Using Competition law to promote broader public interest issues in merger regulation by

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Chapter 1

1. Introduction

During the apartheid system economic policy in South Africa was shaped by dependence on extractive industries and isolation from many world markets. Monopoly concessions were granted to some industries around the turn of the 19th century.\(^1\) Manufacturers benefited from low costs of inputs such as steel and electricity, which were supplied by state monopolies.\(^2\) Discrimination and protection were combined in policy measures that protected white farmers and businesses against African competition, by reserving most of the land for white ownership and giving white farmers and white-owned companies preferences in subsidy and support programs whereas black entrepreneurs were outside of the formal economy.\(^3\) South Africa for many years was excluded from international trade due to its apartheid policies. South Africa therefore had to develop industrial policies to ensure its survival in the domestic space and consequently decided to form and nationalise and support heavily certain industries including energy and steel industries. As a result of the state’s intervention in certain industries, one of the unintended consequences was that monopolies were created in the process.\(^4\)

1.1. Regulation of Monopolistic Conditions Act 24 of 1955

Due to the aforementioned creation of monopolies there was therefore a need for government at the time to ensure that these monopolies did not abuse their monopoly positions. The government initially responded to this need by passing the ‘Regulation of Monopolistic Conditions Act’.\(^5\) The aforesaid Act dealt with *inter alia* monopolistic conditions which are today referred to as ‘restrictive practices’. The Monopolistic Conditions Act applied to existing monopolistic conditions and not to those which may arise in future.\(^6\) The Monopolistic Conditions Act did however not cover monopoly situations as such, nor until 1969, did it deal with mergers and acquisitions.

The aforesaid legislation was not a success for many reasons *inter alia* because it did not prohibit certain restrictive practices *per se* but rather provided mechanisms to deal

\(^2\) Ibid.
\(^3\) Ibid.
\(^4\) Ibid.
\(^5\) Act 24 of 1955.
with anti-competitive cases and examine these cases and decide on a cause of action.\(^7\) The test for merger analysis was not a rigid one as it simply established a public interest test for anti-competitive cases.\(^8\) The Board of Trade and Industry which was appointed by the Minister of Trade and Industry (“Minister”) was vested with the powers to investigate anti-competitive practices, to make recommendations to the Minister and to negotiate and supervise compliance with orders.\(^9\) The decisions of the Board of Trade and Industry were however not final as the Minister could veto such decisions on the grounds of public interest. However, in the event that a party was not happy with a decision it could take the decision to a special court for review. The powers to investigate anti-competitive practices resided with the Minister who could delegate such powers to the Board of Trade and Industry.\(^10\) The 1955 Act did not have provisions that dealt with mergers therefore is less relevant for the purposes of this dissertation suffice to say that the Act failed in many respects because of a lack of independence by the Board of Trade and Industry.

### 1.2. **Maintenance and Promotion of Competition Act 96 of 1979**

As a result of the apparent failure of the 1955 Act, the government of that time took a decision to appoint a Commission of enquiry to look into the state of Competition policy in South Africa. The Commission of Enquiry after looking at many factors and the apparent failures of the 1955 Act\(^11\) recommended a new competition body with sufficient resources, stronger penalties against violation of orders and also recommended extension of the legislation to include merger evaluations.\(^12\) Following the recommendations of the Commission of Enquiry, the ‘Maintenance and Promotion of Competition Act’\(^13\) was passed.

The Maintenance and Promotion of Competition Act dealt with amongst other things, mergers and also instances of enforcement and exemptions.\(^14\) Cartel behaviour again was made illegal by the Maintenance and Promotion of Competition Act and a new Competition Board was established which had more powers relative to the previous board. The Competition Board was given powers to initiate investigations on its own.

\(^7\) Sunderland and Kemp: Competition Law of South Africa (Lexis Nexis, Durban 2000) Chapter 3 para 3-28
\(^8\) Ibid at para 3-29.
\(^9\) Supra note 1, at 11.
\(^10\) Supra n5.
\(^11\) Supra note 1, at 13.
\(^12\) See id at 7.
\(^13\) Act 96 of 1979.
\(^14\) Section 10 of Act 96 of 1979.
without any direction from the Minister to initiate investigations against any anti-competitive behaviour but the Minister’s powers to decide on a cause of action to be taken after investigation was retained.\textsuperscript{15}

The Maintenance and Promotion of Competition Act and its Competition Board however did not live up to the expectation of the business community. Again, lack of independence impacted heavily on the work of the Competition Board and as a result the new government developed a competition policy that would seek to establish independent institutions that would implement competition policy.\textsuperscript{16} South Africa had its first democratic elections on 27 April 1994. A former political liberation movement (the ANC) was victorious in the said elections. It inherited a government with many failures and many successes. The ANC in its RDP policy recognised certain immediate urgent tasks that needed to be carried out and the ANC led government recognised competition policy as a fundamental task that sought immediate attention as it wanted to reverse some of the failures of the past.\textsuperscript{17}

1.3 Competition Act 89 of 1998

With the new dispensation and the need for the new Government to make radical economic changes in the economic sphere, government, business and organised labour began negotiations at Nedlac with a view of scrapping the Maintenance and Promotion of Competition Act and replacing it with a new Competition Act. The Department of Trade and Industry subsequently published the Competition Bill of 1998 became the current Competition Act. In November 1998 the Competition Act\textsuperscript{18} (“The Competition Act”) came into operation.

The Act established Competition Commission (“Commission”) and Competition Tribunal (“Tribunal”) as independent bodies only subject to the Constitution of the Republic of South 1996\textsuperscript{19} and the law and that they must apply without fear, favour of prejudice.\textsuperscript{20} The Competition Act gave the Commission and the Tribunal powers to

\textsuperscript{15} Section 12 and 13 of Act 96 of 1979.
\textsuperscript{18} Act 89 of 1998.
\textsuperscript{19} Constitution of the Republic of South Africa, 1996.
\textsuperscript{20} In terms of section 3 of the new Act, the new Act applied to all economic activity within or having an effect within the Republic.
investigate anti-competitive behaviour of any firm including state owned companies which powers the previous competition board did not have.\textsuperscript{21}

The Competition Act has special features and has taken the historical context of the South African situation into account. The preamble to the Competition Act provides as follows.\textsuperscript{22}

“The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy must be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

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

In order to

- Provide all South Africans equal opportunity to participate fairly in the national economy
- Achieve a more effective and efficient economy in South Africa;
- Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire;
- Create greater capability and an environment for South Africans to compete effectively in international markets;
- Restrain particular trade practices which undermine a competitive economy;
- Regulate the transfer of economic ownership in keeping with public interest;
- Establish independent institutions to monitor competition; and
- Give effect to the international law obligations of the Republic.\textsuperscript{23}

\textsuperscript{21} Section 3(1) of the Competition Act.
\textsuperscript{22} As adapted by the Candidate.
The South African Competition Act is unique in that it expressly pursues certain public interest objectives as stated in section 2(a) to (f) which provides:

The purpose of this Act is to promote and maintain competition in the Republic in order

“(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 to 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 stakes of historically disadvantaged persons”.

Public interest also plays a significant role in the context of member regulation in terms of the Competition Act. In this regard section 12A9A) provides as follows:

“wherever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in subsection (2) and

(a) if it appears that the merger is likely to substantially prevent or lessen completion, then determine-

(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

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

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

Section 12A(3) then further provides:

23 Preamble of the Competition Act, 89 of 1998.
“(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or Competition Tribunal must consider the effect that the merger will have on -

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

1.4 What is public interest?

It is generally accepted that the primary purpose of the competition law and policy is first and foremost to maintain and promote competition. The question is how to align the contradictory objectives of the competition law and policy to promote competition objectives and non-competition objectives embodied in the public interest provisions as provided for in the Competition Act.24

The inclusion of these provisions generated some serious debates among competition law and policy scholars.25 It is argued by Hantke-Domas that the rationale for the inclusion of public interest provisions in competition policy is to ensure that the political and moral values of whom are realised and the public interest concept provides the judiciary with a base from which a proper interpretation and meaning can be given to the public interest provisions such as employment and promotion of small businesses.26 According to Hantke-Domas public interest is part of an ideological debate about the aims of the state.27 It is submitted that the public interest provisions in the Competition Act show how the new government in 1994 planned to deal with issues affecting employment, small businesses and international competitiveness of South African companies and industries. The aim of the South African government in utilizing the competition law and policy to pursue non-competition objectives is clearly articulated in the preamble and objectives section28 of the Competition Act.

24 Section 2 of the Competition Act.
25 Dingley D Presentation on “The economics of public interest provisions in South African Competition Policy” at the Competition Commission Sixth Annual Competition Conference, September 6 and 7 2001 at 1.
27 Ibid.
28 Section 2 of the Competition Act.
1.5 Scope of the dissertation

The preamble of the Act is important in the sense that it recognises the need to balance the interest of workers, owners and consumers. Further it recognises the need to regulate the transfer of economic ownership in keeping with the public interest. The primary aim of the Competition Act is to promote and maintain competition. As indicated, the Act lists six of the objectives that it wants to realise, of which five are public interest objectives.29

These two factors contained in the preamble are at the heart of this dissertation. The dissertation asks difficult questions such as to which extent has the Commission and the Tribunal managed to balance the interest of workers, owners and consumers in their merger analysis?

Most importantly the Act states the intention of the legislature on what the legislature intended to achieve with this piece of legislation. This dissertation will endeavour to also address this question.

The dissertation will examine some of the merger cases (intermediate and large mergers) decided by both the Commission and Tribunal from 1998 to 2012. The focus will be on mergers that have a public interest dimension including employment, protection of small enterprises and small to medium-sized enterprises. It is worthwhile mentioning that the competition authorities since their inception in 1998 have not blocked or prohibited a merger case on the basis that the merger cannot be justified on substantial public interest grounds.30

The objective of this study is to assess and revisit previous Commission and Tribunal’s decision to determine whether the competition authorities have the zeal and zest to reject pro-competitive mergers on public interest grounds alone. The study is also aimed at showing through competition authorities’ decisions on merger cases that there is reluctance on their part to take unpopular decisions on the second-stage analysis of mergers. Furthermore, the dissertation will endeavour to give an analysis of the Tribunal decisions with reference to decisions on second stage analysis of

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29 To provide consumers with competitive prices and product choices; To promote employment and advance the social and economic welfare of South Africans; To expand opportunities for South Africans participation in world markets and recognise the role of foreign competition in the Republic; To ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and To promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

30 www.comprrib.co.za/cases (accessed on 22 May 2014).
mergers and their effect on employment and broader public interest issues, and finally it will propose a way forward in relation to protection of employment and other broader public interest grounds.

