors that Influence the Level of Mergers and Acquisitions”. *International Journal of Academic Research in Accounting, Finance and Management Sciences* Vol. 5, No.3, July 2015 1.

⁴ Ibid.

A merger takes place 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.⁵ The transfer of control of businesses between firms may affect the market structures once they are established.⁶ It is disruptive and difficult for Competition Authorities to change market structures once they are established.⁷ Accordingly, Competition authorities worldwide supervise mergers.

The idea behind competition policy is to promote fair competition and to prevent anti-competitive trade practices.⁸ Accordingly, merger regulation is an attempt to prevent market structures from developing that may enhance the ability of firms to abuse market power either unilaterally or co-operatively to the detriment of consumers.⁹

Mergers are regulated by Chapter 3 of the 1998 Competition Act. Merger regulation is an attempt to proactively regulate the structure of the economy and markets in order to ensure that markets function optimally.¹⁰ Section 12A(1) enjoins the Competition Authorities to determine whether a merger is likely to lessen or prevent competition. If it is established that the merger is anti-competitive, it must be established whether the merger has pro-competitive consequences that outweigh those negative effects.¹¹ In determining the competitive consequences of the merger, the intention, motive or rationale of the merging parties is important.¹² In almost every merger case the Competition Authorities will attempt to establish what the business rationale for the transaction is.¹³ Sometimes if the merging parties can show the Competition Authorities that their business rationale is good, that may be an indication that the merger is not anti-competitive.¹⁴

In determining the competitive effects of the merger the Competition Authorities will firstly attempt to define the market.¹⁵ When defining the market the Authorities will also look at the

⁵ Section 12(1)(a) .

⁶ Sutherland and Kemp *Competition law of South Africa* (service issue no 18) 8-3 (herein after Sutherland).

⁷ *Ibid.*

⁸ Lewis *Thieves at the Dinner Table: Enforcing the Competition Act 2012* 77 (hereinafter Lewis)

⁹ Neuhoff *et al A Practical guide to South African Competition Act* (2006) 179 (hereinafter Neuhoff).

¹⁰ *Ibid.*

¹¹ Section 12A(1)(a)(i) of the Act.

¹² *Alpha (Pty) Ltd/Slagment (Pty) Ltd* 27/Lm/Jun03 par 4.

¹³ *BromorFoods(Pty) Ltd/National Brands Ltd* 19/LM/Feb00 par 14.7.

¹⁴ *Schumann Sasol(Pty)Ltd/Price's Daelite (Pty) Ltd* 10/CAC/Aug01 .

¹⁵ *Medicross Healthcare Group(Pty)Ltd/Competition Commission* 55/CAC/Sep05 par 25.

market shares of each party to the merger.¹⁶ If parties to a merger hold more shares than other firms in the relevant market, the Competition Authorities will take that factor into account in deciding whether to approve or not approve a merger.

The Competition Authorities conduct a public interest assessment: that is, whether there is an interest that the public may derive from the merger.¹⁷ The Act contains a closed list of public interests grounds that have to be considered. Section 16(3) of the 1998 Competition Act enjoins the Competition Commission or the Competition Tribunal to consider the effects that the merger will have on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets. If there is a public interest that outweighs the negative effects of the merger, the Competition Authorities may approve the merger.

In the assessment of mergers, the Competition Act recognises three kinds of mergers. It also sets requirements for merger notification, namely that a party to a small merger is not required to notify the Competition Commission of that merger unless the Commission requires it to do so in terms of subsection (3) of section 13 and may implement that merger without approval, unless required to notify the Competition Commission in terms of subsection (3) of section 13.¹⁸ A party to an intermediate merger must notify the Competition Commission of that merger in the prescribed manner and form ; and a party to a large merger must notify the Competition Commission of that merger in the prescribed manner and form.¹⁹

The Competition authorities have available to them a wide variety of remedies for anti-competitive conduct under the Act. They are empowered to interdict the further occurrence of such conduct, to impose positive behavioural and structural conditions on corporate conduct and to impose penalties on respondent firms.²⁰

1.2 Merger regulation regime of COMESA

The Common Market for Eastern and Southern Africa was formed in December 1994 as a regional organisation whose mission it is to promote economic integration through trade and

¹⁶*Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd* 05/x/Jan06 pars 47-49.

¹⁷Brassey et al *Competition law* (2002) 275(hereinafter Brassey).

¹⁸Section 13(1).

¹⁹ Section 13A(1).

²⁰Brassey 317.

investment in Eastern and Southern Africa (the Common Market). It comprises of 19 members: Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe and the Republic of Egypt and Malawi.

A Regional COMESA Competition law has been introduced to apply to all member states, some of which already have national competition laws in place while others have no dedicated domestic competition laws. The relevant competition legislation comprises the COMESA Competition Regulations and the Rules. The Competition regime became operative on 14 January 2013.²¹ Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the “Treaty”), provides for the prohibition of any agreement or concerted practice between undertakings, which has as its effect, the prevention, restitution or distortion of competition within the common Market.²² It further authorizes the COMESA Council to make regulations to regulate competition within the Member States.²³

The purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of the market, thereby enhancing the welfare of the consumers in the Market, and to protect consumers against offensive conduct by market actors.²⁴ Article 3 sets out the scope of application of the Regulations. They apply to economic activity that has an appreciable effect on the Common market and restricts competition.²⁵ This requirement that conduct that is likely to restrict or have an appreciable effect on competition in a relevant market echoes Section 12A(2) of the Competition Act. Section 12A(2) also requires the merger regulation authorities to determine whether a merger will lessen or prevent competition.

Merger control is addressed in the Regulations due to the potential of some mergers to affect trade between Member States and restrict competition in the common market. The approach is to require notification to and review by the COMESA Competition Commission of mergers in order to allow the Commission to regulate those that are likely to result in a substantial lessening of competition.²⁶ Conduct not capable of appreciable effect on trade between

²¹Commission Notice No. 1/2013.COMESA Competition Commission: Notice on the Commencement of Operation of the COMESA.

²²Preamble of the COMESA Competition Regulations 2004.

²³Article 6 of COMESA Competition Regulations 2004.

²⁴Article 2 of the COMESA Regulations.

²⁵Article 3(2) of the COMESA Regulations.

²⁶COMESA Merger Assessment Guidelines (2014).

Member States or restricting competition in the Common Market falls outside the scope of the Regulations, including the merger control provisions.²⁷

Article 23 of the Regulations defines what constitutes a “merger” and when it is notifiable or non-notifiable. Article 24(1) requires “notifiable mergers”, which are those that have a “regional dimension” and are above a specified threshold to be notified to the Competition Commission. A merger is defined in Article 23(1) of the regulations as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

- (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
- (c) any means other than as specified in sub-section (a) or (b).

Article 23 will apply where both the acquiring undertaking and the target undertaking or either the acquiring undertaking or target undertaking operate in two or more Member States; and the threshold of combined annual turnover or assets prescribed by the Board under Article 23(4) is exceeded. Article 23 implies that if the merger only affects one member state it will not be notifiable. This may create problems in Member States which do not have domestic laws to address merger issues.

Before the amendment of Rule 3 of the Rules on Notification Threshold, the threshold of combined turnover or assets for the purposes of Article 23(4) was exceeded if:

“(a) The combined worldwide aggregate annual turnover or combined worldwide aggregate value of assets, whichever is higher, all of undertakings to the merger in the Common market equals **zero US dollar**; and

(b) The aggregate annual turnover or the aggregate value of assets, whichever is higher, of each or at least two undertakings to the merger in the market equals or exceeds **zero US dollar**.”

²⁷Article 3 of COMESA Regulations.

This actually meant that the old rules were vague and uncertain as to when mergers must be notified. Parties would still notify mergers and pay filing fees even if the merger did not lessen or prevent competition.

According to the amended rules on the determination of merger threshold and method of calculation²⁸ any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if²⁹:

- (a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM\$ 50 million; and
- (b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.

It is abundantly clear that the COMESA Regulations were initially lacking in how and when parties would be required to notify their mergers as there was no set thresholds for notifying mergers, which meant that all mergers were notifiable. The amended Regulations clarify this point as they now set notification thresholds.

In some instances the COMESA Competition Commission may direct that the merger be reported to the respective Member State. This will normally be the case where both parties to the merger are domiciled in the same country and where the merger will not have appreciable effect on the other Member States.

It terms of COMESA, a notification fee for a merger is calculated as a percentage of combined turnover or assets in the common market subject to a cap of COM \$500 000 equivalent to US \$ 500 000.³⁰ This means that a COMESA notification may require one of the highest filing fees.³¹ Before the amended rules, COMESA made it compulsory for all mergers to be notified even if it was not yet established if the merger will lessen or prevent competition.

²⁸Rules on the determination of merger threshold and method of calculation 2015.

²⁹Rule 4 of the Rules on the determination of merger threshold and method of calculation 2015.

³⁰Article 55 of COMESA Competition Regulations 2004.

³¹ Dini Tamara “the new Competition Commission for Eastern and Southern Africa: high-priced overregulation in Africa” Without Prejudice Issue 4 volume 13 11.

1.3 Nature and Scope of Research

Merger regulation is an attempt to prevent the creation of anti-competitive market structures. It is an efficient way to encourage, promote and maintain fair competition and the strengthening of a country's economy. In this research I probe into the merger control regime of South Africa and COMESA. The research will *inter alia* focus on the notification threshold of mergers in both South Africa and COMESA.

The consequences of non-compliance with the legal procedure for implementing a merger will also be dealt with as well as the jurisprudence on merger regulation for both South Africa and COMESA. Finally, some recommendations will be made as to how merger regulation strategies can be improved in both COMESA and South African order to enhance and promote fair competition in the relevant markets.

Chapter Two History of Merger Control in South Africa

2.1 Introduction

The area of merger control in South Africa was one where the old Competition Board was most active under the Maintenance and Promotion of Competition Act.³² The structure of the system was different to the current one. There was no compulsory pre-notification of mergers and the Board's powers were only investigatory in nature, for it could not approve or disapprove of a merger.³³ The Competition Commission could investigate the alleged merger and lodge its report with the Minister of Trade and Industry.³⁴ Under section 6(1)(d) of the 1979 Act, the Competition Board could call the parties to the merger for consultation. The purpose of the consultation was to establish whether the acquisition was likely to be problematic. If the acquisition raised no competition issues, the Board would issue a "no action" letter which would mean that based on what the Board was shown by the parties, there were no competition concerns unless other information came to light.³⁵

If the Board decided that the merger was not in the public interest, the Minister still had a final say on the alleged transaction.³⁶ But if the merger was in the public interest, it was the end of the merger enquiry. This would mean that the minister had no say in whether the merger should be allowed or not. Under the 1979 Act, the issue that has to be investigated was whether the acquiring firm had a controlling interest over the acquired firm.

Controlling interest was defined as follows:

"(a) any business or undertaking, mean any interest of whatever nature enabling the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the business or undertaking ; and

(b) any asset means any interest of whatever nature enabling the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset."³⁷

³²Act No. 96 of 1979.

³³ Martin Brassey at al *Competition law* 2002 1st edition 229(hereinafter Brassey).

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid.

³⁷Section 1 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979).

Once it was established that the “acquisition” fell within the above definition, it was reported to the Competition Board and investigated. The analysis or the investigation was centred on whether the merger was in the public interest.³⁸ The public interest enquiry was however not defined by the legislation and thus the Board had to exercise its own discretion in determining what constituted public interest.³⁹ This created problems as the public or the merging parties had no guidelines as to what constituted public interest. This problem was rectified in 1981, when the Competition Board published guidelines on what should be considered in determining public interest.⁴⁰ When determining what constituted public interest, the Board could take into the socio-political factors.⁴¹ Some of the factors that were considered included the following: The effect that the merger will have on a particular industrial sector or region; effect on employment; the ability of small businesses, or those controlled by historically disadvantaged persons to become competitive; and the ability of local industries to compete internationally.

2.1 Rationale for regulating or controlling mergers.

A country’s Government has the responsibility to ensure that the markets and economy function well. The rationale for merger regulation is derived from economic theory that anti-competitive conduct is bad for the economy and could result in less competition with the resultant few participants, high barriers to entry, customers with little bargaining power and little product innovation.⁴² The idea is that competitors must conduct their business affairs with due care without infringing on consumers rights and other competitors rights to participate in the market is of paramount importance. Accordingly, merger regulation is an attempt to prevent market structures from developing that may enhance the ability of firms to abuse either unilateral or co-operative market power to the detriment of consumers.⁴³ This implies that consumer’s interests are incorporated in the whole idea of regulating mergers. It is worth noting that merger control is not, or not only, about pre-emptively preventing a merged entity from abusing its dominant position in the future; it is also about maintaining a

³⁸ Brassey 229.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Minette Neuhoff *A Practical Guide to the South African Competition Act* 179.