With high numbers of unemployment, trade union activism and global recession, public interest issues have taken centre stage in evaluation of mergers. Recent merger cases have shown that most of the merger cases involve public interest issues and in particular employment issues. The question that one may pose is whether merger conditions relating to employment have been adequate enough to deal with retrenchments and redundancy created by amalgamations?

As remarked above, since the Competition Act came into operation, not a single merger has been rejected on the basis of public interest issues. One is tempted to suggest that the competition authorities probably place too much emphasis on the first-stage of analysis which focuses on pure competition issues. In this dissertation it will be investigated whether the fact that mergers have not been prohibited on public interest grounds mean that the competition authorities are of the view that their primary objective is to promote competition and that other considerations are of less significance. It will also be investigated whether the competition authorities are still not clear on how much substantial public interest grounds is taking into account section 12A (3) factors. It will thus be asked what the intention of the legislature was in relation to section 12A (1)(b) of the Act and whether the legislature envisaged a situation wherein a merger is prohibited or approved on substantial public interest grounds alone?
Chapter 2:

2. Merger control regime

2.1. Introduction

In order to be in a position to assess the role of public interest in the Competition Act, it is imperative to give an overview of the merger control regime and its practical process from merger filing until a decision is made by the Commission in relation to intermediate mergers and by the Tribunal in respect of larger mergers. Historically, the Commission invested its human and capital resources on evaluation of mergers. This is evident from the number of cartel cases prosecuted between 2000 and 2007.\(^\text{31}\) The Commission’s strategic focus on merger regulation took a serious shift in around 2007, when it decided to prioritise certain industries which may be prone to cartel activities.\(^\text{32}\) Most of these industries were infected with state interventions and legalized monopolies.

2.3. Mergers

Section 12 of the Act provides that for the purpose of the Competition Act, a merger occurs when one or more firms\(^\text{33}\) directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm\(^\text{34}\). The Act further provides that a merger contemplated in paragraph (a) may be achieved in any manner, including through:

a) purchase or lease of the shares, acquiring an interest or assets of the other firm in question\(^\text{35}\); or

b) amalgamation or other combination with the other firm in question.\(^\text{36}\)

Acquisition of control over the whole or part of the business of another firm may manifest in many different ways. Section 12(2) provides various forms in which a firm may acquire control over a business of another firm, namely that a person controls a firm if that person:

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\(^\text{33}\) Firm includes a person, partnership or a trust.

\(^\text{34}\) Section 12 (1)(a) of the Act.

\(^\text{35}\) Section 12 (b)(i) of the Act.

\(^\text{36}\) Section 12(ii) of the Act.
a) beneficially owns more than one half of the issued share capital of the firm;

b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;

c) is able to appoint or to veto the appointment of a majority of the directors of the firm;

d) is a holding company, and the firm is a subsidiary of that company as contemplated in the Companies Act 1973 what about the fact that there is now a 2008 Companies Act);

e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

f) 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

g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

If either of the factors listed above are present in an intermediate or a large merger, the parties to the merger are required to notify the Commission of such acquisition. The Regulations on threshold published by the Minister of Trade and Industry gives guidance on when merger is regarded as an intermediate or large merger.

Chapter 3 of the Competition Act deals with merger regulation. The Competition Act recognises three types of mergers in section 11(5), depending the size of the merger, namely:

a) A small merger - this means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection\(^{37}\) (1)(a), namely the combined annual turnover or assets of the acquiring and target firms is below R560 million and the turnover or assets of the target firm is less than R80 million.\(^{38}\)

b) An intermediate merger- this means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection

\(^{37}\) Determination of Merger Thresholds and Method of Calculation GN in GG 31957, 6 March 2009.

\(^{38}\) Section 11(5)(a) of the Act.
(1)(a)\(^{39}\), namely the combined assets or turnover of the merging firms is valued at R560 million or above and the assets or turnover of the target firm is valued at R80 million or above; and
c) A large merger - this means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a), namely the combined assets or turnover of the merging firms is equals to 6.6 billion or above and the assets or turnover of the target firm is valued at R190 million or above.

2.4. Section 12A Consideration of Mergers

This section is the most important section in the Competition Act for the purpose of the dissertation. It mainly indicates what the Commission has to consider in the evaluation of mergers. The first thing that the Commission and the Tribunal do is to assess the effect of the merger on competition in the relevant market.

The concept of a relevant market is central to the enquiry into the alleged abuse of dominance in terms section 7 and 8 of the Act.\(^{40}\) Abuse of dominance takes place in a specific market.\(^{41}\) It is therefore imperative to properly define the relevant market in which the abuse of dominance is perpetrated.\(^{42}\) In The Tongaat-Hulett Group merger, the Tribunal held that the identification of the relevant market always occupies a central place in anti-trust analysis.\(^{43}\) Thus, competition does not take place in a vacuum, but always occurs within a market. It is therefore imperative to properly define the market (both product and geographic).

In terms of section 12A(1) of the Competition Act, the analysis of competitive consequences is divided into two stages. It must first be determined whether the merger is likely to substantially prevent or lessen competition. If it is found that the merger is anti-competitive, it must then be established whether the merger has pro-competitive consequences that outweigh those negative effects.\(^{44}\) According to section 12A(2) when determining whether or not a merger is likely to substantially prevent or

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\(^{39}\) Section 11(5) (b) of the Act.
\(^{40}\) South African Raisins (Pty) Ltd and another v SAD Holdings and others. Case number 04/IR/Oct/1999.
\(^{41}\) Ibid.
\(^{42}\) Ibid.
\(^{43}\) The Tongaat-Hulett Group Limited and Transvaal; SuikerBeperk and Others. Tribunal case No: 83/LM/Jul00.
lessen competition, the Commission or Tribunal must assess the strength of competition in the relevant market and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market.

Section 12A(1) assesses whether the merger will substantially prevent or lessen competition by interrogating barriers to entry\textsuperscript{45} in the relevant market, determining whether the market is concentrated and whether there is history of cartel activities. The competition authorities must also assess the buying power of the customers of the merging parties, the dynamic characteristics of the market including growth, innovation, whether the parties in the market are vertically integrated and if so, the extent of such integration.\textsuperscript{46} The competition authorities must furthermore assess whether the target firm is a failing firm (failing firm defence) and whether the acquisition of the target firm would lead to a removal of a maverick competitor (whether the acquisition is calculated at destabilising competition between the acquiring firm and the target firm).\textsuperscript{47} It must be noted that the competition authorities assess these factors holistically; therefore any of the factors may amount to a substantial lessening or prevention of competition. Again, any of the factors may prove that the merger is unlikely to prevent or lessen competition in the market.

\textsuperscript{45} Barriers to entry are conditions that may prevent a potential competitor from entering into a market.

\textsuperscript{46} See Section 12A(2) factors. Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and- a. if it appears that the merger is likely to substantially prevent or lessen competition, then determine- i. whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and ii. whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or b. otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).2. When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including- a. the actual and potential level of import competition in the market; b. the ease of entry into the market, including tariff and regulatory barriers; c. the level and trends of concentration, and history of collusion, in the market; d. the degree of countervailing power in the market; e. the dynamic characteristics of the market, including growth, innovation, and product differentiation; f. the nature and extent of vertical integration in the market; g. whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and h. whether the merger will result in the removal of an effective competitor.
Once the Commission or the Tribunal has determined that the merger may or may not substantially prevent or lessen competition in the market, the second stage of the enquiry is the public interest enquiry which is undertaken in order to determine whether a merger can or cannot be justified on public interest grounds. The Tribunal in *Harmony Gold and Gold Fields Limited* held that all mergers must first be subject to a competition evaluation. This is not because of some administrative preference but because this is what the section requires. The Tribunal gave guidelines on the processes that need to be followed in merger evaluation. It held that two possible outcomes exist after the competition evaluation, namely if the merger is not found to lessen competition, the Tribunal follows the path set out in sub-section (b). Such a merger can thus be considered as having passed the competition inquiry. If the merger is found to be anti-competitive then the next stages enumerated in sub-section (a) follow. If the merger does not lessen competition, then the competition authorities still have to determine whether the merger cannot be justified on substantial public interest grounds.

Section 12A(1)(b) and (3) are of specific importance. In terms of the said sections, when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on:

a) a particular industrial sector or region;

b) employment;

c) the ability of small business, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

d) the ability of national industries to compete in international markets.

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49 Section 12A(3) of the Competition Act.
40 Paragraph 41 of Tribunal case Number: 93/LM/Nov04.
50 See id at 14.
51 Paragraph 42 of Tribunal case Number: 93/LM/Nov04.
52 First one performs the efficiency trade-off required by (a)(i). This inquiry again can have two outcomes. The efficiency trade-off can be greater than and offset the anti-competitive effects in which case the merger can again be considered to have passed the competition inquiry. If the efficiency trade off does not redeem the merger then the merger emerges from the competition enquiry as having net harm to competition.
53 Section 12A (1) (b) of the Competition Act.
54 means a separate and distinct business entity, together with its branches or subsidiaries, if any, including cooperative enterprises, managed by one owner or more predominantly carried on in any sector or sub-sector of the economy mentioned in column 1 of the Schedule and classified as a micro-, a very small, a small or a medium enterprise by satisfying the criteria mentioned in columns 3, 4 and 5 of the Schedule; (National Small business Act 102 of 1996).
Having dealt with the legislative framework of the merger control regime, it is therefore worthwhile to allude to the practicalities on the merger control regime. Merger evaluations are by their very nature forward-looking. South African merger regulation is consistent with other trade liberalisation. South Africa has become part of the global market, barriers to international trade have become less, and investors are beginning to invest in Africa. Merger control regime seeks to ensure that mergers do not create monopolies and concentrated markets. Most industries during the apartheid era were subjected to state regulation and in some the state was the only market participant. With the dawn of democracy, there was a need to privatise and deregulate some of these industries. Competition policy played an important role in the regulation and privatisation of the South African economy. The Competition authorities thus ask themselves simple and difficult questions including, what will happen in an identified relevant market if the merger is approved.

The provisions of Act that deal with merger regulation have similarities with merger regulation regimes in other jurisdictions around the world including Canada, European Union and US Office of Fair Trading. South Africa’s Mergers and Acquisitions division is rated and ranked amongst the best in the world. Most of its recommendations have been accepted and confirmed by the Competition Tribunal. The approach by the Competition Tribunal and Competition Appeal Court in evaluation of mergers is however a contested terrain.

55 Sutherland and Kemp in Chapter 10.1.
56 Industrial and Trade Policy as envisaged in White Paper on Reconstruction and Development Policy.
58 Boshoff W Presentation on “Transitions from legal cartel regimes” at the Competition Commission Eighth Annual Competition Conference, September 4 and 5 2001 at 1.
59 Steel industry is one example. Iscor was sold to Arcelor Mittal.
60 In my opinion, privatisation was not handled properly by the government because it simply meant taking monopoly from the hands of government to the hands of one company. For example, the monopoly enjoyed by state with regards to the steel industry (ISCOR) was transferred to one company (Arcelor Mittal). In my view, the state should have sold Iscor to more than one buyer in order to stimulate competition in the steel market or they should have introduced a sector regulator to ensure that prices charged a dominant player are not to the detriment of consumers.
61 Ibid.
63 Global Competition Review (GCR) and ICN.
64 Karinga R Presentation on “Between a rock and a hard place? A closer look at the Competition Appeal Court” at the Competition Commission Fifth Annual Competition Conference, October 4 and 5 2011 at 9 and 11.
Chapter 3

3. Protected public interests in merger evaluation

As indicated, the Competition Act recognises and protects four classes of public interest grounds during merger evaluation. In the past the Tribunal has had an opportunity to decide on mergers that involved any of the aforesaid four public interest grounds. The listed public interest grounds must be assessed as a whole by the Commission or the Tribunal. It has been accepted by the Tribunal that there may be a situation where the public interest factors in section 12A(3) compete against each other. In the Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd case, the Tribunal stated that “in the first place each public interest ground asserted should be viewed in isolation to see if it is substantial. And if it is substantial and that more than one public interest ground exists which contradicts the other/s, the Tribunal must try to reconcile the contradictions and if not, the Tribunal must then balance them and arrive at a net conclusion.”

3.1. The public interest grounds in merger evaluation

The Competition Act has an explicit public interest test that requires the Commission or the Tribunal to balance its competition evaluation, namely a substantial lessening of competition test against the transaction’s impact on a number of specified public interest grounds as stated above. Hence it is conceivable that a transaction that is found to substantially lessen competition may nevertheless be approved because this anti-competitive effect is outweighed by its positive impact on any of the public interest grounds. Or conversely, a transaction that is not anti-competitive may nevertheless

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65 Section 12A(3) of the Competition Act lists a particular industrial sector or region, employment, the ability of small businesses, or firms controlled or owned by historical disadvantaged person to become competitive and the ability of national industries to compete in international markets as factors that the competition authorities must consider to determine the effect of a merger on public interest grounds.  
66 IG Teage (2005) The role of the public interest in competition law: a consideration of the public interest in merger control and exemptions in SA and how the public interest plays a more important role in the competition laws of SA and of developing nations, unpublished LLM dissertation, University of Cape Town.  
67 Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd- Tribunal Case N0: 08/LM/Feb02.  
68 Ibid.  
69 Ibid at para 217.  
70 The role of public interest in merger evaluation. A paper delivered by David Lewis (former Tribunal Chairperson) at International Competition Network conference held on 28-29 September 2002.
have conditions imposed upon it or may even be prohibited because it impacts negatively on employment or a particular region.\textsuperscript{71}

The competition authorities have made it clear that the primary purpose of the Competition Act is the promotion and maintenance of competition. However, the South African historical context led the legislature to include a public interest aspect in merger regulation. The competition authorities are therefore required by the Competition Act to conduct a public interest analysis in merger evaluation.\textsuperscript{72}

As indicated in chapter two, the Act provides for a two-stage analysis of mergers. The most important aspect of the merger analysis concerns pure competition issues. A merger analysis will commence with an evaluation of these issues. Thereafter public interest issues must be analysed.\textsuperscript{73} Sutherland suggests that “in principle public interest issues may not be considered during the first phase of the merger analysis. However, public interest and competition consequences of a merger cannot be clearly separated. Sometimes public interest factors will have to be considered in making a competition analysis. A competition analysis should be done against the backdrop of fundamental public interest concerns”.

The Competition Act provides that for a claim of public interest to succeed in merger evaluation, the public interest relied upon must be substantial (\textit{my emphasis}).\textsuperscript{74} The effect on public interest is substantial if it leads the competition authorities to a conclusion that is opposite to that of the competition analysis.\textsuperscript{75}

3.2. \textbf{A particular industrial sector or region evaluation}

As part of the public interest considerations mandated in merger evaluation, the competition authorities must determine what would happen in a particular industry if the merger is approved. For example the competition authorities may prohibit a merger in the cement industry between cement companies on the ground that it will lessen competition then it has to consider the effect that it would have in the cement industry because the cement industry has four big players and barriers to entry are high. The merger of cement companies may have a negative effect on this particular

\textsuperscript{71}Ibid.
\textsuperscript{72} Section 12A(1) (b) of the Competition Act.
\textsuperscript{73} Sutherland and Kemp on mergers: substantive issues paragraph 10.4.
\textsuperscript{74} Section 12A(1)(b) of the Competition Act.
\textsuperscript{75} If the merger cannot be justified on public interest grounds and that prohibition or conditional approval is necessary.
industry because the merged entity may coordinate its behaviour and deter entry in the market. The Tribunal in The *Tongaat-Hulet Ltd v Transvaal SuikerBeperk* case prohibited a merger in the sugar market because of the effect it would have had in the sugar industry if it had been approved. The merging parties argued that the merger would have a positive effect on the Mpumalanga region and the Southern Africa region. The Tribunal dismissed the proposition made by the merging parties and held that the public interest benefits as a result of the merger were not substantial enough to offset the effect of the merger on competition. The Tribunal held that the positive impact of the merger on a particular region may be achieved absent the merger. In *Isco Ltd and Saldanha Steel (Pty) Ltd*, the Tribunal approved an anti-competitive merger on the basis that the public interest ground favours its approval and failure to approve the merger would lead to Saldanha Steel exiting the market which would have a deleterious effect on the Saldanha region in that people would lose their jobs. The Tribunal thus married the failing firm defence with a public interest ground namely in that the Tribunal reasoned that a failure to approve the merger will result in the closure of Saldanha Steel which will ultimately have negative consequences on public interest grounds.

Recently the Tribunal approved a merger subject to conditions that would protect public interest especially a particular industrial sector. The Tribunal in *Industrial Development Corporation and Rio Tinto South Africa Ltd* (herein after IDC-case) conditionally approved a merger which did not have a horizontal or vertical effect on competition. However, the merger had an effect on public interest concerns. The Commission submitted that the merger would allow diversion of locally produced Dense Medium Separation (“DMS”) iron ore to the merging entities to the detriment of domestic customers of DMS iron ore. In view of the significance of DMS iron ore in the domestic coal industry and the likely inability of existing domestic customers to post merger access sufficient volumes of DMS iron ore, the Tribunal approved the

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76 Tribunal case no: 83/LM/Jul00.
77 In Cherry Creek Trading 14 (Pty) Ltd and North West (Pty) Ltd- Tribunal case no: 52/LM/Jul04- the Tribunal imposed a condition on a merger to protect people in the North West region in relation price transparency so that commuters of North West Star buses are not over-charged. If the condition was not imposed, commuters in the North West region would not have known the agreement between the North West Government and the merging parties regarding bus fares and would have had substantial effect in the North West region.
78 Ibid at paragraph 114.
79 Ibid at paragraph 47.
80 Ibid at paragraph 50. DMS is used in the washing of coal to improve its quality.
transaction on condition that customers who required DMS would have access to DMS.

The above cases show that the competition authorities are obliged to take public interest concerns seriously in their merger evaluation. The *IDC* case mentioned above did not raise any competition issues but the Tribunal approved it on specific conditions as a result of the effect of the merger on public interest concerns. The decision drives home the point that the competition authorities would always seek to protect public interest by conditionally approving a merger to address public interest concerns including the effect of a merger on a particular industrial sector or region.

The Tribunal has found in the past that when the legislature used the words “sector” or “region” in section 12A(3) of the Competition Act, it intended not to limit the evaluation of effects to markets. The legislature’s use of the word “sector” here as opposed to the use of the word “market”, (the word used in section 12A(2)) is instructive. Clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regarded to some sphere of economic activity, *wider* than the mere relevant market, being the traditional tool of analysis of pure competition law issues. It is submitted that the legislature wanted the competition authorities to assess the merger effect on a sector or region as a whole because a particular merger may not have public interest effects in a defined relevant market but may have substantial effects in a particular sector.

The decisions of the Tribunal on the effect of a merger on a particular industrial sector or region are to a certain extent informed by Government’s National Industrial Policy Framework and the New Growth Path. The DTI’s Industrial Policy aims to use competition policy to stimulate growth and create employment.