⁴³ Ibid.

market structure that is capable of producing the kind of outcome that follow from competition.⁴⁴

The competition authorities in South Africa recognise three types of mergers. They are: a horizontal merger; a vertical merger and a conglomerate merger. A horizontal merger is a merger between firms operating in the same level of the supply chain selling substitutable products in the same geographic area. This type of merger is usually between direct competitors, such as two dairy products chains. Horizontal mergers attract more attention from the Competition Authorities because of the serious “harmful “effects that they exert in the relevant market.⁴⁵ Some of the effects of horizontal mergers are the elimination of one competitor by another, increasing the market share of the merged entity and market concentration and reducing customer choice.⁴⁶ Horizontal mergers are motivated by size and by forming barriers to entry thereby reducing the number of competitors within an industry.⁴⁷

In the absence of the factors that constrain the merged entity from abusing market power, horizontal mergers may thus enhance unilateral market power.⁴⁸ These are referred as the unilateral effects of a merger.⁴⁹ In addition, where the number of market participants in the market is already limited, any further reduction in the number of players may facilitate the ability of the remaining firms to collude.⁵⁰ Competition Authorities are enjoined to eliminate any arrangements that will result in a decline of service levels and a rise in prices. These are referred to the as “co-ordinated effects” of a merger.⁵¹

A vertical merger entails the integration of parties in a vertical relationship, such as a manufacturer and its distributor.⁵² Vertical mergers are closely associated with operational synergy where firms merge to reduce their dependence on the environment and other firms.⁵³

⁴⁴Richard Whish *Competition Law* (4th edition) 742.

⁴⁵ICN Merger Working Group: Investigation and Analysis Subgroup Prepared for the Fifth Annual ICN Conference in Cape Town April 10-11
<http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf> (accessed on the 5/12/15)

⁴⁶*Ibid.*

⁴⁷ Capron, L., Dussauge, P., & Mitchell, W. (1998) “Resource redeployment following horizontal acquisitions in Europe and North America” 1988–1992. *Strategic Management Journal*, 19(7), 631-661.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹Jocelyn Katz and Wade Graaff “South Africa: Mergers” *Global Competition Review* 55-56.

⁵²ICN Merger Working Group: Investigation and Analysis Subgroup Prepared for the Fifth Annual ICN Conference in Cape Town April 11-12
<http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf>(accessed on the 5/12/15)

⁵³ Fan, J. P., & Goyal, V. K. (2006).” On the Patterns and Wealth Effects of Vertical Mergers.” *The Journal of Business* 79(2), 877-902.

Conglomerate mergers cover all other types of mergers that are neither horizontal nor vertical in nature.⁵⁴ These are transactions that take place between parties that have no apparent economic relationship. Conglomerates are closely associated with financial synergy and often engage in many acquisitions and compete for potentially profitable assets that will expand the economies of scale and scope.⁵⁵ Conglomerate mergers generally attract the least attention from Competition Authorities as these types of mergers do not lead to an integration of suppliers and customers.⁵⁶ An example of a conglomerate merger would be when a mining company acquires a motor vehicle manufacturer.

When it comes to vertical mergers, they seem not raise any competition issues. Some economists are of the view that vertical mergers never raise competition issues, and that the efficiencies resulting from vertical mergers far outweigh the anti-competitive effects.⁵⁷ However, the Competition Authorities in South Africa take a different approach and view vertical mergers as posing a serious threat especially with regard to the potential for input or customer foreclosure to occur post-merger.⁵⁸

2.3 Authorities responsible for merger regulation.

In terms of the Competition Act, there are three Competition Authorities namely the Competition Commission; the Competition Tribunal; and the Competition Appeal Court.

2.3.1 The Functions of the Competition Commission

⁵⁴ Martin Brassey *Competition law* 2002, 1st edition 228.

⁵⁵ Maksimovic, V., & Phillips, G. (2001). The market for corporate assets “Who engages in mergers and asset sales and are there efficiency gains?” *The Journal of Finance*, 56(6), 2019- 2065. **Economies of scale** for a firm involve reductions in the average cost (cost per unit) arising from increasing the **scale** of production for a single product type, **economies of scope** involve lowering average cost by producing more products.

⁵⁶ *Minette Neuhoff* 180.

⁵⁷ *Minette Neuhoff* 179.

⁵⁸ *Ibid* Input foreclosure occurs where a supplier of a particular input acquires one of its customers in the downstream market and thereafter diverts its supply to the entity only. Self-dealing strategy may result in other competitors in the downstream division not getting an input from the supplier in the upper-stream division, or they do, they get an input on a discriminatory basis. In some cases where there is a shortage of an input, the supplier may refuse to supply entities competing with its downstream subsidiary.” “Customer foreclosure, on the other hand, occurs where the supplier’s customer is taken out of the market in the sense that it would now source its input from one supplier only. In this case, competition in the upstream market may be reduced as other input suppliers may not have a sufficient customer base to justify their participation in the market.”

The Competition Commission is empowered to implement measures to increase market transparency; implement measures to develop public awareness of the provisions of this Act; Competition Act, investigate and evaluate alleged contraventions; grant or refuse applications for exemption in terms of Chapter 2; authorise, with or without conditions, prohibit or refer mergers of which it receives notice in terms of Chapter 3; 5 negotiate and conclude consent orders in terms of section 63; refer matters to the Competition Tribunal, and appear before the Tribunal, as required by this Act; deal with any other matter referred to it by the Tribunal.⁵⁹

2.3.2 The functions of the Competition Tribunal.

Upon a matter being referred to it in terms of the Act,⁶⁰ the Competition Tribunal may grant an exemption from a relevant provision of this Act; authorise a merger, with or without conditions, or prohibit a merger; adjudicate in relation to any conduct prohibited in terms of Chapter 2 or 3, by determining whether prohibited conduct has occurred, and if so, impose a remedy provided for in Chapter 6; or grant an order for costs in terms of section 57.

2.3.3 Functions of the Competition Appeal Court.

The Competition Appeal Court may consider any appeal from, or review of, a decision of the Competition Tribunal. The Competition Appeal Court may confirm, amend or set aside a decision or order that is the subject of an appeal or review from the Competition Tribunal; and give any judgment or make any order that the circumstances require.⁶¹

2.4 Definition of a merger within the context of South African Competition law

In terms of the Competition Act a merger takes place 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.⁶² The transfer of control of businesses between firms may affect the structures once they are established.⁶³ It is important to define or determine what constitutes control for the purpose of determining whether a merger has occurred. Section 12(1) of the Competition Act does however not define the word “control”. This has necessitated different approaches to the definition of “control”. Some prefer to use the formalistic approach

⁵⁹ Section 21 of the Competition Act.

⁶⁰ Section 27(1) of the Act.

⁶¹ Section 37 of the Competition Act.

⁶² Section 12(1)(a) .

⁶³ *Phillip Sutherland and Kemp Competition law of South Africa* (service issue no 18 8-3).

whereas others prefer a literal approach.⁶⁴The literal approach was applied in *Bulmer SA(Pty) Ltd v Distillers Corp (SA) (Pty)*.⁶⁵ The court just accepted that control was acquired when the Appellant acquired the assets of the second Appellant.⁶⁶

Section 12(1) of the Act provides that a person achieves control of a firm through the purchase or lease of the shares, interest, or assets of that competitor, supplier, or customer and amalgamation or combination with that competitor, supplier, customer or other person: or any other means.

Section 12(2) provides that a person controls a firm if that person beneficially owns more than one half of the issued share capital of the firm. This has been interpreted to mean that a firm must own more than half of the issued share capital of the firm. A firm that holds more than half of the nominal value of the issued shares in the case of the par value shares can be construed to have control over another firm.⁶⁷ This section is not applicable to firms which hold shares as nominees.⁶⁸

In *Caxton and CTP Publishers & Printers Ltd v Naspers*⁶⁹ the court took the view that to acquire control means that there has to be a link between economic interest and the ability to control. In some other instances it was decided that holding preference shares which constitute majority shares of the target firm constitute control even though the preference shares were not voting shares per se.⁷⁰

Section 12(2)(b) further provides that a person achieves control over a firm if he is entitled to vote a majority of the votes that may be cast at a general meeting or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person. This provision was intended to regulate companies that have voting rights attached to the shares. This means that if for instance Company A has 50% or more of the shares in Firm B, which in turn gives Company A majority of votes in the general meetings, then it will be construed as having control over Firm B.

⁶⁴ Sutherland 8-14

⁶⁵ *Bulmer SA(Pty) Ltd v Distillers Corp (SA) (Pty)* 94/FN/NOV00 101/FN/Dec00 14.

⁶⁶ *Distillers(South Africa) Ltd v Bulmer (SA) (Pty)* 2002(2) SA 346 (CAC) 359.

⁶⁷ *Sutherland* 8-18.

⁶⁸ *Ibid.*

⁶⁹ 16/FN/MAR04 par 24

⁷⁰ *Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd* 05/X/Jan06.

Section 12(2) further provides that a person achieves control over a firm in the following instances:

- if he is able to appoint or to veto the appointment of a majority of the directors of the firm. A firm will control another firm if it is able to appoint, or veto the appointment of, the majority of the directors of a firm.⁷¹
- If that person has the ability appoint the majority of the trustees, to appoint or change the majority of the beneficiaries of the trust; in the case of a close corporation, owns the majority of members' interest, or controls directly, or has the right to control the majority of members' votes in the close corporation; or in a manner has the ability to materially influence the policy of the firm.

It can be argued that control must be established exclusively with reference to the listed instances in section 12(2). The argument can be substantiated by paragraph (g) of section 12(2). However, in *Ethos Private Equity Fund IV/Tsebo Outsourcing Group Pty Ltd v Bulmer*⁷² the court held that the list in section 12(2) is not exhaustive. The tribunal observed that section 12(2) did not cover the simplest of the mergers listed in section 12(1)(a) where one firm acquires the business of another firm by way of a purchase of assets.⁷³ Counsel for the appellant in the Appeal Court in *Distillers (South Africa)*⁷⁴ argued that the provisions exclusively regulate the situations which they concern. He noted that section 12(2)(a), for instance, determines that the holding of 50% plus one share would constitute control. He therefore asserted that holding less than 50% of the shares could not be labelled control. The court did not attend to this issue exclusively, but it seems to be untenable.⁷⁵ Sutherland opines that it is impossible to circumscribe the situation to which each provision and the different provisions apply.⁷⁶ In the *Distillers* case, the Tribunal held that “section 12(2) has a more mundane relationship to section 12(1). Section 12(1) as we have seen provides for a merger to be accomplished through the acquisition or establishment of direct or indirect control.”

⁷¹Michael Blackman *Commentary on the Companies Act* 17 suggests that even where shares are held as security, the person so holds them will be regarded as holding the voting rights attached to those shares. Sutherland 8-23 suggests that voting rights which are exercisable only in certain circumstances will be taken into account only when those circumstances arise or if the circumstances are within the control of the firm holding them.

⁷²*Ethos Private Equity Fund IV/Tsebo Outsourcing Group Pty Ltd v Bulmer* (SA) Ltd 30/LM/Jun03 par 32.

⁷³*Bulmer SA(Pty) Ltd v Bulmer (SA)(Pty) Ltd* 2002(2) SA 346 CAC 354.

⁷⁴ *ibid*

⁷⁵ Sutherland 8-14.

⁷⁶ *Ibid*.

The acquisition of direct control seems not to pose interpretation problems but indirect acquisition of control does. The rationale behind section 12(2) was to clarify or give examples of direct control.⁷⁷ The Tribunal in the *Bulmer* case stated that the term “control”, as used in section 12(1), must be interpreted in the light of the wording of that provision but section 12(2) will be ancillary to that, although section 12(2) is not determinative in establishing the meaning of the word “control”.⁷⁸

It is worthwhile to note that section 12(2) does not operate negatively.⁷⁹ However, it will operate positively. This means that even if the transaction does not fall within section 12(2), it can still be construed to constitute a merger.