3.3. Effect of a merger on employment

It has been reported in the past that South Africa has the highest unemployment rate in the world. The Competition Act also has the promotion of employment and

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83 Nasionale Pers Ltd v Education Investment Corporation 45/LM/Apr00 at para 24.
84 Industrial Corporation of South Africa Ltd v Anglo-American Holdings Ltd 25/LM/Jun02.
85 *Ibid* at paragraph 23 *IDC* submitted that it is mandated by the DTI and Department of Economic Development to promote the deepening and the widening of the manufacturing processes in the industry by investing in the downstream manufacturing to potentially capitalise on South Africa’s competitive advantage in the upstream beneficiation of natural resources.
86 More consideration should be given to mandating public interest conditions on proposed mergers, particularly in respect of employment and prices at page 20.
advancement of the social and economic welfare of South Africans as one of its objectives. The unemployment rate in South Africa was at 25% in the last quarter of 2013.\textsuperscript{87} The Economic Development Department (“EDD”) in its New Growth Path Framework (“NGP”) outlines that more consideration should be given to mandating public interest conditions, on proposed mergers, particularly in respect of employment.\textsuperscript{88} The NGP wants the competition authorities to involve trade unions in merger transactions, particularly those merger transactions that have an effect on employment.

It is against this backdrop that the effect of mergers on employment is taken seriously by the competition authorities. The competition authorities have shown in the past that they would try to protect against loss of employment as a result of a merger by attaching conditions to the merger that would ameliorate its effect on employment. It is worthwhile noting that since the Competition Act came into effect, no merger transaction was prohibited on the ground that it had a substantial effect on public interest concerns. However, the competition authorities have in the last ten years conditionally approved transactions that had effect an on public interest including employment.

The public interest consideration became a specific centre of attention in the last three years. This was necessitated by the fact that South Africa was also affected by the recession in 2009 and many companies failed in the manufacturing sector and as a result jobs were lost.\textsuperscript{89} The attention on public interest issues gained prominence when Walmart Inc, an American chain store signalled its intention to enter the South African market by acquiring Massmart Limited. The government and organised labour were opposed to Walmart acquiring Massmart.\textsuperscript{90} During the merger hearing at the Tribunal, the Commission submitted that the acquisition of Massmart by Walmart did not raise any competition concerns because there was no overlap between the activities of the merging parties in South Africa.\textsuperscript{91} However, the Commission pointed out that Walmart was “infamous worldwide for not respecting labour laws”.

\textsuperscript{87} \url{http://www.tradingeconomics.com/south-africa/unemployment-rate} (accessed on 28 January 2014).
\textsuperscript{88} Page 18 of the New Growth Path Framework.
\textsuperscript{89} SEDA Research on the Performance of the Manufacturing Sector (2012)- The manufacturing sector in SA is growing slower in comparison to other sectors and has shrunk from 19% of GDP in 1993 to 17% of GDP in 2010.
\textsuperscript{90} Para 18 of Walmart and Massmart case-Tribunal case number: 73/LM/Dec10.
\textsuperscript{91} Para 22 of Massmart and Walmart case.
The Walmart/Massmart merger proved to be a game changing transaction. The merging parties at the Tribunal were ordered to reinstate employees who were retrenched by Massmart prior to its acquisition proved by Walmart. The merging parties were also ordered to make funds available R100 million that would assist local suppliers of goods to retail stores, particularly Walmart.

The competition authorities’ approach to the effect on employment by a merger largely focuses on unskilled employees because of the high rate of unemployment and the difficulties faced by the unskilled employees to find employment in South Africa and elsewhere in the world. This approach must be applauded and it is submitted that the competition authorities must continue using it. However, the limitation of retrenchments to a period of two years is an approach which in my opinion must be revisited by the competition authorities because merging parties have a tendency of retrenching employees once the two year moratorium on retrenchment has lapsed. It is submitted that the competition authorities must use the public interest provisions to protect and promote employment. Any retrenchment must not be merger specific but rather in terms of the labour relations laws and the labour laws which jealously guard against the interest of the employees would be activated to ensure that any retrenchment is procedurally and substantially fair. It is submitted that the competition authorities must consider increasing the moratorium on retrenchment to four years. It is further submitted that the Competition Commission must develop internal capacity to monitor compliance with conditions imposed by the Tribunal on mergers.

3.4. The ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive

The Competition Act in its preamble provides that it seeks to open the South African economy to greater ownership by a greater number of South Africans. As indicated in chapter one the Competition Act is predominantly informed by historical circumstances that many small businesses or companies owned by disadvantaged persons were denied access to participate in the national economy. The Competition Act therefore requires the competition authorities to assess the effect of a merger on small businesses and firms owned by disadvantaged persons to effectively compete with established companies.

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92 Para 1.2 of Massmart and Walmart order.
93 Para 1.4 of Massmart and Walmart order.
94 Para 83 read with para 113 of Momentum/Metropolitan merger.
95 Momentum and Metropolitan merger.
In the case of Masscash Holdings (Pty) Ltd and Finro Enterprises (Pty) Ltd\textsuperscript{96}, the Tribunal observed that some of the competitors of the merging parties made submissions to the Commission about the effects of the merger on small business: “UMS submitted that large retailers took hold of the opportunities now available to access the markets normally generally operated by the previously disadvantaged communities. Sadly many smaller house shops, spazas, mobile shops and garage shops have disappeared from the areas”.\textsuperscript{97} Because of the significance of public interest provisions in the Competition Act, the Tribunal held that the Commission is statutorily bound to assess the effect of a merger on the ability of small businesses to be competitive. The Tribunal had the following harsh words for the Commission: “in line with the spirit and specific public interest provisions of the Competition Act the potential effects on small businesses such as spaza shops, small superettes and the like, deserves a larger focus in the Commission’s analysis of potential public interest effects. The Competition Act is unequivocal that the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive must be considered in merger analysis”.\textsuperscript{98}

Recently the Tribunal in Pioneer Hi-Bred International Inc and Pannar Seed (Pty) Ltd\textsuperscript{99} decided to prohibit a merger on competition grounds namely that the merger will substantially prevent or lessen competition in the relevant market. In the second leg of the merger assessment relating to public interest consideration the Tribunal found that the merger must also fail on public interest grounds because of the effect it is likely to have on small-scale commercial and subsistence farmers (SMEs) in that the merger was likely to result in the increase of prices for hybrid maize seed to the detriment of small-scale farmers.\textsuperscript{100} The Tribunal found the claim by the small farmers to be a public interest issue as envisaged in section 12A(3)(c) of the Competition Act.\textsuperscript{101}

\textsuperscript{96} Tribunal case no: 04/LM/Jan09.  
\textsuperscript{97} Ibid paragraph 202.  
\textsuperscript{98} Ibid paragraph 203.  
\textsuperscript{99} Tribunal case no: 81/AM/Dec10.  
\textsuperscript{100} Para 407 and 409- small-scale commercial and subsistence farmers collectively make a meaningful contribution to South Africa’s overall maize production, and since this output is largely used to feed these farmers, their families and communities, it indubitably plays a very important role in the livelihoods of these South Africans.  
\textsuperscript{101} Ibid.
The Tribunal clearly acknowledges that the competition authorities have a role to play in the economy by ensuring that an acquisition does not negatively affect small businesses to be competitive in the national economy. This view was also expressed in an unrelated matter wherein the Tribunal found that Sasol discriminated in terms of price against Nationwide Pole.\textsuperscript{102} The Tribunal held that the price discrimination provision in the Competition Act was intended to protect small businesses.\textsuperscript{103} They declared as follows: “It is our view that the proscription of price discrimination reflects the legislature’s concerns to maintain accessible, competitively structured markets, markets which accommodate new entrants and which enable them to compete effectively against larger and well-established incumbents. This set of concerns points directly to problems confronting small and medium sized enterprises (SMEs) which in the absence of a level playing field or what is the same thing, in the presence of discrimination may well find it difficult to enter new markets and even more difficult to thrive, to compete effectively on merits. The influence of SME-related considerations in the legislative history of the Robinson-Patman Act is absolutely clear. Equally clear is our own Act’s concern with the development of small business, it is telling that one of the stated purposes of our Act is to ensure the equitable treatment of small and medium sized enterprises”.\textsuperscript{104}

It is submitted that the competition authorities recognise the importance of competition policy and industrial policy to open up markets for small businesses and businesses owned by historically disadvantaged persons.\textsuperscript{105} This is of course informed by our particular past and the Competition Act in its preamble\textsuperscript{106} recognises this. The competition authorities at the same time recognise that at times the public interest they may seek to protect may actually be the public interest that they harm in that blocking a merger or conditionally approving it as a result of public interest concerns may result in parties to that merger abandoning the merger and the target firm closing down. The Tribunal in \textit{Shell SA (Pty) Ltd and Tepco Petroleum (Pty) Ltd}\textsuperscript{107} cautioned

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\textsuperscript{102} Para 81 Nationwide Poles and Sasol Oil (Pty) Ltd, Tribunal case number: 72/CR/Dec03.  \\
\textsuperscript{103} Ibid.  \\
\textsuperscript{104} Nationwide Poles and Sasol (Oil) Pty Ltd- Tribunal case no: 72/CR/DEC03 at para 81. The decision of the Tribunal was overturned on appeal by the Competition Appeal Court.  \\
\textsuperscript{105} In Bedrock Mining Support (Pty) Ltd and The Competition Commission of South Africa-Tribunal case no: 23/AM/May2010 at para 51 The Tribunal in line with the public interest provisions, conditionally approved a merger that the merging parties must continue supplying a BEE company (Shefeera) with hardwood timber.  \\
\textsuperscript{106} That the economy must be open to greater ownership by a greater number of South Africans and regulate the transfer of economic ownership in keeping with public interest.  \\
\textsuperscript{107} Tribunal case no: 66/LM/Oct01.
\end{flushright}
the Commission not to be over-zealous in their quest to protect public interest.\textsuperscript{108} However, due to lack of information and/or resources by small businesses and businesses owned by historically disadvantaged persons, the public interest provisions in the Competition Act are not fully utilised. It is therefore submitted that the Commission and the Tribunal must channel resources to stakeholder relations and disseminate information about the Competition Act, its role and purposes to the general public\textsuperscript{109} particularly to those who have limited knowledge about the Competition Act. It is submitted that the information must be disseminated in four of the South African official languages.\textsuperscript{110}

3.5. The ability of National industries to compete in international markets

The Competition Act recognises that South Africa and its national industries have become part of the global village. The Competition Act seeks to allow national companies an opportunity to compete in international markets at the expense of national markets. In other words, the competition authorities may decide to approve a merger on the ground that it permits the merged entity to compete in international markets. In its preamble the Competition Act outlines that it wants to create greater capability and an environment for South Africans to compete effectively in international markets. The Competition Act further states that its other purpose is to expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa.\textsuperscript{111}

For a very long time, South African companies during the apartheid era were sanctioned from participating in the world economy. The United Nations General Assembly passed a resolution on 2 December 1950 to declare apartheid a policy of

\textsuperscript{108} Ibid at para 51 and 58.
\textsuperscript{109} A Guide to SME http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/SME.pdf (accessed on 5 February 204). The guide seeks to inform the public about the function and proceedings of the Commission. It has been submitted that the competition authorities must do more than to produce documents and put them on their website.
\textsuperscript{110} The Role of South African Competition Law in supporting SMEs- Can David really take on Goliath?- KimpKampel-Case Manager at the Tribunal, page 4- Accessibility-Despite the existence of an informal structure and prosecutorial authority to support interest groups, this has not been the practical effect. Intimidatory tactics are common; it is not unknown for large companies to boycott an SME’s business as a direct result of their pursuing complaint against them. The upshot is that there have been a handful of occasions on which SME groups have intervened or participated in merger or prohibited practice hearings before the Tribunal.
\textsuperscript{111} Preamble and Section 2(d) of the Competition Act.
racial segregation.\textsuperscript{112} The sanctions were in place until they were uplifted after the release of political prisoners at the end of apartheid.\textsuperscript{113} 

It is submitted that section 12A(3)(d) of the Competition Act is distinguishable from section 12A(3)(b) and (c) considerations in that the issue of employment in South Africa is historically due to the fact that unemployment to some extent can be blamed on the apartheid system in that the majority of people in South Africa have not been equipped with education and skills that would make them employable and own businesses. The same goes for the issue of participation by small business and businesses owned by historically disadvantaged persons in that many opportunities were not available to these types of groups. The preamble in the Competition Act put it blatantly that apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy.\textsuperscript{114} It is therefore submitted that unemployment and economic participation directly affects South Africans as a result of apartheid laws, whereas participation in the world economy affects South African companies as a result of economic sanctions imposed by the United Nations and countries around the world that wanted to see an end to the apartheid regime.

In the case of \textit{Tongaat-Hullet and Suiker BPK}\textsuperscript{115}, the Tribunal found that the merger would lessen competition in the sugar market. The merging parties argued that the merger would enhance their ability to compete in the international market.\textsuperscript{116} They requested the Tribunal to approve the merger on one of these public interest grounds. The Tribunal held that as much as the merger would allow the merging parties to compete in international markets, it could not allow a merger on the basis that it would create a dominant player at the expense of the local market.\textsuperscript{117} It is submitted that the Tribunal correctly decided that participation in the international stage by local companies must not be to the disadvantage of the national market in that the unintended consequences thereof would be abuse of dominance in the national


\textsuperscript{114}Preamble of the Competition Act.

\textsuperscript{115}Tongaat-Hullet and Suiker BPK, Tribunal Case no: 83/LM/Jul00.

\textsuperscript{116}Para 114 of Tongaat-Hullet and Suiker BPK case.

\textsuperscript{117}\textit{Ibid} at para 115.
market by the merged entity. It is further submitted that the merged entity might have the ability to charge excessive prices, induce local suppliers or customers not to deal with a competition.\textsuperscript{118}

It is submitted that in the event that a national company wants to enhance its ability to compete in the international markets, the best route to follow is not through an anti-competitive merger and then to argue section 12A(3) public interest factors, in justification of the merger, particularly section 12A(3)(d) but to file an exemption application provided the exemption application will meet all section 10.\textsuperscript{119} The parties must agree to cooperate with a view to compete on international markets.

In the case of \textit{Telkom SA Limited v Business Connexion Group Ltd},\textsuperscript{120} the Tribunal prohibited a merger on competition grounds. However, because the Competition Act requires the competition authorities to also assess the impact of a merger on public interest listed in section 12A(3), the Tribunal assessed the impact of the Telkom merger in the ICT sector and the ability of South African firms to compete in the international markets.

Lastly, it was held by the Tribunal in the \textit{Tongaat-Hullet Ltd and Transvaal Suiker BPK}\textsuperscript{121} that it will be reluctant to consider an argument that domination of a local market by a merged firm is necessary for international success. It held that economics of scale and rationalisation may be important\textsuperscript{122}, however, the size of a firm in itself will not be conclusive\textsuperscript{123}. It is submitted that it appears that it was not the intention of the legislature to create dominant firms to be able to compete in international markets, when local competition will suffer. The merging parties must therefore show efficiencies resulting from the merger that would assist the merging parties to compete in international markets.

The Tribunal has properly observed that its primary mandate is to protect competition by assessing the effects of a merger in a particular market. However, the drafters of the Competition Act gave the competition authorities a secondary mandate to assess

\begin{itemize}
  \item \textsuperscript{118} The merged entity has the ability to employ all the strategies that are prohibited in terms of section 8 and 9 of the Competition Act.
  \item \textsuperscript{119} Section 10(3)(b) of the Competition Act provides that an agreement or practice or category of agreements or practices may be exempted provided it contributes to the maintenance or promotion of exports, promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive.
  \item \textsuperscript{120} Tribunal Case Number: 51/LM/Jun06.
  \item \textsuperscript{121} Tribunal Case number: 83/LM/Jul00.
  \item \textsuperscript{122} \textit{Ibid} at para 115.
  \item \textsuperscript{123} Sutherland and Kemp in chapter 10 para 10-99.
\end{itemize}
the effect of a merger on public interest. It must be understood that this secondary mandate is against the backdrop of the country’s historical context and to utilize competition policy to advocate government’s plans and goals such as the National Industrial Policy, the New Growth Path Framework and possibly the National Development Plan.

The protection of public interest such as employment and SMMEs is an important consideration especially in a developing economy like South Africa. The better part of the Competition Act’s preamble and its objective is about social welfare rights and it is therefore befitting that the Competition Act seeks to ensure that its objectives are not undermined by commercial considerations by firms who wish to merge. By the same token, if a merger promotes the objective of the Competition Act and will have a positive impact on public interest such a merger must be supported. However, sight must not be lost that public interest considerations are secondary considerations in merger evaluation. The Tribunal has held that the words “can or cannot” were included to indicate that public interest criteria do not always point in the same direction, but that they will have to be assessed against each other and that a net public interest effect of a merger must be determined.\(^\text{124}\)

### 3.6. Exemption applications in terms of section 10 of the Competition Act

The Competition Act recognises that certain anti-competitive structures, agreements or practices that would normally have been prosecuted under the Competition Act may be necessary and required in certain industries. Such structures, agreements or practices may be in the in place for public interest purposes.

The dissertation will deal only with two parts of the exemption application which, it is submitted, is closely related to section 12A(3) public interest provisions in merger regulation. In this regard section 10(3)(b)(i) and (ii) of the Competition Act provides that the Commission may grant an exemption if the agreement or practice concerned are aimed at maintenance or promotion of exports or promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive.\(^\text{125}\)

\(^{124}\) *Ibid* at Chapter 10 para 10-92.

\(^{125}\) Section 10(3) of the Competition Act.
3.6.1. Maintenance or promotion of exports

It is widely accepted that the competition authorities do not necessarily concern themselves with export cartels. Export cartels by their very nature tend to harm the export market and not the local markets which the competition authorities are entrusted to enforce competition law.\textsuperscript{126}  

This objective is similar in wording to that of the section 12A(3)(d) public interest merger consideration of the ability of national industries to compete in international markets.\textsuperscript{127} The Commission will grant an exemption to the exemption applicant if the agreement or practice concerned is required to attain public interest objectives such as to maintain and promote exports.\textsuperscript{128} It is submitted that the purpose of this objective is to ensure that efficiencies are realised and that South African companies are able to compete in the international markets. It might not make economic sense for a company on its own to export its goods for the international market but makes more sense if the competing firms pull resources together to compete in the international market.  

It is therefore submitted that the objectives of the exemption contained in section 10(3)(b)(i) of the Act are similar to the public interest ground in respect of the ability of national industries to compete in international markets. If the efficiencies and cost savings to promote and maintain exports cannot be achieved through exemptions, it may be achieved through mergers. It is submitted that companies may decide to file a merger or an exemption application if the purpose is to maintain and promote exports. Exemption application by its nature suggests that it is an agreement that contravenes section 4(1)(b) of the Competition Act.\textsuperscript{129} It must meet all the requirements for exemption in section 10. If the exemption application fails to meet the requirements, the firms concerned may be prosecuted by the Competition Commission for cartel conduct in contravention of section 4(1)(b) of the Competition Act. However, it is proposed that the merger filing route is the best route to argue these objectives and there are less hurdles once the competition analysis stage has been passed. It is further proposed that the merging parties do not face a risk of prosecution if a merger

\textsuperscript{126} Marek Martyniszyn- Export Cartels: is it legal to target your neighbour? Analysis in light of recent case law. The author argues that antitrust laws remain predominantly national. Virtually all jurisdictions permit export cartels, either explicitly requiring prior notification and or registration or implicitly by limiting cartels prohibition to those affecting domestic markets only. (https://jeil.oxfordjournals.org/.
\textsuperscript{127} Section 10(3)(b) of the Competition Act.
\textsuperscript{128} Section 10 (3) (b)(i) of the Competition Act.
\textsuperscript{129} Section 10 (1) read with section 4 of the Competition Act.
fails as opposed to the failure of an exemption application which can expose engagement in cartel conduct.

3.6.2. Promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive

This object of an exemption provision in the Competition Act is historical and seeks to open the markets to companies that have not had their equal share in market participation before 1994. The Competition Act recognises that there might be a need to grant special attention to certain types of small businesses or black owned businesses. In the event that companies take the exemption application route, the companies must show that the exemption is required to promote the interest of small businesses or companies owned by historically disadvantaged persons.