The Tribunal has on more than one occasion argued that the forms of control contained in section 12(2) constitute “bright lines” which the regulated and regulator have to observe.⁸⁰ The enquiry does not end there. One still has to determine if the merger is uncompetitive. This last aspect will be dealt with when the substantive analysis of the merger is discussed.

In some cases determining the existence of control can be complicated and cumbersome especially where more than one company has an equal amount of shares or interests in another company and those companies take over another company. The issue would then whether all companies acquire control collectively post-merger. This type of scenario was discussed at length in *Distillers Corporation (South Africa) Ltd v Bulmer (SA)(Pty) Ltd*⁸¹ where Distillers Corporation contracted to purchase all the assets of Stellenbosch Farmers’ Winery(SFW).

Counsel for D and SFW contended that the merger was not notifiable as the Act was concerned with ultimate or unitary control.⁸² However, both the Tribunal and the Appeal Court rejected this contention. The Appeal Court observed that the Act contemplates the possibility that more than one firm can exercise control over a company at the same time, as contemplated in section 12(2)(a), while another exercises control more directly through its

⁷⁷Sutherland 8-15.

⁷⁸*Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd* 94/FH/NOV00 101/FN/DEC00 14.

⁷⁹ 8-15

⁸⁰ *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd* 30LM/JUN03 par 16.

⁸¹2002(2) SA 346 (CAC).

⁸²*Distillers par 24.*

power to appoint directors and senior managers in terms of section 12(2)(g).⁸³The Tribunal stated that the Act conceived of “control” as an event-based concept which means that control can be acquired by one person by virtue of one provision in section 12(2) whilst it still resided in another by virtue of another provision of the section.”⁸⁴

The counsel for the Applicant in *Bulmer*⁸⁵ argued that all the instances of control listed in section 12(2) refer to ultimate control. The Court rejected the ultimate or unitary concept of control.⁸⁶ This is so solely for the fact that it is difficult to point out the ultimate controller of a firm. The Court that found that there was a change of control that would have to be notified in terms of the Act.

3.5 Substantive analysis of mergers

Before the economic consequences of a merger can be determined, the markets affected by the merger must be clearly defined. In terms of section 12A(2) the relevant adjudicatory authority must assess the strength of competition in the relevant market. In the *Medicross Healthcare* case, the Appeal Court stated that the assessment must be “preceded by a proper definition of the relevant market”.⁸⁷ In *JD Group Ltd/Profurn Ltd*, the Appeal Court regarded market definition as a necessary precursor to the assessment of the competitive consequences of a merger.⁸⁸

Where it is difficult to define markets, competition authorities may sometimes circumvent this problem.⁸⁹ Market definition is required to the extent that it is necessary to justify the reasoning of the particular adjudicatory body where the case concerns prevention or

⁸³*Distillers* Par 21-23, 29, 32-33. Each of three Companies, SAB, Rembrandt and KWV had 30% interests in both Distillers (D) and SFW. D and SFW were listed companies and the remaining 10% shares in each were held by a range of smaller shareholders. There was also a voting pool agreement between the major shareholders. In terms of the merger the assets of SFW were transferred to D for exchange of D’s shares to SFW major shareholders. After the merger the shareholding of SA, KWV and Rembrandt remained the same. There was no change in the ultimate controllers of the business that was previously conducted by SFW. The question was whether there was a change of control that would have to be notified in terms of the Act. Paragraphs 4-6.

⁸⁴*Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd* 94/FN/NOV00 101/FN/Dec00 19.

⁸⁵ At paragraph 15.

⁸⁶ At Paragraph 27.

⁸⁷*Medicross Healthcare Group (Pty) Ltd v Competition Commission* 55/CA/sep05 par 25.

⁸⁸*JD Group Ltd/Profurn Ltd* 28/CAC/May pars 12-13.

⁸⁹ Sutherland 10-11.

lessening of competition.⁹⁰ Relevant markets can seldom be determined with precision and there will often be some doubt about their boundaries. But absolute precision is not required.⁹¹ The market has two dimensions: the product market and the geographic market. The relevant market must be defined with reference to a product or group of products and a territory within which these products are sold.⁹²

Demand and supply side substitution will be important to the definition of a market. All products that consumers regard as substitutables and the territory, within which they are regarded as substitutables, must be established.⁹³ Most competition law sources state that this will generally be determined with reference to the SSNIP test (Small but Significant Non-transitory Increase in Price-Test).⁹⁴

The market must be defined as narrowly as possible for purposes of determining whether a merger will restrict or prevent competition.⁹⁵ It must be determined whether a hypothetical monopolist will be able to increase the price for a product within the territory by a small but significant amount for a non-transitory period of time.⁹⁶ The point of departure is that the Competition Commission must determine whether the merger can be approved and if so whether it can be approved with conditions or no conditions. Section 12A serves a backdrop against which all substantive issues relating to mergers are analysed. In terms of section 12A a merger has to be assessed in the following manner:

- The relevant competition authority must determine whether the merger “is likely to substantially prevent or lessen competition”.⁹⁷
- If it appears that a merger is likely to substantially prevent competition, then the relevant adjudicating body must determine whether the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition that may result from

⁹⁰ Sutherland 10-12.

⁹¹ Willem Boshoff “Why define markets in competition cases?” *Stellenbosch Economic Working Papers*: 10/13 MAY 2013 7-8.

⁹² *Medicross Healthcare Group (Pty) Ltd v Competition Commission* 55/CAC/Sep05 par 30.

⁹³ https://en.wikipedia.org/wiki/Relevant_market accessed on the 16/12/15.

⁹⁴ Sutherland 10-13.

⁹⁵ Patrick Massey Market Definition and Market Power in Competition Analysis: Some Practical Issues *LYSIS* 309 309 *The Economic and Social Review*, Vol. 31, No. 4, October, 2000 309.

⁹⁶ *Ibid.*

⁹⁷ *Schumann Sasol (South Africa) (Pty) Ltd v price’s Daelite (Pty) Ltd* 10 CAC/Aug 01 5.

merger. It must be unlikely that such gains would be obtained if the merger were prevented.⁹⁸

- Finally, the authority must consider whether the merger can or cannot be justified on certain public interest grounds.⁹⁹

The Competition Authorities must also consider the following questions¹⁰⁰:

- does the merged entity have the ability to foreclose?
- does the merged entity have the incentive to foreclose?
- would foreclosure have a significant detrimental effect on competition?

Only if each of the above questions is answered in the affirmative would there be appreciable concerns about a merger resulting in foreclosure.¹⁰¹

An anti-competitive merger may be permitted in the face of strong public interest reasons in favour of the merger, however by the same token a merger that is judged to have no negative impact on competition may be disallowed on public interest grounds.¹⁰² Section 12A thus serves as a tool to gauge the competitiveness of all mergers. It provides a framework on how mergers must be assessed and analysed.¹⁰³

3.6 Predictive nature of merger analysis

Merger analysis is forward-looking, predictive and probabilistic.¹⁰⁴ The evolution of assessing mergers involves speculation and conjecture.¹⁰⁵ The Competition authorities must try to compare two scenarios. The first one being what would be the situation if the merger is to proceed and the second scenario is what will be the situation post-merger.¹⁰⁶ The *status quo* of the merging firms is used as a counterfactual. This means that firms can justify their

⁹⁸ Section 12A(1)(a)(i)

⁹⁹ Section 12A(1)(a)(ii) and section 12A(1)(b), read with s 12A(3)

¹⁰⁰ Simon Roberts et al *Introduction to Special Section on competition law and economics* SAJEMS NS 11 (2008) No 3 252.

¹⁰¹ Ibid.

¹⁰² David Lewis the Competition Act 1998: Merger Regulation.

www.comptb.co.za/assets/uploads/speeches/Lewis9.pdf (accessed on 5/12/15)

¹⁰³ *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings* 45/ LM/Jun02 and 46/LM/ Jun02 of 23/10/2002 pars 31-34.

¹⁰⁴ *Schumann Sasol (South Africa) (Pty) Ltd/Price's Daelite (Pty) Ltd* 23 /LM/May01 par 54.

¹⁰⁵ *Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00 par 23.

¹⁰⁶ *Schumann Sasol (South Africa) (PTY) LTD /Price 'S Daelite (PTY) LTD* CASE NO: 10/CAC/Aug 4.

mergers if they can show to the Commission that the post-merger situation is more efficient and better than the *status quo*.¹⁰⁷ The competition authorities must also determine if the merger would be in violation of the Act.

At the end the test is whether the merger will substantially lessen or prevent competition. Research and economic tools are useful for making these predictions, but they never create absolute certainty¹⁰⁸ and adequate data sometimes will not be available.¹⁰⁹ Where it is impossible for competition authorities to predict the future, there may be cause for greater circumspection.¹¹⁰ The competition authorities will adopt a conservative approach in allowing such mergers in a market. This actually means that if the Competition Commission cannot predict the full effects of the merger, it will be strict and careful in approving the merger.¹¹¹ In *Nasionale Pers Ltd/Education Investment Corporation Ltd*, the tribunal imposed conditions when it approved the merger that would allow it to deal with possible changes of circumstances.¹¹² However, Sutherland opines that the tribunal has shown a reluctance to adopt a wait-and-see attitude.¹¹³

In determining the competitive consequences of a merger, the intention, motive or rationale of the merging parties is important.¹¹⁴ The mere fact that parties intended, or did not intend to harm competition, will not be conclusive.¹¹⁵ The competition authorities are only concerned with the effect of the merger.

As appears from the aforementioned, the Act provides for a two-stage merger assessment.¹¹⁶ The most important aspect of merger analysis concerns pure competition issues. Thereafter public interest must be considered. Competition authorities will not allow a merger if it can be used to avoid price regulation in an industry where economies of scale make the existence of a dominant firm inevitable.¹¹⁷

¹⁰⁷*Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 pars 215-216.

¹⁰⁸*Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00 par 23.

¹⁰⁹ *Ibid*.

¹¹⁰ Sutherland 10-6.

¹¹¹*Medicross Health Group(pty) Ltd/Prime Cure Holdings (Pty)(Ltd)* 11/LM/Mar05 Par 70.

¹¹² 45/LM/Apr00 par 24,

¹¹³ Sutherland 10-6.

¹¹⁴*Bromer Foods (Pty) Ltd/National Brands Ltd* 19/LM/Feb00 Par 14.7 where it was found that the motive of the merging parties was to act competitively.

¹¹⁵*Allied Technologies (Pty) Ltd/Namitech Holdings Ltd* 37/LM/JUL03 par 65.

¹¹⁶*African Media Entertainment Ltd v David Lewis* 68/CAC/Mar07 01/12/2008 par 2.

¹¹⁷*Telkom SA LTD/Business Connections Group Ltd* 51/LM/jun06 pars 23, 89 and 262.

If a merger is found to lessen or prevent competition substantially, section 12A(1)(a)(ii) provides that it must then be determined whether the merger can or cannot be justified on substantial public interest grounds. Public interest grounds therefore also have to be considered where it is found that merger does not prevent or lessen competition.¹¹⁸ Posner describes public interest as one of the theories of economic regulation, which holds that regulation is supplied in response to the demand by the public for the correction of inefficient or inequitable market practices.¹¹⁹ Miller on the other hand, describes public interest as the sum of private interests and argues that both efficiency and equity can co-exist in economic thought as regards the public interest.¹²⁰ Padberg and Westgren extend this economic view of the public interest by stating that product evolution, observed in the integrity in communication, sensitivity to collective as well as individual values, waste, conservation, and product safety constitute the public interest.¹²¹

In *SA Ltd/Business Connections Group Ltd* the merging parties argued that a weak finding on harm to competition cannot be bolstered by contending that the harm generated is harm to the public interest.¹²² The Tribunal held that public interest can be used to strengthen a competition finding where there is a clear relationship between the competition finding and the public interest criteria set out in the Act.¹²³

Public interest concerns must be merger specific; they can be considered only in so far as they relate to the merger.¹²⁴ Public interest will have to be considered in light of the finding of the Competition Commission, that is whether the merger is anti-competitive or not. The commission will look at the effects of the merger on the following:

- a particular industrial sector or region;
- the effects of the merger on employment;
- small businesses and firms controlled or owned by historically disadvantaged persons;
- and or

¹¹⁸ Ibid par 291.

¹¹⁹ Posner, R.A., (1974), *Theories of Economic Regulation*, *The Bell Journal of Economics and Management Science*, vol 5(2), pp 335 – 358.

¹²⁰ Miller, E.S., (1990) “Economic Efficiency, the Economics Discipline, and the “Affected-with a-Public-Interest” *Journal of Economic Issues*, vol 24(3), pp 719 – 732.