It is submitted that for companies to qualify for this exemption it must meet two requirements. Firstly the companies must be small businesses as defined in the National Small Business Act. Secondly, it must require the exemption in order to become competitive. The inclusion of public interest objectives in exemption applications is aligned to South Africa’s Industrial policy to ensure that those small fragmented businesses are assisted in order to jointly take up opportunities and to build collective efficiency thereby creating long term jobs and “level the playing field between the bigger and small businesses as well as between rural and urban businesses.”

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130 Act 102 of 1996.
Chapter 4

4. The merger regulation world after the Massmart-Walmart merger

4.1. Introduction

It is well accepted that today’s merger regulation world is not the same as that of earlier years. Public interest considerations play a huge role in merger evaluation in the sense that the competition authorities have begun to look closely at the impact of mergers on public interests. In the Commission’s previous financial year for 2012/2013, thirty-seven (“37”) mergers were approved with conditions. Of the 37 merger cases approved with conditions, 28 were imposed to address public interest concerns that were identified during the investigation of mergers. 11 of the conditions were aimed at employment concerns and 17 of the conditions were aimed at addressing effect of a merger on the ability of small and medium sized businesses. This is particularly as a result of the keen interest by the government, in particular the Department of Trade and Industry (“the DTI”) as well as the Department of Economic Development (“the EDD”). The two Departments seek to champion the Industrial Policy framework and New Growth Path ambitions through the back door by using competition policy to achieve some of the goals set in these documents.

4.2. Metropolitan Holding Ltd and Momentum Group Ltd case

Before the Massmart/Walmart case, the competition authorities during 2010 had to deal with a merger between Metropolitan Holding Ltd and Momentum Group Ltd which on the face of it did not raise competition issues. The case involved the acquisition by Metropolitan of Momentum’s 100% share. But the merger did raise serious public interest issues in the form concerns regarding of employment.

4.3. The facts

This case showed how the competition authorities would in future deal with public interest claims. The approach of the Tribunal in this case to public interest issues was

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132 Competition Commission Annual Report for 2012/2013 financial year at page 27. See also Commission’s Annual report for 2011/2012 at page 17. The Commission approved 22 mergers subject to public interest conditions. Thirteen of the public interest conditions were aimed at addressing employment concerns.

133 Supra N 121.

134 Ibid.

135 Tribunal case number: 41/LM/Jul10.
not surprising at all. It is shows maturity in the competition jurisprudence and public interest jurisprudence. How the competition authorities assessed public interest in the early 2000s will clearly not be the same as how they assess public interest issues at this stage when the institutions are now more than ten (10) years old.

4.4. The argument

As stated, the merger did not have a significant impact on competition. However the Tribunal indicated that it is still required to assess the impact of a merger on public interest despite a conclusion that the merger does not raise competition concerns. In the *Harmony and Goldfields* merger, the Tribunal held that the language of the legislature requires it to still assess the impact of a merger on public interest grounds and held that the words in section 12A of the Competition Act “can or cannot” indicate that a merger that has failed the competition test can still be passed on the public interest test and hence be approved. Conversely, that a merger that has passed the competition test could still fail the public interest test and hence be prohibited.

NEHAWU participated in the merger hearing at the Tribunal and argued that the merger must be prohibited on the ground that it has a substantial effect on employment in that more than a 1000 employees would be retrenched and that the merging parties have failed to justify the retrenchments. The merging parties submitted that the effect of the merger on employment ‘on a worst case scenario’ would be a net amount of 1000 retrenchments.

The merging parties submitted that the merger would result in efficiencies in that their services are more complementary than that of competitors. A witness of the merging parties argued that the merger would result in cost saving therefore leading to lower premiums for its customers. However, this could not be supported by evidence.

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137 Tribunal case number: 93/LM/Nov04.
138 Para 45 of Metropolitan/Momentum merger.
139 Para 63 of Metropolitan/Momentum merger.
140 Para 61 of Metropolitan/Momentum merger.
141 Para 5 and 6 of Metropolitan/Momentum merger.
142 Para 84 of Metropolitan/Momentum merger.
143 Para 88 of Metropolitan/Momentum merger.
4.5. The decision of the Tribunal

The Tribunal reached a decision that the merger would have a substantial effect on employment.\(^{144}\) The Tribunal was not satisfied with the explanation given by the merging parties about efficiency gains as result of the merger.\(^{145}\) In the end the Tribunal approved the merger subject to conditions that there should be no merger related retrenchments for a period of two years in the semi-skilled and unskilled level of employees.\(^{146}\) The moratorium on retrenchments excluded senior employees and the Tribunal held that senior employees within the employ of the merging parties were most likely to find employment elsewhere and hence there was a less compelling public interest to protect them.\(^{147}\)

The Tribunal has decided in previous merger cases that their jurisdiction with respect to public interest issues is secondary\(^{148}\) and the South African government has created laws and institutions that can best resolve public interest claims. However, this does not mean that the Tribunal would not assess the impact of a merger of public interest grounds. In the *Shell and Tepco* merger\(^{149}\) the Tribunal dismissed the Commission’s argument that acquisition of Tepco by Shell would reverse the gains by historically disadvantaged persons to participate in the petroleum industry. The Tribunal held that there were legislation\(^{150}\) and BEE codes in place that dealt with empowerment in the petroleum industry. The Tribunal cautioned the Commission not to pursue their public interest mandate in an over-zealous manner because such approach would be catastrophic to the very public interest to which they seek to protect.\(^{151}\)

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\(^{144}\) Para 101 of Metropolitan/Momentum merger. The Tribunal held that the merger leads to an adverse effect on the public interest on employment.

\(^{145}\) The merging parties have failed to discharge the evidential burden of showing a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary on their worst case scenario.

\(^{146}\) Para 64 of Metropolitan/Momentum merger.

\(^{147}\) See para 112 and 113 of Metropolitan/Momentum merger.

\(^{148}\) Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd, Tribunal case number:08/LM/Feb02 at para 232.

\(^{149}\) Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd: Tribunal case no: 66/LM/Oct01.


\(^{151}\) Para 58 of Shell/Tepco case.
4.6. **The Massmart/Wal-mart case**\(^{152}\)

This case was unique in many respects: it did not raise competition concerns as there was no overlap between the activities of the merging parties in South Africa because Wal-Mart Stores Inc (“Walmart”) had no presence in South Africa.\(^{153}\) However, the merger had interesting public interest dimensions. The DTI, EDD and trade unions\(^{154}\) participated in the merger hearings and persistently argued that the merger would have a substantial impact on employment and the ability of small businesses or firms owned by historical disadvantaged persons to become competitive. The Massmart/Walmart case made it all the way to the CAC. It is therefore logical to start analysing the decision of the Tribunal.

4.7. **The facts**

The Massmart/Walmart case drew great interest in the local media and international media because of the unusual remedies that were proposed by the trade unions and the government\(^{155}\) as a result of alleged ignorance of labour laws by Walmart in countries such as Chile, Mexico and the United Kingdom.\(^{156}\) The Massmart/Walmart case changed merger evaluation greatly. The case involved an acquisition by Walmart\(^{157}\) of 51% of Massmart’s shares.\(^{158}\) The transaction was notified to the Commission by the merging parties during 2010. The Commission recommended unconditional approval of the merger to the Tribunal.\(^{159}\)

4.8. **The argument**

The Commission and the interveners at the Tribunal accepted that the merger did not raise competition issues as there was no horizontal or vertical overlap among the

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\(^{152}\) Wal-Mart Stores Inc and Massmart Holding Ltd- Tribunal Case number: 73/LM/Nov10.

\(^{153}\) Para 5,14 and 26 of Walmart and Massmart Tribunal decision.

\(^{154}\) South African Commercial, Catering and Allied Workers Union (“SACCAWU”), National Union of Metalworkers of South Africa (“NUMSA”), Food and Allied Workers Union (“FAWU”), Southern African Clothing and Textile Workers Union (“SACTWU”) and Labour Research Services.

\(^{155}\) The DTI, EDD and The Department of Agriculture, Forestry and Fisheries.

\(^{156}\) Para 71 of Walmart and Massmart Tribunal’s decision.

\(^{157}\) Walmart is the largest retailer in the world, has three retail formats in the form of discount stores (stocked with a variety of general merchandise), supercenters (features products such as bakery goods; meat and dairy products; fresh produce, dry goods and staples; beverages etc) as well as neighbourhood markets. Walmart also has a chain of warehouse stores. See Tribunal case number: 73/LM/Nov10 at para 2 and 3.

\(^{158}\) Massmart has in excess of 10 subsidiaries in South Africa and around the African continent. It is a wholesaler and retailer of grocery products, liquor and general merchandise. It has four divisions namely: Massdiscounters, Masswarehouse, Massbuild and Masscash., at para 7 of Walmart and Walmart Tribunal’s decision.

\(^{159}\) Para 22 of Walmart/Massmart’s Tribunal decision.
business activities of the merging parties.\textsuperscript{160} As indicated, the issues at the Tribunal turned on public interest issues, especially the effect of the merger on employment, and its effect on small businesses and businesses owned by historical disadvantaged persons.