¹²¹ Padberg, D. I. and Westgren, R. E., (1979) “Product Competition and Consumer Behavior in the Food Industries”, *American Journal of Agricultural Economics*, Vol 61 (4), pp. 620- 625.

¹²² 51/LM/Jun06 20/08/2007 par 297.

¹²³ Ibid par 298-304.

¹²⁴ Sutherland 10-25.

- stability of national industries to compete.

Section 12A(1) states that the relevant competition authority must determine whether the merger substantially prevents or lessens competition and if it is found that the merger is anti-competitive, it must be established whether the merger has anti-competitive consequences that outweigh those negative consequences. It is not enough for the competition authorities to prove that the market will be uncompetitive; one has to prove to that the merger will lessen or prevent competition.¹²⁵ There must thus be a causal link between the merger and anti-competitive effects on the market.¹²⁶

3.7 Classification of mergers: thresholds

There are three categories of mergers classified according to size namely: small, intermediate and larger mergers. Once a transaction falls within the definition of a merger, it must be determined if, and how, the transaction must be notified. The manner in which these thresholds for classification are established will be described first; thereafter, the thresholds themselves and the manner in which mergers are classified for purpose of the Act will be discussed.

3.7.1 Manner in which thresholds are established

Initially, the Act allowed the Minister of Trade and Industry to set thresholds below which the Act did not apply to mergers. The Minister had to lay down a threshold to distinguish intermediate and large mergers, which were dealt with differently in terms of the Act.¹²⁷

The Act now merely distinguishes between small, intermediate and large mergers for notification and adjudication purposes. The Minister of Trade and Industry, in consultation with the commission, must establish the thresholds for the purpose of notifying mergers. The thresholds are determined with reference to the assets and turnover of each firm. Currently the thresholds are determined by GN 216 of 2009.¹²⁸ This regulation establishes that the lower threshold is reached if:

¹²⁵*Main Street 333 (Pty) Ltd/Kumba Resources Ltd 14/LM/Feb06* pars 53-55.

¹²⁶*Santam Ltd/ Guardian Insurance co Ltd 14/lm/Feb06* pars 53-55.

¹²⁷Section 11 of the original Competition Act.

¹²⁸GG 31957 OF 6 March 2009.

- Any combination of the turnovers or assets of the acquiring and transferred firms in the Republic equals or exceed R560; and
- Either the turnover or the asset values of the transferred firm or firms in the Republic equal or exceed R80 million.

The higher threshold is reached if

- Any combination of the turnover or assets of the acquiring and transferred firms in the Republic equals or exceeds R6,6 billion; and
- Either the turnover or asset values of the transferred firms in the Republic equal or exceed R190 million.

Merger thresholds as at 1 April 2009

Thresholds	Combined turnover/Asset value	Target turnover/Asset value
Lower threshold	R560 million	R80 million
Higher threshold	R6 600 million	R190 million

If a merger falls below the values of the lower threshold, it is a small merger.¹²⁹ If a merger equals or exceeds the values of the lower threshold but falls below the higher thresholds, it will be an intermediate.¹³⁰ If the merger equals or exceeds the higher threshold, it is a large merger.¹³¹

3.7.2 Notification of mergers

Notification of mergers to the Commission is the centrepiece of South African merger regulation.¹³² Under the previous Act, merging firms were not obliged to notify mergers, although they were often notified voluntarily.¹³³

¹²⁹ Item 4(a) Threshold Regulation.

¹³⁰ Item 4(b) Threshold Regulation.

¹³¹ Item 4(c) Threshold Regulation.

¹³² Sutherland 9-11.

¹³³ Ibid.

In *Competition Commission v Edgars Consolidated Stores Ltd*,¹³⁴ the Tribunal noted that notification of mergers in South Africa is necessary for jurisdiction, and that it is necessary to interpret the term “merger” widely in order to ensure wide jurisdiction over mergers.

Small mergers can be implemented without notification, unless the Commission specifically requires notification.¹³⁵ A party to a small merger may voluntarily notify the merger and this apparently will not hinder the implementation of the merger.¹³⁶ The Act determines that the Commission may however require the parties to a small merger to notify the merger to the Commission in the prescribed form within 6 months after implementation.¹³⁷ The law provides that a merger must be notified to all the parties¹³⁸ unless the merger has already been implemented.¹³⁹

The Commission may only oblige notification of a small merger if that merger, in its opinion may substantially prevent or lessen competition; or cannot be justified on public interest grounds.¹⁴⁰ It is unclear how the Commissioner can form this opinion before notification.¹⁴¹ It is my submission that these Guidelines suffers from several flaws. They start off by making the point that the Commission will exercise its discretion in every merger case, as it would clearly have to in terms of the Act.

However, the Commission does not require immediate notification of a small merger. The parties will have to voluntarily notify the Commission of the merger and the circumstances in which it took place. So how should parties to a small merger react to this Guideline? The suggestion is that the Guideline is not legally enforceable but it is still advisable to give a written notice to the Commission as required by it.¹⁴²

Section 13(3) of the Competition Act provides that notification of a small merger can be given to the Commission within six months after the implementation of the merger. It is considered that section 13(3) should be read to mean that notification of a merger to the Commission may not take place after that time but that it may take place before the

¹³⁴95/FN/Dec02 par 74.

¹³⁵ Section 13(1)

¹³⁶ Section 13(2)

¹³⁷Section 13(3) of the Competition Act.

¹³⁸ Rules for conduct of proceedings: Competition Commission or Competition Rules(CCR) r 25,

¹³⁹CCR 25(3).

¹⁴⁰Section 13(3).

¹⁴¹ Sutherland 9-12(1).

¹⁴² Ibid.

implementation of a merger although it will not be clear from what time the Commission may require notification.

The Commission Rules determine that the merger must be notified within 20 days of receiving the Commission's notice requiring the notification of the merger.¹⁴³ It can therefore be argued that section 13(3), read together with the Commission Rules, imposes a duty to notify on the merging parties before a merger can be implemented. If the notification is not given within the stated time, the Tribunal may impose an administrative penalty in accordance with section 59(1)(d)(i) of the Competition Act. If a small merger is implemented in contravention of an obligation not to do so, the same consequences as those in the cases of intermediate and large mergers will ensue.

All intermediate and large mergers must be notified to the Commission in the prescribed manner and form.¹⁴⁴ The Appeal Court in *Gold Fields Ltd v Harmony Gold Mining Co Ltd*,¹⁴⁵ apparently accepted that the Act imposes a duty on the parties to such a merger to notify the merger. In *Johnnic Holdings Ltd V Hosken Consolidated Investment Ltd*¹⁴⁶ the Tribunal noted that the *Gold Fields* case "may carry certain enigmas". This is due to the fact that not all mergers will result in the lessening of competition in the relevant market.

The conclusion that parties to large and intermediate mergers have duties to notify such mergers to the Competition Authorities is not supported by the wording of the Act. Initially, the Act obliged firms to notify mergers within 7 days¹⁴⁷ of the earliest of (a) the conclusion of the merger agreement; (b) the public announcement of a proposed merger bid; or (c) the acquisition by any one of the parties to that merger, of a controlling interest in another.¹⁴⁸ This 7 day period seemed cumbersome to comply with. Therefore, the idea that a merger must be notified within a period after the conclusion of an agreement or announcement was abandoned.¹⁴⁹

¹⁴³ Section 25(2) of Commission Rules.

¹⁴⁴ Section 13A.

¹⁴⁵ 43/CAC/Nov04 27 January 2005 15.

¹⁴⁶ 65/FN/Jul05 par 102.

¹⁴⁷ Business day.

¹⁴⁸ Section 13(1).

¹⁴⁹ Competition Commission Annual Report 2000/2001 63.

The new section 13A(1) causes its own problems of interpretation. The Act still states that it imposes a duty to notify but does not state when parties to the merger must comply with that duty. The Appeal Court in *Gold Fields Ltd v Harmony Gold Mining Co Ltd*¹⁵⁰ accepted that the duty to notify a merger will arise for a large merger as soon as a merger is “proposed”, as a merger is defined in section 11(5) as a merger or proposed merger. The duty, then, will not arise only once a transaction or agreement to establish a merger has been concluded but whenever a proposal to merger has been made. “It is submitted that such an interpretation flies in the face of the intention of the legislature in amending the original merger provisions. It would simply create new uncertainties and would continue to make it difficult for parties to comply with the duty to notify.

Sutherland remarks that it may be contended that the duty to notify exists and that notification must take place within a reasonable time from the conclusion of an agreement to merge or the making of a proposal to merge.¹⁵¹ Such interpretation would accord better with the intention of the legislature in enacting the new section 13(A)(1) but requires considerable constructive interpretation of the provision, and the term “reasonable time is quite vague”.¹⁵² Sutherland indicates it can also be argued that the duty to notify is quite a narrow one. It is not an independent and freestanding duty to notify; it is a merely a duty that must be complied with before the merger can be approved.¹⁵³ Finally, according to Sutherland it maybe averred that the judgement in *Gold Fields* is not correct and that section 13A(1) does not lay down a duty to notify but simply sets out how notification must be made.¹⁵⁴

The only constraint on parties to an intermediate or large merger in the latter two cases would then be that they cannot implement the merger unless they have properly notified the merger and it has been approved. The Tribunal In *Anglo American Holdings Ltd/Kumba Resources Ltd*¹⁵⁵ decided that a merger cannot be notified when it is still academic but that it may be notified even before all details about the transaction that will constitute a change of control are known and “before they have completed the process of acquisition”. To acquire completion of the transaction “would create burdens on merging firms who would then be

¹⁵⁰ 43/CAC/Nov04 27 January 2005.

¹⁵¹ Sutherland 9-14.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ 46/LM/ju02 par 34.

faced with the “Scylla” of not implementing a merger prior to approval, and the “Charybdis” of not adequately completing the transaction prior to notification.¹⁵⁶

It is quite clear that the parties to an intermediate or large merger may not implement the merger unless the merger has been notified and approved in accordance with the Act.¹⁵⁷ The Commission can approve an intermediate merger with conditions or not.¹⁵⁸ The merger would then be implemented in accordance with the approval. The Act makes provision for parties to appeal decisions of the Competition Tribunal or the Competition Commission to the Appeal Court.¹⁵⁹ Once the Appeal Court has made its own finding on the merger, a merger may be implemented in accordance with the decision of the Appeal Court,¹⁶⁰ irrespective of whether it was previously prohibited by the Commission or Tribunal or whether it was approved subject to stricter conditions than those imposed by the Appeal Court.¹⁶¹ Lewis remarks that mergers that raise no competition issues should not be notified, however, the Competition Commission will not allow parties to regulate themselves as to what constitutes a merger.¹⁶²

3.7.3 Position if the parties to a merger are not sure whether the transaction is a merger or not

Before the Competition Commission can adjudicate on the issue of whether a transaction is a merger or not it must determine it has jurisdiction.¹⁶³ Where parties to a transaction have doubts as to whether the transaction is a merger, it seems that the first step in practice often has been to ask the Competition Commission for an advisory opinion.¹⁶⁴ The Act itself does not provide for or require such opinions. The Competition Commission Rules only refer to them in passing, and do not say how they should be obtained.¹⁶⁵ There is no specified form for requesting an advisory opinion: a party seeking one simply submits a letter to the Head of Corporate Compliance at the Commission, outlining the facts of the matter in question, and

¹⁵⁶Sutherland 9-15.

¹⁵⁷ Section 13A(3).

¹⁵⁸ Section 14(1)(ii) of the Competition Act.

¹⁵⁹Section 17.

¹⁶⁰ Section 13A(3).

¹⁶¹ <http://www.compcom.co.za/the-competition-appeal-court-rules/> (accessed on the 18/December 2015)

¹⁶² David Lewis *Why Merger Regulation? - a response to our Critics*. 2001

¹⁶³CCR 30(2)(a).

¹⁶⁴*Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd* 30/LM/jun03 pars 3-5.

¹⁶⁵ CCR 9(1)(d). In terms of CCR 10(4)

pays the prescribed fee.¹⁶⁶ An advisory opinion is however not binding on competition authorities.¹⁶⁷

In some instances, an advisory opinion, combined with other facts, will lead the Tribunal to the conclusion that the Commission has made a firm decision that the transaction does not constitute a merger.¹⁶⁸ The Commission however has the discretion to reverse its decision if it later transpires that the transaction constitutes a merger. The Commission may then bring an application to the Tribunal to interdict implementation, impose a penalty for failure to notify the merger or grant divestiture.¹⁶⁹

If the Commission gives an advisory opinion that the transaction is not a merger, the parties will not have to notify. However, a person who has an interest in the merger and objects to it may have the advisory opinion by the Commission reviewed, or may appeal against it to the Tribunal.¹⁷⁰

3.7.4 How long does it take to process a merger?

In terms of the Competition Act, there is no stipulated time within which parties to a merger must notify their proposed merger. The Act is silent on time periods but it provides that parties “must” notify the Competition Commission of their merger.

3.8 Time within which the Competition Commission must decide on a notified merger

3.8.1 Intermediate merger

Section 14(1) provides that an intermediate merger must be decided within 20 business days after all the parties have fulfilled all their notification requirements in the prescribed manner and form. Section 14(1)(a) provides that the 20 day period may be extended by another period not exceeding 40 business days. In addition Section 14(2) provides that if upon the expiry of the 20 business day period provided for in subsection 1(a), the Competition Commission has not issued any of the certificates, the merger must be regarded as having been approved.

¹⁶⁶CCR 10(4). Rule 10.4 of the Rules for the Conduct of Proceedings in the Competition Commission provides that a fee of R2500 is payable by a party who is requesting an opinion.

¹⁶⁷*Seagram Africa (Pty) Ltd v Stellensbosch Farmers' Winery Group Ltd* 2001 2 SA 1129(C) 1143.

¹⁶⁸Sutherland 9-16.

¹⁶⁹Sections 59 and 60.

¹⁷⁰Sutherland 9-18.

3.8.2 Large Merger

Section 14A(1) provides that after receiving notice of a large merger, the Competition Commission must refer the notice to the Competition Tribunal and to the Minister. The Commission must within 40 business days after all parties to a large merger have fulfilled all their prescribed notification requirements, forward to the Competition Tribunal and the Minister a written recommendation, with reasons, whether or not implementation of the merger should be approved, approved subject to any conditions or prohibited. Time period may be extended by no more than 15 business days.¹⁷¹

3.9 Notification fees

Fees must be paid when a merger is notified. The Commission must receive these fees on or before the date of filing of the necessary documents.¹⁷² The fee will differ depending on the type of merger that is being notified. The parties must pay the fee on the basis of their own classification in their Merger Notice.¹⁷³

After the merger has been notified to the competition authorities, the Commission can make the following decisions and recommendations in respect small and intermediate mergers:

- It may approve the merger without conditions;¹⁷⁴
- It may approve the merger subject to any conditions;¹⁷⁵ or
- It may prohibit implementation of the merger.

In case of large mergers, the Commission can recommend that that the merger be approved; or that the merger be approved subject to conditions; or that the merger be prohibited.

The decisions of the Commission can be referred to the Tribunal if the parties are not satisfied with its findings failing which they can approach Appeal Court which would have a final say on the matter.

If the parties to a merger fail to notify their merger to the Commission, the Commission can undo the transaction. This means that the merger will be deemed non-existent. In addition,

¹⁷¹ Section 14A(2) of the Competition Act.

¹⁷² CCR 27(2).

¹⁷³ Form CC4(1). CCR 10(5) provides that for intermediate and large mergers, the fees are R100 000 and R350 000 respectively. Sutherland remarks that fees are extremely high and do not reflect the amount of work that will have to be done on a particular merger by competition authorities. (9-33)

¹⁷⁴ On merger Clearance Certificate Form CC 15.

the Commission can void the merger agreement; impose an administrative penalty of 10% of turnover and parties to the merger may suffer reputational harm.

Chapter Three **Background: Merger Regulation in COMESA**

3.1 Introduction

Before considering the relevant provisions of the COMESA Regulations, it is apposite to consider the background to COMESA, the reasons for its existence and the features of the market that it is intended to address.

Prior to COMESA, a Preferential Trade Area in Africa¹⁷⁶ was established with the signing of the Treaty establishing the Preferential Trade Area for Eastern and Southern Africa States (the “PTA Treaty”) in December 1981. The PTA Treaty had as its purpose, the promotion of “co-operation and development in all fields of economic activity particularly in the fields of trade, customs, industry, transport, communications, agriculture, natural resources and monetary affairs with the aim of raising the standard of living of its peoples, of fostering closer relations among its Member States, and to contribute to the progress and development of the African continent”.¹⁷⁷

The PTA was later replaced by the Common Market for Eastern and Southern Africa (“COMESA”) when a treaty (the “COMESA Treaty”) was signed on 5 November 1993 in Kampala, Uganda and was ratified in Lilongwe, Malawi on 8 December 1994.¹⁷⁸ COMESA, as the successor to the Preferential Trade Area for Eastern and Southern Africa was created in fulfilment of the requirements contained in Article 29 of the PTA Treaty which provides for the development of the Preferential Trade Area into a Common Market and eventually an Economic Community for Eastern and Southern African States

3.2 The objectives of COMESA.

A Regional COMESA Competition law has been introduced to apply to all member states, some of which had already have national competition laws in place while others had no

¹⁷⁶Consisting of 22 Member States, namely Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe (<http://www.fao.org/docrep/w5973e/w5973e06.htm>).

¹⁷⁷Article 3(3) of the Treaty Establishing the Preferential Trade Area for Eastern and Southern African States.

¹⁷⁸http://about.comesa.int/index.php?option=com_content&view=article&id=95&Itemid=117 (accessed on 06/12/15)

dedicated domestic competition laws.¹⁷⁹ The relevant competition legislation comprises the COMESA Competition Regulations and the Rules.¹⁸⁰ The Competition regime became operative on 14 January 2013.¹⁸¹ Article 55 of the Treaty establishing the Common Market for Eastern and Southern Africa (the “Treaty”), provides for the prohibition of any agreement or concerted practice between undertakings, which has as its effect, the prevention, restitution or distortion of competition within the common Market.¹⁸² It further authorises the Council to make regulations to regulate competition within the Member States.¹⁸³

The purpose of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of the market, thereby enhancing the welfare of the consumers in the Market, and to protect consumers against offensive conduct by market actors.¹⁸⁴ Article 3 sets out the scope of application of the Regulations. They apply to economic activities “within, or having an effect within, the Common Market”. The Regulations apply to conduct that have an appreciable effect on the Common market and restrict competition.¹⁸⁵

3.3 Jurisdiction

Article 3(2) of the Regulations provide that the COMESA Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4. These regulations apply to conduct which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.¹⁸⁶

3.4 Competition Authorities responsible for Merger Regulation

¹⁷⁹ Batohi Schweta “Another layer of bureaucracy looms : competition international law” *Without Prejudice*, Vol 11, Issue 6 p 44-45.

¹⁸⁰ Understanding COMESA <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Understanding-COMESA.pdf> (accessed on the 5/12/15)

¹⁸¹ *Commission Notice No. 1/2013.COMESA Competition Commission: Notice on the Commencement of Operation of the COMESA.*

¹⁸² *Preamble of the COMESA Competition Regulations 2004*

¹⁸³ Article 6 of *COMESA Competition Regulations 2004*

¹⁸⁴ Article 2 of the COMESA Regulations.

¹⁸⁵ Article 3(2) of the COMESA Regulations.

¹⁸⁶ Jessica Staples “ Less room to manoeuvre : competition law *Without Prejudice*, Vol 15, Issue 1 p 22.

In terms of the COMESA Regulations there are two Competition Authorities namely the COMESA Competition Commission,¹⁸⁷ and the Board of Commissioners.¹⁸⁸

3.5 The Functions of the COMESA Competition Commission

The Commission is tasked with applying the provisions of the Regulations with regard to trade between Member States and is responsible for promoting competition within the Common Market.¹⁸⁹ The CCC enjoys international legal personality and has capacity to, inter alia, and perform its functions under the Treaty in the territories of the Member States.¹⁹⁰ In order to accomplish that, the Commission shall:¹⁹¹

- “(a) monitor and investigate anti-competitive practices of undertakings within the Common Market, and mediate disputes between Member States concerning anti-competitive conduct;
- (b) regularly review regional competition policy so as to advise and make representations to the Council with a view to improving on the effectiveness of the Regulations;
- (c) help Member States promote national competition laws and institutions, with the objective of the harmonisation of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market;
- (d) co-operate with competition authorities in Member States;
- (e) co-operate and assist Member States in the implementation of its decisions;
- (f) provide support to Member States in promoting and protecting consumer welfare; g) facilitate the exchange of relevant information and expertise;
- h) enter into such arrangements as will enhance its ability to monitor and investigate the impact of conduct outside the Common Market but which nevertheless has, or may have, an impact on trade between Member States;
- i) be responsible for developing and disseminating information about competition policy and consumer protection policy; and
- j) co-operate with other agencies that may be established or recognised by COMESA to monitor and regulate any specific sector.”

¹⁸⁷ Article 6 of the COMESA Regulations.

¹⁸⁸ Article 12 of the COMESA Regulations.

¹⁸⁹ Article 7.

¹⁹⁰ Mashido, Eric “COMESA : Consumer protection in Africa : consumer law” *Without Prejudice*, Vol 13, Issue 3, 2013 83.

¹⁹¹ Article 7.

3.6 The Functions of the Board of Commissioners

The Board may¹⁹² issue determination on any conduct prohibited in terms of Part 3 of these Regulations. It may also adjudicate on any other matter that may, in terms of the Regulations, be considered by it and make an order provided for in the Regulations. The Board may further hear appeals from, or review any decision of, the Commission that may, in terms of the Regulations, be referred to it and it may hear appeals from initial determinations made by the committee responsible for the determination. The Board is also empowered to make any ruling or order necessary or incidental to the performance of its functions in terms of the Regulations; and delegate any of its functions to another COMESA agency established to co-ordinate and regulate a specific sector.

The Board may in addition recommend to the Council, Rules governing anything which under the Regulations is required or permitted to be prescribed; any forms necessary or expedient for purposes of these Regulations; any fees payable in respect of any service provided by the Commission; or such other matters as are necessary or expedient for the better carrying out of the purposes of the Regulations: impose on the undertakings concerned necessary restrictions or conditions and afford such undertakings the possibility of eliminating competition in respect of a substantial market for the goods or services in question.

3.7 Rationale for COMESA merger regulation

Merger Control is addressed in the Regulations due to the potential of some mergers to affect trade between Member States and restrict competition in the common market. The approach is to require notification to and review by the Commission of certain mergers in order to allow the Commission to regulate those that are likely to result in a substantial lessening of competition.¹⁹³ Conduct not capable of an appreciable effect on trade between Member States or restricting competition in the Common market is outside the scope of the Regulations, including merger control.¹⁹⁴

¹⁹²Article 15.

¹⁹³COMESA Merger Assessment Guidelines(2014) 8.

¹⁹⁴Article 3 of COMESA Regulations.

3.8 Definition of a merger

Regulation 23 defines what a “merger” is and when it is notifiable or non-notifiable. Article 24(1) requires “notifiable mergers”, which are those that have a “regional dimension” and are above a specified threshold to be notified to the Competition Commission. Article 23(1) of the Regulations defines a merger as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

- (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
- (b) the amalgamation or combination with a competitor, supplier, customer or other person; or
- (c) any means other than as specified in sub-section (a) or (b).

“Controlling interest” is defined in Article 23(2) of the Regulations as:

- “(a) in relation to any undertaking, interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and
- (b) in relation to any asset, any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset.”

The definition of control interest is broad and vague as a result of the phrases “any control” and “interest whatsoever” in Article 23(2). Whether or not a person has the possibility of exercising a decisive influence on an undertaking or asset concerned should be assessed on a case by case basis.¹⁹⁵ Regard should be had to the overall relationship between the person and undertaking or asset concerned in light of the commercial context, in particular in relation to the competitive conduct of the relevant business, including its strategic direction and its ability to define and achieve its commercial objectives.¹⁹⁶

¹⁹⁵Paragraph 2.5 of the COMESA Merger Assessment Guidelines 2014.

¹⁹⁶Paragraph 2.5 of the COMESA Merger Assessment Guidelines 2014.

Paragraph 2.6 of the COMESA Merger Assessment Guidelines provides that in determining whether a person has the possibility of exercising a decisive influence over an undertaking, the Commission will take into account, among other factors, whether the person directly or indirectly:

- (a) has the ability to determine a majority of the votes that maybe cast at a general meeting of the undertaking;
- (b) is able to appoint or veto the appointment of a majority of the directors of the undertaking;
- (c) has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking; or
- (d) has a controlling interest in an intermediary undertaking that in turn has a controlling interest in the relevant undertaking.