The two interveners (government and trade unions) challenged the merger on the following substantial grounds:

- The Commission when making its recommendation to the Tribunal submitted that unfortunately Walmart is famous in other countries for not respecting labour laws of such countries.\textsuperscript{161} SACCAWU submitted that Walmart is known in the US of violating labour laws and its negative attitude towards collective bargaining.\textsuperscript{162}
- The trade unions proposed that there should not be retrenchments for a period of three years.\textsuperscript{163}
- The trade unions proposed that the 503 employees that were retrenched prior to the merger must be re-employed by the merging entities. The trade union argued that the retrenchments were merger specific because Massmart retrenched employees in anticipation of the merger.\textsuperscript{164}
- The trade unions and government argued that the size of Walmart poses a serious threat to local producers of goods who supplied Massmart pre-merger, more in particular small businesses and businesses owned by historical disadvantaged persons.\textsuperscript{165}

The argument by the interveners premised on Massmart's treatment of trade unions worldwide and its ability to source product cheaply from Asian countries.\textsuperscript{166} The interveners argued (which argument was accepted that the Tribunal) that “imports of goods will increase because of Walmart’s superior buying power and logistics will

\textsuperscript{160} \textit{Ibid} and para 26.
\textsuperscript{161} Opening statement by Mr Maarten Van Hooven (Former Divisional Manager of Mergers and Acquisitions) during the hearing of the Walmart/Massmart merger.
\textsuperscript{162} Para 71 of Walmart and Massmart’s Tribunal decision.
\textsuperscript{163} Para 44 of Walmart and Massmart’s Tribunal decision.
\textsuperscript{164} \textit{Ibid} at para 45 and 55- the Tribunal observed that the remaining theory would then be that Massmart effected the retrenchment to entice Walmart’s bid.
\textsuperscript{165} \textit{Ibid} at para 72 and 73.
\textsuperscript{166} \textit{Ibid} at para 60- A witness from the US called by one of the union interveners testified that Walmart employs more than 1 million employees in the US. However, not a single employee belongs to a trade union because of Walmart's attitude towards organised labour.
allow for this”. The Tribunal found, however, that what is not clear is the extent to which Walmart will import goods post-merger.\(^{167}\)

The government departments argued that the Tribunal must impose an import quota on Walmart post-merger. i.e. that Walmart must not import all its goods into South Africa, but that it must source certain goods from local suppliers.\(^{168}\) The trade unions argued that Walmart must commit to Massmart’s existing volume of local procurement for a period of time.\(^{169}\) The merging parties, however, submitted that it is unlikely that Walmart post-merger would start importing goods.\(^{170}\) In this regard, the merging parties provided a comparison study on Chile in respect of importation of goods. They submitted that since Walmart entered the Chilean market, they have not imported goods.\(^{171}\) The merging parties argued that procurement conditions will be not fair on the merging parties because it will only be the merged entity that would be required to source locally.\(^{172}\) It submitted that its competitors would therefore have an unfair advantage over it. However, in order to address the concerns of the union and the interveners, the merging parties tendered conditions to ameliorate the effect of the merger on employment and small businesses.\(^{173}\)

4.9. The Decision of the Tribunal

The Tribunal approved the merger subject to certain conditions tendered by the merging parties. In respect of public interest issues raised by the interveners, the Tribunal made the following remarks “our job in a merger control is not to make the world a better place, but to prevent it becoming worse as a result of a specific transaction”.\(^{174}\) The Tribunal reiterated that its primary objective is to promote competition. In its previous decision in the matter between the Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd, Tribunal stated that it will be difficult to determine the public interest that needs to be protected and that it may be

\(^{167}\) Ibid at para 84.

\(^{168}\) Para 75 of Walmart and Massmart’s Tribunal decision.

\(^{169}\) Para 102 of Walmart and Massmart’s Tribunal decision.

\(^{170}\) Para 79 of Walmart and Massmart’s Tribunal decision.

\(^{171}\) Ibid at para 77.

\(^{172}\) Para 113 of Walmart and Massmart’s Tribunal decision.

\(^{173}\) Para 119 and 120 of Walmart and Massmart’s Tribunal decision read with the Tribunal’s Order in the matter.

\(^{174}\) Para 32 of Walmart and Massmart’s Tribunal decision.
“a policy at war with itself”. The asserted public interest can pull competition authorities in opposite directions.\textsuperscript{175}

In the end the Tribunal decided that “the problem is that the concern raised in relation to local procurement is also associated with important benefits for consumers”.\textsuperscript{176} It further decided that a possible loss of jobs in manufacturing of an uncertain extent must be weighed up against a consumer interest in lower prices and job creation at Massmart.\textsuperscript{177} Furthermore the Tribunal held that since the poorest of the poor are the likely beneficiaries from the low prices to be offered by Walmart post-merger in the event that Walmart decides to import goods, the interest of consumers to buy goods at a lower price were also compelling.\textsuperscript{178}

It is submitted that the merging parties in the Massmart/Walmart-merger were too generous with their tendered public interest conditions. The issues ventilated at the merger hearing were mostly not merger-specific but issues relating to government policies to ensure that small businesses and firms owned by historically disadvantaged persons participate effectively and efficiently in the national economy. The remedies were over-broad and discriminating because it only applied to a single firm. They did not apply to the retail industry as a whole. It is submitted that if government wants to protect local producers and small business in order to create and promote employment, it must do so within the context of the National Industrial Policy. The government must not use competition policy and institutions created by the Competition Act to push or achieve Industrial Policy goals which are not protected by the Competition Act. Lastly, it is submitted that the effect of the Massmart/Walmart merger on public interest such as small businesses were not substantial and absent the merging parties’ tendered conditions, the Tribunal would have approved the merger unconditionally. There is nothing wrong with being big in a particular market when the dominant firm is not abusing its dominance.

It is therefore submitted that there was no information in the possession of either the Commission or the interveners to suggest that the merged entity would post-merger become a dominant firm and consequently abuse such dominance. It is submitted that the decision of Walmart to import goods would not have substantially affected small

\textsuperscript{175} Sunderland and Kemp in Chapter 10 at para 10.11.
\textsuperscript{176} Para 99 of Walmart and Massmart's Tribunal decision.
\textsuperscript{177} ibid.
\textsuperscript{178} ibid.
businesses because local producers could still supply retailers such as Shoprite/Checkers, Pick ‘n Pay and the Spar Group.

4.10. The CAC-case\textsuperscript{179}

The \textit{Massmart/Walmart} Tribunal decision was taken on review by the Ministers of EDD, the DTI and Agriculture and Fisheries. SACCAWU appealed the decision of the Tribunal. Both the appeal and the review were heard at the same time by the CAC. The ministers’ review application was mainly about how the Tribunal managed its hearing schedule and SACCAWU appealed the decision of the Tribunal.

The facts of this case are common cause and it is therefore not necessary to regurgitate them here. Suffice to say that the CAC reversed the decision of the Tribunal on the basis that the Tribunal did not afford itself an opportunity to interrogate the conditions proposed by the merging parties. The CAC ruled that the 503 employees who were retrenched by Massmart before the merger must be reinstated because their retrenchments were as a result of the merger.\textsuperscript{180} The merging parties were also ordered to respect the collective bargaining system and recognise SACCAWU as the largest union at its workplace.\textsuperscript{181} The CAC also held that a supplier-development fund to the tune of R200 million for a period of five years.\textsuperscript{182} The CAC held that the fund must be created to assist small and medium sized businesses to be able to participate in the Walmart’s global value chain training programmes.\textsuperscript{183}

It is submitted that the CAC decision does not materially differ from the decision of the Tribunal. All it did was to make few changes in the Tribunal decision. The CAC did not rule otherwise in relation to collective bargaining.\textsuperscript{184} It reinforced the fact that unions provided evidence which pointed out towards a structural systemic underpayment of employees.\textsuperscript{185} Further, the CAC held that the criticism of Walmart’s practices was also

\textsuperscript{179} The Minister of Economic Development and Others v Walmart Stores Inc and Massmart Holding Ltd-CAC case number:110/CAC/Jul11.
\textsuperscript{180} Para 140, 141 and 172 of Walmart/Massmart merger. CAC decision.
\textsuperscript{181} Para 172 and 2.1.3 of Walmart/Massmart merger CAC decision.
\textsuperscript{182} See the CAC condition order delivered on 9 October 2012 under case number: 110/CAC/Jul11.
\textsuperscript{183} ibid.
\textsuperscript{184} The CAC held that the Tribunal’s decision that they should not be retrenchments in a period of two years after the merger and that the merged entity must continue respecting SACCAWU as a largest union. It held that beyond these protections, SACCAWU must use either its bargaining power or use the labour courts to protect their rights and rights of its members.
\textsuperscript{185} Para 128 of Walmart/Massmart merger. CAC decision.
echoed by a statement of Professor Nelson Lichenstein of University of California, concerning systematic anti-union strategies adopted by Walmart in the US.  

What is more interesting and controversial was the decision of the CAC to order the reinstatement of 503 employees of Game in Nelspruit who were retrenched in 2009 and 2010. The CAC held that these retrenchments were merger specific and that the decision was part of the broad merger decision. During the time of the merger negotiations Massmart had a workforce of about 26000. It is therefore submitted that it cannot be gainsaid that a retrenchment of 574 employees may be linked to a merger or as an attempt by Massmart to entice Walmart to acquire it. It is my observation and opinion that the CAC was generous with the reinstatement order. The merging parties wanted an approval at all cost hence they did not vigorously fight against this order.

The size of Walmart at the Tribunal and at the CAC came under scrutiny as a result of its ability to be able to source products cheaper from imports. The divergent views regarding the effect of the merger on small and medium sized businesses took most of the time of the merging parties and the interveners in one group arguing that the merger would not have serious effects on public interest whereas the other group argued passionately that the merger would result in Walmart not sourcing goods especially non-tradable goods from local producers and consequently resulting in local producers closing down and ultimately employment loses.

The CAC accepted that the entry of Walmart into South Africa and importation of goods by Walmart would result in reduced prices to the benefit of consumers and thus that consumer benefits would flow from the merger.

Finally, it is my observation and opinion that most of the public interest issues that were argued at the CAC by SACCWU and government were not issues that could properly be dealt with under the auspices of the Competition Act. The issues were squarely about Industrial policy, trade policy and to a certain extent about labour policy. The CAC has bluntly put it that “competition law cannot be a substitute for

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186 Para 128 of Massmart/Walmart case.
187 In respect of the reinstatement of 503 employees, the CAC observed that an examination of the reason that the retrenchments were not merger specific does not automatically support the argument that because the retrenchment took place prior to the merger, it cannot be merger specific.
188 Para 141 of Massmart/Walmart case.
189 Para 138 of Massmart/Walmart case.
190 Para 116 of Mass/Walmart case.
industrial or trade or trade policy, hence the competition authorities cannot construct a holistic policy to address the challenges which are posed by globalisation".  