In some cases, a minority interest in an undertaking may include certain rights, such as the ability to veto decisions which are essential to determining the strategic commercial behaviour of the undertaking.¹⁹⁷ Whenever a minority interest is changed, the parties should consider whether the new minority interest amounts to a controlling interest when a merger is construed.¹⁹⁸

Some joint ventures involve the integration of parts of the business activities of the undertakings to a joint venture, including a contribution of productive assets to the new joint venture.¹⁹⁹ This can result in a reduction or elimination of competition between the undertakings to the joint venture in the joint venture's field of activities.²⁰⁰ For a joint venture to constitute a merger within the meaning of Article 23(1) of the Regulations, it must be a full function venture.²⁰¹ This means that it must perform, for a long duration all the functions of an autonomous economic entity. A joint venture established for a purposefully finite period will not be viewed as having a long duration.²⁰²

¹⁹⁷Paragraph 2.7 of the COMESA Merger Assessment Guidelines 2014

¹⁹⁸Paragraph 2.8 of the COMESA Merger Assessment Guidelines.

¹⁹⁹Paragraph 2.11 of the COMESA Merger Assessment Guidelines.

²⁰⁰Ibid.

²⁰¹Paragraph 2.12 of the COMESA Merger Assessment Guidelines.

²⁰²Ibid.

Article 23 implies that if the merger only affects one member state the Merger will not be notifiable. This may create problems in Member States which do not have domestic laws to address merger issues.

Before the rules on the determination of merger threshold and method of calculation came into being on the 26th of March 2015,²⁰³ the COMESA regulations were not certain or specific as to the exact figures or assets values (i.e. the threshold amounts) that must assist in determining whether the merger is notifiable. This created problems as Member States would be required to notify any merger even if it had no anti-competitive effects among the Member States.²⁰⁴ Member States would be required to pay filing fees even if a merger had no anti-competitive effect, thus putting unnecessary and unjustifiable strain on the member states.

According to the new rules on the determination of merger threshold and method of calculation²⁰⁵ any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if:

- (a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds US\$ 50 million dollars; and
- (b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover²⁰⁶ or assets in the Common Market within one and the same Member State.

It is abundantly clear that the COMESA Regulations were initially lacking in how and when parties would be required to notify their mergers as there was no set thresholds for notifying mergers. This position has now been remedied by the new regulations thresholds.

The new COMESA regulations and COMESA merger assessment guidelines are however silent on whether mergers that fall below the thresholds can be reviewed by the COMESA Commission. Sometimes if the merger is not notifiable to the COMESA Commission, the Member States may be required to comply with their national laws.²⁰⁷ This is another

²⁰³Rules on the determination of merger threshold and method of calculation 2015.

²⁰⁴Anti-trust Committee of the International Bar Association: Submissions regarding the COMESA Competition Regulations and Draft Guidelines dated April 2013 13.

²⁰⁵*Rule 4 of the Rules on the determination of merger threshold and method of calculation 2015*

²⁰⁶Aggregate turnover is the sum of your annual **turnover** for the income year. The annual **turnover** of any entity connected with you, for that part of the income year that the entity is connected with you.

<https://www.google.co.za/#q=aggregate+turnover> (accessed on the 6/12/15)

²⁰⁷http://www.comesacompetition.org/?page_id=269 (accessed on 18/12/15)

problem inherent in the COMESA Regulations in that even if the Member States notifies a merger to the Regional Commission, they still have to notify their domestic authority which is a duplication of work.²⁰⁸ This may also mean Member States will incur double filing fees.

Another problematic issue with the COMESA regulations is that a merger is automatically notifiable if it affects two or more Member States. This arguably means that all mergers that meet the “two or more Member States” requirement are notifiable.²⁰⁹ However, one can suggest that since the Regulations explicitly refer to mergers that have an “appreciable” effect on trade between Member States and which restrict competition within the Common Market, a merger is not notifiable if there is no such appreciable effect or restriction. It is submitted that this interpretation of the Regulations may also form the basis for an argument that a merger where the acquiring firm operates in two or more Member States but the target firm has no operations in the Common Market does not require notification despite the “two or more Member State” requirement being met.

3.9 Notification fees

The notification fee is calculated as a percentage of combined turnover or assets in the common market subject to a cap of COM\$ 500 000 equivalent to US\$ 500 000.²¹⁰ COMESA makes it compulsory for all notifiable mergers to be notified even if it is not yet established if the merger will lessen or prevent competition.

3.10 Time within which to notify a merger with the COMESA Competition Commission

The COMESA Competition Commission must be notified of a proposed merger within thirty days of the parties ‘decision to merger.²¹¹ This is problematic as there may be significant delays between the decision to merger and the date on which they sign the binding agreement.

3.11 How long does it take to process a merger?

In accordance with Article 25 of the Regulations, the Commission shall examine a merger as soon as the notification is received and must make a decision on the notification within 120

²⁰⁸Ibid.

²⁰⁹COMESA - A New Regional Competition Law Regime for Eastern and Southern Africa.
<http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF> (accessed on 5/12/15)

²¹⁰Article 55 of *COMESA Competition Regulations* 2004.

²¹¹ Dini, Tamara The New Competition Commission for Eastern and Southern Africa: High-priced over-regulation in Africa Without Prejudice Issue 4 Vol 13 11.

days after receiving the notification. This means that if the Commission does not make a decision on the merger within 120 days, the parties should consider the merger approved. However, if the notification is incomplete, the examination period begins on the day following receipt of complete information.²¹²

3.12 Effects of failure to notify a merger.

Article 24 of the Regulations provides that any notifiable merger that is carried out in contravention of the merger control part of the Regulations will have no legal effect and no rights or obligations imposed on the parties by any agreement in respect of the merger will be legally enforceable in the Common market.

The regulations do not prohibit the parties from implementing a notifiable merger before making a notification or before the Commission issues a decision declaring that it does not object to the merger. A merger would be unlawful in terms of COMESA Regulations if it has the capacity to lessen or prevent competition and parties fail to notify such a merger. The implementation of mergers without an approval from the relevant Competition Authorities may cause undesirable effects. This would be the case as some of the effects of mergers may be irreversible and cause harm on consumers or other competitors. However, parties should be cautious when implementing a notifiable merger before receiving such a decision. Article 26(7) of the COMESA Regulations, provides that if upon review the Commission determines that such a merger is unlawful, the parties may be required to dissolve the merger or to take such steps as may be determined by the Commission under the regulations to make the merger lawful. The COMESA Competition Commission may also impose a high administrative penalty of 10% of the aggregate annual turnover in the COMESA region for not notifying the merger.²¹³

3.13 Substantive analysis of a Merger.

The objective of the Commission's merger policy is to promote and encourage effective competition ultimately in order to enhance consumer welfare.²¹⁴ The test that is used to gauge the competitiveness of a merger is whether a merger will result in substantial prevention or lessening of competition.²¹⁵ The test is the same as the one used in South Africa. According

²¹² Article 25(2) of the COMESA Competition Regulations.

²¹³ Jacobsberg Ian et al Cross-border Merger and Competition Regulation Without Prejudice Issue 10 Vol 13

²¹⁴ paragraph 7.1 of the *COMESA MERGER ASSESSMENT GUIDELINES*.

²¹⁵ paragraph 7.4 of the *COMESA MERGER ASSESSMENT GUIDELINES*.

section to 7.6 of the COMESA Merger Assessment Guidelines, the Commission will consider the business rationale of the merging parties. It will request background and documentary evidence from the parties, including board papers. In order to assess whether the merger is more likely than not to give rise an SPLC (Substantial prevention or lessening of competition), the Commission will use an analytical framework, referred to as the “theory of harm”.²¹⁶ According to this theory the likely effects of the merger will be considered against a counter-factual scenario which describes the competitive situation absent the merger under consideration.²¹⁷

In determining whether a merger is more likely than not to give rise to an SPLC requires a comparison of the competitive situation in light of the merger against the competitive situation without the merger.²¹⁸ The nature of the counter-factual scenario is affected by the extent to which events or circumstances and their consequences are foreseeable.²¹⁹ The foreseeable period may sometimes be relatively short.²²⁰ The counter-factual scenario maybe more or less competitive than the prevailing conditions of competition, the selection of the appropriate counter-factual may increase or reduce the prospects of a finding by the Commission that a merger is more likely than not to give rise to an SPLC.²²¹ The Commission may in principle examine several possible counter-factual scenarios, but typically only the most likely scenario will be selected as the relevant counterfactual.²²²

In considering competitive issues of a merger, the competition authorities will also use the “failing undertaking scenario” in terms whereof they will have to consider the whether the target undertaking would have existed the market in the near future; and if so whether there would have been an alternative purchaser for the target undertaking or its assets to the acquiring undertaking.²²³

The failing undertaking scenario is most commonly considered when one of the undertakings is said to be failing financially.²²⁴ The Commission will also consider the counter-factual situation including the entry of the merging parties into the market of another merging party

²¹⁶paragraph 7.7.

²¹⁷ Ibid.

²¹⁸ Paragraph 6.1 of the *COMESA MERGER ASSESSMENT GUIDELINES*.

²¹⁹Paragraph 7.10 of the *COMESA MERGER ASSESSMENT GUIDELINES*.

²²⁰ Ibid.

²²¹Paragraph 7.12.

²²² Ibid.

²²³ Ibid.

²²⁴Paragraph 7.19.

or, if already within the market, whether the first merging party would have expanded had the merger not taken place.²²⁵

As part of its assessment of a merger, the Commission may take into account market shares and market concentration, as assessed in the relevant market.²²⁶ The Commission will consider mergers that result in substantially larger market shares or increased market concentration as more likely to give rise to an SPLC.²²⁷ When assessing market shares information and levels of concentration, the Commission may have regard to the following factors:

- the degree, if any, of product differentiation;
- evidence of market share fluctuations over time;
- how widely the market is drawn; and
- the level of variable profit margins, which can serve an indication of market power when properly benchmarked.

3.14 Merger Transactions which were notified to the COMESA Competition Commission for approval.

3.14.1 Decision of the Thirteenth Meeting of the Committee of initial Determination (CID) regarding the proposed Acquisition of *African Development Corporation AG and the Rwandan Bank* by *ATMA Co-Nvest* (Case file no.CCC/MER/6/20/2014).²²⁸

On the 4th August 2014, the COMESA Competition Commission hereinafter referred to as (“the Commission”) received a notification for approval of a merger between ABC Holdings Limited, ADC African Development AG and commercial banking assets and liabilities of the Development Bank of Rwanda by ATMA Co-Nvest.²²⁹

The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations. Under this provision the Commission is required to assess whether

²²⁵ Paragraph 7.28.

²²⁶ paragraph 8.6.

²²⁷ Ibid.

²²⁸ Decision of the Thirteenth Meeting of the Committee of initial Determination (CID) Regarding the proposed Acquisition of *African Development Corporation AG and the Rwandan Bank* by *ATMA Co-Nvest* (Case file no.CCC/MER/6/20/2014 1-2 <http://www.comesacompetition.org/wp-content/uploads/2014/10/Decision-ADC-AG-and-Rwandan-Bank-by-ATMA.pdf> (accessed on the 5/12/15)

²²⁹ P 2 of the decision.

the proposed transaction between the parties would, or is likely to have the effect of substantially preventing or lessening competition; or would be contrary the public interest in the Common Market pursuant to Article 26 of the Regulations.²³⁰

The Committee of Initial Determination hereinafter referred to as (the “CID”) noted that the parties operate in two or more COMESA Member States.²³¹ This, therefore, means that the regional dimension requirements under Articles 23(3) and 23(5) are satisfied and asserts jurisdiction of the Commission to assess transaction. The parties to the transaction are currently active in the following COMESA Member States: Rwanda, Zambia and Zimbabwe.²³²

The parties to the transaction were: ATMA Con-Nvest, ABC Holdings Limited and ADC African Development AG.

ATMA was incorporated to undertake an acquisition of the target companies and has no operational history.²³³ ATMA was incorporated in the British Virgin islands on 28 November 2013 and is listed on the London Stock Exchange.²³⁴ ATMA is a financial services holding company to undertake the acquisition of target banks in Africa with the objective of becoming a leading financial services group in the continent.²³⁵ ATMA was the acquiring firm in this transaction whereas ABCH and ADC were target firms. ABCH is headquartered in Gaborone, Botswana.²³⁶ It is a holding company for the African Banking Corporation of Companies operating under the brand “BancABC”, which is currently active in Botswana, Mozambique, Tanzania, Zambia and Zimbabwe, and has a group service office located in Johannesburg, South Africa. ADC is a German open market listed Holding Company. ADC’s focus is on the banking sector in sub-Saharan Africa.²³⁷

The proposed transaction consists of the acquisition by ATMA of sole control over ADC. ADC is a German, open market listed holding company of an emerging pan African financial services group and has had more shares in ABCH.²³⁸ In another interrelated transaction, ATMA had entered into a framework deed with the Government of Rwanda, the National

²³⁰ P 2 of the decision.

²³¹ P 2 of the decision.

²³² P 2 of the decision.

²³³ P 2.

²³⁴ P2.

²³⁵ P 2.

²³⁶ P 2.

²³⁷ P 2.

²³⁸ P 3.

Agricultural Export Development Board and the Rwanda Social Security Board to facilitate the ultimate acquisition by ATMA of the Rwandan bank.²³⁹ As a result of the transaction, ATMA would hold 100% of the issued shares of the Rwandan Bank.

The CID established that the transaction would not frustrate the single market objective of the Treaty in that it does not have an appreciable effect on trade between Member States.²⁴⁰ The CID established that the transaction does not raise substantial competition concerns and is compatible with the Treaty establishing the Common Market.²⁴¹ The CID has therefore decided to approve the transaction. This decision was adopted in application of the COMESA Competition Regulations.

3.14.2 Cannon Assurance Limited and Metropolitan International Holdings Proprietary Limited (case file No.CCC/MER/9/30/2014).²⁴²

In *Cannon Assurance Limited and Metropolitan International Holdings Proprietary Limited* (case file No.CCC/MER/9/30/2014), the transaction involved the sale and purchase of 16,875,000 shares by Metropolitan in Cannon constituting 75% of Cannon's issued share capital together with any claims of the sellers against Cannon or its subsidiaries.²⁴³ The Committee on Initial Determination (CID) defined the relevant market as the provision of Life Insurance and General Insurance products. The CID established that the market is highly fragmented with several players and shall remain so post-merger.²⁴⁴ The CID further established that the transaction would not frustrate the single market objective of the Treaty in that it does not have an appreciable effect on trade between Member States.²⁴⁵ It determined that the merger does not substantially prevent or lessen competition and is compatible with the Treaty Establishing the Common Market. Thus it decided to approve the transaction. The decision was adopted in accordance with Article 26 of the Regulations.²⁴⁶

3.14.3 *InproChem Proprietary Limited and Clariant Southern Africa's Water Treatment Business*

²³⁹ P 3.

²⁴⁰ P3.

²⁴¹ Ibid.

²⁴² Decision of the Fourteenth Meeting of the Committee of initial Determination (CID) Regarding the proposed between Cannon Assurance Limited and Metropolitan International Holdings Proprietary Limited <http://www.comesacompetition.org/wp-content/uploads/2015/03/Decision-Cannon-Assurance-Metropolitan.pdf> (accessed on the 5/12/15).

²⁴³ P 2 of the decision.

²⁴⁴ Ibid.

²⁴⁵ P 3 of the decision.

²⁴⁶ P 3 of the decision.

In another decision of the Fourteenth Meeting of the Committee of Initial Determination regarding the proposed merger between *InproChem Proprietary Limited and Clariant Southern Africa's Water Treatment Business*, the COMESA Competition Commission received a notification to approve a merger from InproChem Proprietary Limited and Clariant Southern Africa Proprietary Limited (case file No, CCC/MER/9/32/2014). The transaction involved the acquisition by InproChem of the water and wastewater treatment business of Clariant. In terms of the sale of Business Agreement between InproChem and Clariant, InproChem is purchasing the water treatment business which could be more fully described as a fully stand-alone and autonomous business unit of Clariant, being sold as a going concern and which included property, rights, benefits, employees and contracts of the water treatment business. The CID established that the transaction would not frustrate the single market objective of the Treaty in that it did not have an appreciable effect on trade between Member States.²⁴⁷

3.14.4 Robert Bosch GmbH of Hytec Holdings(Pty)Ltd (case file no.CCC/MER/8/29/2014)

On the 14th August, 2014, the COMESA Competition Commission received an application for approval of a transaction involving the proposed acquisition by Robert Bosch GMBh of controlling interest in Hytec Holdings (Pty) Ltd.²⁴⁸ The transaction was notified with the Commission under Article 24(1) of the COMESA Competition Regulations. The primary concern of the Commission with regard to transactions of this nature is whether the proposed transaction would or is likely to have the effect of substantially preventing or lessening competition; or would be contrary to public interest in the Common Market pursuant to Article 26 of the Regulations.²⁴⁹

The Committee on Initial Determination (CID) noted that the transaction involved vertical integration of the businesses of the parties namely Bosch (upstream) and Hytec (downstream) considering that they operate at different levels of the supply chain.²⁵⁰

²⁴⁷ P 3 of the decision.

²⁴⁸ Decision 1 of the Twelfth Meeting of the Committee of Initial Determination involving the Acquisition by Robert Bosch GmbH of Hytec Holdings (Pty) Ltd.) <http://www.comesacompetition.org/wp-content/uploads/2014/10/Decision-Number-13-2014-Bosch.pdf> (accessed on the 5/12/15).

²⁴⁹ *Ibid.*

²⁵⁰ P 2 of the decision: Bosch supplies drive and control technologies to Hytec. Hytec on the other hand, utilizes the supplies from Bosch as inputs into the manufacture of its hydraulic and automation solutions as well

It was decided that the proposed transaction would not raise significant competition concerns in the Common Market considering that much as integration of Hytec into Bosch would obviously foreclose a channel of distribution for the upstream competitors of Bosch who have been using Hytec to penetrate the regional market, the relevant downstream market remained competitive given the existence of a larger number of no-sell operators of products of similar functionality.²⁵¹ In addition, the market did not have substantial barriers to entry hence there was potential for expansion of existing suppliers as well as the entry of new suppliers.

3.15 Conclusion

It appears that the COMESA Competition Commission's enquiry into merger assessment is two-fold. Firstly, it assesses whether the merger will have an appreciable effect on the common market and secondly, it considers whether the merger will lessen or prevent the competition in the market. The first enquiry will also require a determination the jurisdiction of the Commission as envisaged by Article 3 of the Treaty.

It is worth noting that the COMESA Competition Commission will have jurisdiction if the merger affects two or more of the Member States. It however remains uncertain whether the Commission will have jurisdiction in cases where the merger only has its effects in one Member state. Member States of COMESA have their own domestic anti-trust legislation. This may cause confusion if both the COMESA Commission and the respective Commission of the Member State make a finding on the competitiveness of the merger. Then it will remain to be argued as to which decision will trump the other.

as specialising in the distribution, marketing and selling of a wide range of products and systems to diverse range of customers in the mining and drilling industry in the Common Market.

²⁵¹ *Ibid.*

CHAPTER 4 A comparative analysis of the merger regulation regimes of South Africa and COMESA.

4.1 Comparative table

In order to obtain a condensed overview of the similarities and differences between the merger regimes in South Africa and COMESA and in order to facilitate a discussion on these similarities and differences it is apposite to refer to the following table:

ITEM	SOUTH AFRICA	COMESA
1. JURISDICTION AND COMPETITION INSTITUTIONS.	<p>The Competition Act only applies to all economic activity within, or having an effect within the Republic.</p> <p>INSTITUTIONS</p> <ul style="list-style-type: none"> • Competition Commission. • Competition Tribunal. • Competition Appeal Court. 	<p>The COMESA Regulations and Rules apply only to its Member States.</p> <p>INSTITUTIONS</p> <ul style="list-style-type: none"> • COMESA Competition Commission • The Board of Commissioners
2. FILING FEES	<p>Small merger- nil</p> <p>Intermediate Merger- R100 000</p> <p>Large Merger- R350 000</p>	<p>A fee is calculated as a percentage of combined turnover or assets in the Common Market subject to a cap of Com \$ 500 000.</p>
3. MERGER THRESHOLDS	<p>The lower threshold is reached if the following is met:</p> <p>Any combination of the turnovers or assets of the acquiring and transferred</p>	<p>(a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger</p>

	<p>firms in the Republic equals or exceed R560; and</p> <p>Either the turnover or the asset values of the transferred firm or firms in the Republic equal or exceed R80 million.</p> <p>The higher threshold is reached if:</p> <p>Any combination of the turnover or assets of the acquiring and transferred firms in the Republic equals or exceeds R6,billion; and</p> <p>Either the turnover or asset values of the transferred firms in the Republic equal or exceed R190 million.</p>	<p>equals or exceeds COM\$ 50 million; and</p> <p>(b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover²⁵² or assets in the Common Market within one and the same Member State</p>
<p>4. MERGER REVIEW</p>	<p>The CC must initially determine whether the merger is likely to substantially prevent or lessen competition, taking into account a number of factors listed in the Act.</p>	<p>The CCC must initially determine whether the merger is likely to substantially prevent or lessen competition, taking into account a number of factors listed in the Regulations.</p>

²⁵²Aggregate turnover is the sum of your annual **turnover** for the income year. The annual **turnover** of any entity connected with you, for that part of the income year that the entity is connected with you.
<https://www.google.co.za/#q=aggregate+turnover> (accessed on the 6/12/15)

<p>5. CONSEQUENCES OF FAILURE TO NOTIFY A MERGER.</p>	<p>The CC can impose a 10% penalty.</p> <p>The CC can approve the merger subject to conditions.</p> <p>The CC can disallow the merger.</p> <p>The CC can make other order.</p>	<p>The CCC can undo the merger,</p> <p>The CCC can impose a 10% penalty.</p> <p>The CCC can make any other order.</p>
<p>6. TIME TO PROCESS A MERGER AFTER FILING.</p>	<p>Intermediate mergers-20 business days. May extend the period by not more than 40 days.</p> <p>Large merger- 40 days</p> <p>May extend this period by not more than 15 days.</p>	<p>120 days</p> <p>The CCC may extend this period by time it deems appropriate.</p>
<p>GROUND UPON WHICH A MERGER CAN BE JUSTIFIED</p>		
<p>7. PUBLIC INTEREST</p>	<p>The Merger can be justified on public interest ground.</p>	<p>The merger can be justified on substantial specified public interest ground.</p>
<p>8. ANY TECHNOLOGICAL, EFFICIENCY OR OTHER PRO-COMPETITIVE GAIN.</p>	<p>If parties to a merger can show the Authorities that there exists technological, efficiency or other pro-competitive gains that outweigh the negative effects of a merger, the merger can be approved.</p>	<p>If parties to a merger can show the Authorities that there exists technological, efficiency or other pro-competitive gains that outweigh the negative effects of a merger, the merger can be approved.</p>

4.2 Discussion

In the previous chapters an overview was provided of merger regulation regimes applicable in South Africa and COMESA. This chapter will now compare these regimes in order to make conclusions regarding problematic aspects that require reform.

4.2.1 What constitutes a merger?

Both the COMESA and South African definition of a merger seem to share the same definitional components. The acquisition of control is the centerpiece of the definition. A “merger” is the direct or indirect acquisition or establishment of a “controlling interest” by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person. Article 23(1) of the COMESA Regulations defines a merger as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whereas in terms of Section 12(1)(a) the South African Competition Act a merger takes place 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. In relation to an undertaking, a controlling interest is any interest that enables the holder to exercise, directly or indirectly, any “control” whatsoever over the activities or assets of the undertaking. In respect of an asset, a controlling interest is any interest that enables the holder to exercise, directly or indirectly, any control whatsoever over the asset. Looking at both definitions, One can argue that both COMESA and South Africa define concept of a merger in the same way.

4.2.2 Jurisdiction and notification of mergers

In South Africa the Competition Commission will have exclusive jurisdiction to assess a merger if the merger meets the set statutory thresholds. Section 3(1) of the Competition Act provides that it applies to all economic activities having appreciable effects in the Republic whereas Article 3(2) of the COMESA Regulations applies to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market If the merger falls below the set thresholds, it may not be necessary to assess the merger except in certain where cases the Commission deems it necessary that the merger be notified. Section 13 of the Competition Act provides that Small mergers can be implemented without notification, unless the Commission specifically requires notification. In COMESA, the situation is bit different as parties to the merger will be required to notify the merger if it

affects two or more Member States (regional mergers). It therefore follows that a merger will have to be notified provided it affects two or more Member States irrespective of its effects. This remains a challenge to Member State of COMESA who will have to pay filing fees even if it turns out that the merger does not have an appreciable effect on the Common Market. The COMESA Competition Commission (CCC) may also require parties to a non-notifiable merger to notify a transaction if it appears to the COMESA Competition Commission that such merger is likely to substantially prevent or lessen competition or is likely to be contrary to the public interest, provided that where both the acquiring firm and the target firm operate in a single Member State, the COMESA Competition Commission must first consult the relevant Member State before requiring parties to the merger to file a merger notification.²⁵³

It is worth noting that a merger can either be adjudicated by the COMESA Competition Commission or the competition commission of the Member State to common market. This may raise issues of the whether COMESA Competition Commission has exclusive or concurrent jurisdiction with the national competition authorities of the Member States. In merger regulation the COMESA Competition Commission is of the view that it has exclusive jurisdiction over mergers with a regional dimension.²⁵⁴ This view is supported by the provisions in the Regulations dealing with referrals by the COMESA Competition Commission to a National Competition Authority (NCA) of the Member State.²⁵⁵ The view is also supported by the fact that merger filing fees must be shared between the COMESA Competition Commission and the relevant Member States; the sharing of filing fees arguably compensates the Member States concerned for the loss of jurisdiction and the filing fees they might otherwise have earned. Notwithstanding this, the Regulations do not expressly exclude the jurisdiction of the NCAs over mergers with a regional dimension although they do refer to the CCC having “primary” jurisdiction.²⁵⁶ While it might be argued that a NCA asserting jurisdiction over a merger that is notifiable to the CCC will breach Article 5 of the Regulations, which provides that Member States must abstain from taking any measure which could jeopardise the attainment of the objectives of the Regulations, it remains an open

²⁵³Article 23(6) of the Regulations.

²⁵⁴<http://www.savca.co.za/wp-content/uploads/2014/05/comesa-merger-control-an-overview-and-recent-developments11.pdf> (accessed on the 06/12/15).

²⁵⁵ Ibid.

²⁵⁶Article 3(2) of the Regulations.

question how the NCAs will respond. Indeed, some NCAs have already declared that they do not share the view of the CCC.²⁵⁷

In terms of the COMESA regulations a merger can still be implemented prior to approval. However, such a merger will have no legal consequences. This may cause undesirable consequences as customers of the parties to the merger may be affected. This actually implies that in terms of COMESA Regulations, parties to a merger may implement their merger even if they did not comply with the statutory requirements. A merger that was implemented without the Commission's approval may have negative effects in the relevant market because other competitors and customers may have already been affected before the merger could be nullified.

4.2.3 Factors that are taken into account in examining a merger

The CCC must initially determine whether the merger is likely to substantially prevent or lessen competition, taking into account a number of factors listed in the Regulations. If it appears that this is likely, the CCC must then determine whether:

- the merger is likely to result in any technological, efficiency or other pro-competitive gain that will be greater than and offset the anticompetitive effects of the merger and would not likely be obtained if the merger is prevented; and
- the merger can be justified on substantial specified public interest ground.

From the wording of the Regulations and the Rules, there does not appear to be a significant difference between the competition and the public interest considerations in COMESA. The Regulations state that any merger which leads to a substantial lessening of competition or results in the strengthening of a position of dominance is contrary to the public interest and further provide that, in order to determine whether a merger is or will be contrary to the public interest, the CCC must take into account all matters that it considers relevant in the circumstances, and must have regard to the desirability of:

- maintaining and promoting effective competition;
- promoting the interests of consumers, purchasers, and other users in the region; and
- promoting, through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.

²⁵⁷<http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF> (accessed on 06/12/15)

The CCC has expressed the view that it considers competition (including efficiency and innovation) to be the “foremost public interest” and that, within the context of the merger control rules in the Regulations, public interest must be interpreted narrowly so that only market-related public interest considerations are to be taken into account in determining whether to prohibit or approve a merger.²⁵⁸ Finally, pursuant to the Regulations, if the CCC is satisfied that a merger is contrary to the public interest (i.e. is anticompetitive according to the above interpretation), it may make a number of orders aimed at addressing such effect.²⁵⁹

In South Africa, the Act provides for a two-stage analysis of mergers.²⁶⁰ The most important aspect of merger analysis in South Africa concerns pure competition issues. Thereafter public interest must be considered.²⁶¹ As indicated, the Competition authorities will not allow a merger if it can be used to avoid price regulation in an industry where economies of scale make the existence of a dominant firm inevitable.²⁶²

If a merger is found to lessen or prevent competition substantially, section 12A(1)(a)(ii) provides that it must then be determined whether the merger can or cannot be justified on substantial public interest grounds. Public interest grounds therefore also have to be considered where it is found that a merger does not prevent or lessen competition.²⁶³

In *SA Ltd/Business Connections Group Ltd*²⁶⁴ the merging parties argued that a weak finding on harm to competition cannot be bolstered by contending that the harm generated is harm to the public interest. The Tribunal held that public interest can be used to strengthen a competition finding where there is a clear relationship between the competition finding and the public interest criteria set out in the Act.²⁶⁵

²⁵⁸CCC Draft Guidelines on the Application of Public Interest Criteria of April 2013, at paragraphs 2.1 and 2.2.

²⁵⁹Article 26(7) of the Regulations.

²⁶⁰*African Media Entertainment Ltd v David Lewis* 68/CAC/Mar07 01/12/2008 par 2.

²⁶¹<http://www.bowman.co.za/FileBrowser/ArticleDocuments/Understanding-COMESA.pdf> p 3 (accessed On the 18/12/15)

²⁶²*Telkom SA LTD/Business connections Group Ltd* 51/LM//jun06 pars 23, 89 and 262.

²⁶³*Ibid* par 291.

²⁶⁴51/LM/Jun06 20/08/2007 par 297.

²⁶⁵*Ibid* par 298-304.

Thus it can be concluded that the test employed by both regulators in South Africa and COMESA is more or less the same. They are both concerned with the likely effects of the merger.

4.2.4 Consequences of failure to notify a merger

Article 24 of the COMESA Regulations provides that any notifiable merger that is carried out in contravention of the merger control part of the Regulations will have no legal effect and no rights or obligations imposed on the parties by any agreement in respect of the merger will be legally enforceable in the Common market. In addition, Article 26(7) of the COMESA Regulations provides that if upon review the Commission determines that such a merger is unlawful, the parties may be required to dissolve the merger or to take steps as may be determined by the Commission under the regulations to make the merger lawful. The Regulations merely provide that civil proceedings may be brought for the recovery of penalties for failure to notify a notifiable merger.²⁶⁶ Nevertheless, it is submitted parties to a merger will need to be mindful of the possible reputational consequences of contravening a merger determination.

If the parties to a merger fail to notify their merger to the South African Commission, the following decisions can be taken:

- The Commission can undo the transaction. This means that the merger will be deemed non-existent.
- The Commission can void the merger agreement.
- The Commission can impose an administrative penalty of 10% of turnover.
- The parties to the merger may suffer reputational harm.

It can be concluded that both regulators in South Africa and COMESA adopt similar measures towards non-compliance with merger regulations. But one also argue that the COMESA regulations have some loopholes in that they allow Member States to implement mergers prior to approval.

4.2.5 Thresholds for notification of a merger

In South Africa, the Competition Authorities differentiate two types of thresholds for purpose of merger notification namely the lower thresholds and the higher thresholds.

²⁶⁶ <http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF> accessed on the 18/12/15).

The lower threshold is reached if the following is met:

- Either the turnover or the asset values of the transferred firm or firms in the Republic equal or exceed R80 million.

The higher threshold is reached if

- Any combination of the turnover or assets of the acquiring and transferred firms in the Republic equals or exceeds R6,6 billion; and
- Either the turnover or asset values of the transferred firms in the Republic equal or exceed R190 million.

According to the new COMESA rules on the determination of merger threshold and method of calculation²⁶⁷ any merger, where both the acquiring firm and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, shall be notifiable if:

(a) the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM\$ 50 million; and

(b) the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM\$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover²⁶⁸ or assets in the Common Market within one and the same Member State.

The COMESA thresholds amounts appear to be higher than that of South Africa. However, COMESA does not differentiate between a lower threshold and a higher threshold.

4.2.6 Notification fees.

In South Africa, fees for filing a merger vary according to the size of a merger:²⁶⁹

Small merger	Nil
Intermediate merger	R100 000
Large merger	R350 000

²⁶⁷ Rule 4 of the Rules on the determination of merger threshold and method of calculation 2015

²⁶⁸ Aggregate turnover is the sum of your annual **turnover** for the income year. The annual **turnover** of any entity connected with you, for that part of the income year that the entity is connected with you.

<https://www.google.co.za/#q=aggregate+turnover> (accessed on the 6/12/15)

²⁶⁹ <http://www.compcom.co.za/notification-fees> (accessed on the 18/12/15)

In terms of the COMESA Regulations the notification fee is calculated as a percentage of combined turnover or assets in the common market subject to a cap of COM\$ 500 000 equivalent to US\$ 500 000.²⁷⁰ COMESA makes it compulsory for all notifiable mergers to be notified even if it is not yet established if the merger will lessen or prevent competition.

It can be argued that filing fees for COMESA are too high and these amounts may deter Member States from notifying their proposed transactions. Companies that do not have enough funds are likely to fail to notify their merger transactions. They may risk implementing their merger than notifying their mergers.

4.2.7 Consequences of failure to notify a merger.

Article 26(7) of the COMESA Regulations, provides that if upon review the Commission determines that a merger is unlawful, the parties may be required to dissolve the merger or to take steps as may be determined by the Commission under the Regulations to make the merger lawful. The COMESA Competition Commission may impose a high penalty of 10% of the aggregate turnover in the COMESA region for not notifying the merger.²⁷¹

In South Africa the following sanctions may be imposed:

- The Commission can undo the transaction. This means that the merger will be deemed non-existent.
- The Commission can void the merger agreement.
- The Commission can impose an administrative penalty of 10% of turnover.
- The parties to the merger may suffer reputational harm.

Both the COMESA Competition Authorities and the South African Competition Authorities can impose an administrative penalty of 10% on the annual turnover of the parties who fail to notify a merger. It also appears that both Authorities have discretionary powers to do what they deem an appropriate action in each case.

4.2.8 Recommendations

It is submitted that the COMESA Competition Authorities must come with a plan to adjust their notification fees, as they appear to be high and may discourage parties from filing their mergers. They must also find a way to integrate the COMESA Competition Commission and

²⁷⁰Article 55 of COMESA Competition Regulations 2004.

²⁷¹ Annual Turnover will comprise turnover in the most recent year.

the relevant Member State's national Competition laws. It remains uncertain whether the COMESA has exclusive jurisdiction or a final say over mergers with regional impact. This is the case because even if the COMESA Competition Commission approves a merger, it may still have to pass the competition muster of the national laws of a particular Member State. In order for COMESA to achieve its goal of becoming a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states through economic prosperity and regional integration, the COMESA Regulations should be amended to afford exclusive jurisdiction to the COMESA Commission to assess mergers having a regional dimension and should be required that the Members States must enact legislation to give effect to these Regulations.

The COMESA Regulations appear to be vague and certain when it comes to the time period within which to process a merger by the COMESA Commission. It stipulates a 120 day period and goes further to say that the Commission may extend time but mentions no specific period. In the latter regard, Regulations must be amended to make a provision that if after 120 days the COMESA Commission has not made any decision or has not taken any action, the merger must be deemed to have been approved.

The COMESA Regulations must further be amended to make a provision for different types of mergers and thresholds for each merger for purposes of notification. The Regulations are bit confusing as they do not divide mergers into various categories for the benefit of the public. The 120 days period for merger examination is too long especially where national competition authorities also need to present a report on the same merger to their Boards in view of the jurisdictional tussle between the Commission and the National Competition Authorities.

It is submitted that the requirement that all transactions to be notified to the Commission as long as both or either the acquiring firm or target firm operate in two or more Member States even where there is no appreciable effect on trade and competition within the Common Market should be removed from the COMESA Regulations. Only mergers with appreciable effects in the Common Market must be notified and this can be achieved if thresholds and reasonable filing fees are set.

With respect to South Africa, it is submitted that it would be prudent if a provision is made⁶¹ for a time period within which to notify a merger. This will prevent parties from taking an unreasonably long time to notify a merger.

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