4.11. Final Conclusion

The statutory powers of the Commission, Tribunal and CAC to assess public interest claims are outlined in section 12A of the Competition Act. The public interest provisions in the Competition Act in respect to merger evaluation are provided to ensure that the competition authorities when executing their primary mandate to promote and maintain competition also take into account other non-competition objectives of the competition policy. It is the duty of the Tribunal and the CAC to properly interpret the intention of the legislature with regards to public interest grounds in such a way that it does not disregard the intention and purpose of the Competition Act. It is submitted that the competition authorities must not relegate public interest issues to the peripheral in that the Competition Act requires the competition authorities to look at public interest issues in merger evaluation. The competition authorities have shown in the recent past that they do not consider the effect of mergers on public interest less important.

It is submitted that the competition policy is part of the broader industrial policy in that it was broader development objectives such as promotion of employment and advancement of the social and economic welfare of all South Africans, opening of the South African market to small businesses and historically disadvantaged persons. The broader development objectives are as a result of the understanding that the South African economy was concentrated and ownership and control were in the hands of few conglomerates. It is submitted that the legislature understood that it will be extremely important to remove or reduce the distorting effects of excessive economic concentration in order to ensure that small businesses and businesses owned by historically disadvantaged persons equally participate in the South African economy.

It is my submission that the Competition Act envisaged a situation wherein gains realised through other instruments such as national legislation and empowerment charters may be reversed through mergers and acquisitions, ultimately leading to

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191 Para 154 of Massmart/Walmart case.
192 Section 2 of the Competition Act.
193 (c)promotion of employment and advancement of the social and economic welfare of South Africans,(e) to ensure that small and medium-sized enterprises participate in the South African economy and (f)to also ensure that historically disadvantaged persons participate in the South African economy.
economic concentration and removal of small businesses and black owned businesses in the economy. It is against this backdrop that the competition authorities are required to assess the impact of a merger on public interest grounds. The Acting Commissioner of the Commission has suggested that the tension between the Commission and EDD is a healthy one in that Government has a political mandate to grow the economy and protect jobs and wants the Commission to take these issues into account when assessing mergers.

Chapter 5

5. Introduction

The public interest grounds journey for the competition authorities has been a good one in the last ten years. They have developed the public interest jurisprudence over time and it is my opinion that this jurisprudence matured. However, there is no merger that was prohibited by the competition authorities since their inception. It has been held in previous cases by the Tribunal that the primary objective of the competition authorities is to maintain and promote competition. It is for this reason that when it is found that a merger will have a substantial effect on public interest grounds, the competition authorities would attach conditions to cure the public interest as opposed to prohibiting a merger that does not have a substantial effect on competition.

What is a public interest ground? What must be shown that the effect of a merger on public interest grounds is substantial? What could have informed the minds of the legislature to include non-competition objectives in merger evaluation?

It is submitted that that the competition policy was developed immediately after the 1994 elections and the legislature had to ensure that the South African economy is transformed. Many of the industries that were characterised by high barriers to entry and economic concentration had to be transformed to ensure that the markets are open to small businesses and businesses owned by historically disadvantaged persons to participate and become competitive. The change in the country’s economic landscape would result in competitive markets, thereby creating the much

194 Mr Tembinkosi Bonakele.
195 Financial Mail, February 21-February 26, 2014 at 32.
196 Competition Tribunal and Competition Commission’s annual reports.
197 Para 240 of Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Group.
198 RDP white paper.
needed long term jobs. The competition authorities’ approach to employment issues in a merger seems to suggest that they are not really interested in the number of jobs lost or likely to be lost but that they merely, look at the effect of a merger on employment. The number of jobs lost or to be lost is not a yard stick to assess the impact of a merger on employment but it does give a good indication.  

5.1. Executive summary of the study

The dissertation looked at some of the high-profile decisions of the competition authorities in respect of public interest issues and how the jurisprudence on public interest ground has evolved over time. The study also looked at the historically background of the public interest, considerations in the Competition Act and it further did a short comparison of the exemption application in section 10 and public interest provisions in section 12A of the Competition Act with the sole objective of understanding the rationale for the inclusion of developmental objectives in a competition statute whose primary mandate is to maintain and promote competition.

The other purpose of the study was to analyse the some of the decisions of the competition authorities and determine whether the competition authorities are reluctant to prohibit a competitive merger on substantial public interest grounds when such a merger will have deleterious effect on public interest. An analysis of the decisions of the competition authorities was undertaken and it is therefore submitted that the decisions of the competition authorities show that in merger evaluation, competition analysis will always triumph over public interest analysis. The Commission has put it bluntly in the large merger between Unilever Plc and Robertson Foods (Pty) Ltd that ‘public interest grounds do not warrant prohibition of a merger as long as there are remedies for the anti-competitive implications of the merger.  

It is my submission that efficiency and other pro-competitive gains realised through mergers will at most times be at cross-roads with non-competition objectives. It is therefore imperative for the competition authorities to balance the two competing interests. However, the Tribunal has held in previous cases that they will seek to protect the non-competition interest if other available instruments to protect the public interest have been exhausted or are inadequate.

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199 Supra N 121.
200 Tribunal case number: 55/LM/Sep01 at para 36.
201 Distillers Corporation and Stellenbosch Winery Farmers at 232 and 237.
5.2. Findings of the Study

The legislature has intentionally and correctly so, not defined what public interest is. The competition authorities have in the last ten years (10) not defined what public interest is in the context of a merger regulation. In my opinion, the competition authorities need to provide guidance regarding public interest grounds protected in section 12A of the Competition Act.

The approach of the competition authorities with regards to the effect of a merger on employment deserves praise. The competition authorities have ensured in the last ten years that the vulnerable employees who are semi-skilled or not skilled at all are protected when a merger has an impact on employment. However, it is the finding of this study that the competition authorities can do more to ensure that mergers do not lead to unnecessary retrenchments. The competition authorities must interrogate vigorously claims made by the merging parties that a merger will result in efficiency gains and that certain positions will be redundant. A condition on the merging parties that there must not be retrenchments as a result of a merger within a period of two years might look all good on the face of it. It is however my submission that nothing stops the competition authorities to extend a moratorium on employment to three or even four years. A moratorium of two years leaves the future of the semi-skilled or unskilled employees hanging in the balance. South Africa is characterised by high levels of unemployment and it is my submission that the competition authorities would still be within their statutory mandate to place a three or four year moratorium on employment. The preamble of the Competition Act mandates that the competition authorities ‘must balance the interests of workers, owners and consumers and focussed on development, will benefit all South Africans’.202

It is therefore my opinion that the competition authorities are the victims of their own successes, particularly the Commission. Government now wants to use competition law to achieve broader developmental goals, grow the economy and create sustainable jobs. The intervention of government departments in the Walmart/Massmart case clearly shows the confidence the government has in competition policy to promote industrial policy objectives. However, such an approach must be not encouraged because it might seek to undermine the independence of the competition authorities.

202 Preamble of the Competition Act.
The Tribunal’s approach to other public interest objectives in mergers regulation must also be applauded. The remedy in *IDC/Rio Tinto* merger in respect of the supply of DMS iron ore was carefully crafted to ensure that Eskom continues to supply electricity in South Africa because its power stations use washed coal. There were no other suppliers of DMS iron ore in South Africa other than the merging parties.\textsuperscript{203}

### 5.3. Recommendations

It is my submission that the competition authorities will have another *Walmart/Massmart* situation on their hand if they do not define what a public interest is. It is my submission that the competition authorities must furthermore define which factors they will take into account when they assess the effect of a merger on employment, small businesses, a particular industrial sector or region and the international competitiveness of South African companies. Such a guideline by the competition authorities would help companies. In light of the above, I make the following recommendation regarding public interest in the context of a merger:

- That the competition authorities define public interest;
- That the competition authorities provide guidelines on factors that would be taken into account when assessing the effect of a merger on;
- A particular industrial sector or region;
- Employment;
- Small businesses; and
- International competitiveness of South African companies.
- Provide guidelines on how far we can go in marrying the objectives of the Competition Act and public interest provisions in section 12A of the Competition Act.
- The legislature should amend the Competition Act and include a section that grants Minister of Economic Development powers to refuse a merger on public interest especially acquisitions by foreign firms.\textsuperscript{204}

\textsuperscript{203} We conclude that the likely inability of existing domestic customers to post merger access sufficient volumes of DMS iron ore raises a significant public interest concern given its effect on a particular industrial sector, i.e. the supply of DMS iron ore to domestic coal customers (i.e. the domestic coal industry) which in turn will affect the supply of electricity in South Africa.

\textsuperscript{204} Such powers are already given to the Minister of Finance in respect of Bank mergers in terms of section 18 of the Competition Act.
5.4. Conclusion

Trade union activism in merger regulation must be encouraged. Section 13A of the Competition Act recognises the importance of trade union participation in merger regulation. Employees of merging parties who do not belong to a trade union must also be encouraged to participate in merger processes. Organised labour must begin to exercise this right. It is only through their participation that the competition authorities would make correct decisions in respect of effect of a merger on employment (whether in favour or against the interest of organised labour). Section 18 of the Competition Act provides the Minister of Economic Development with a right to intervene and make representations on any public interest ground referred to in section 12A(3) of the Competition Act. This right must be put into context as the public interest grounds in section 12(3) are Industrial policy objectives. The legislature understood that the Minister entrusted with Industrial policy would be best placed to assist the competition authorities when public interest grounds are assessed by the competition authorities.

In Massmart/Walmart merger, Mr Kennedy on behalf of SACCAWU argued that the public interest provisions in the Competition Act seek to achieve a competitive process which seeks to undo the socio-economic problems which were created by the previous regime.\textsuperscript{205} In other words SACCAWU was arguing that competition policy encompasses broader public interest issues as a result of South Africa’s unique position because of past discriminatory laws.

Using competition law to promote broader public interest issues in merger regulation is a commitment by government to regulate the transfer of economic ownership in keeping with public interest, to promote employment and advance the social economic welfare of South Africans, to expand opportunities for South African to play a meaningful role in the global space and to ensure and allow small and black owned businesses to participate in the South African economy.\textsuperscript{206}

The overzealous ambitions of the Competition Act as regards to public interest will not be achieved if the competition authorities do not adopt a radical approach that seeks to give a meaning to the purpose of the Competition Act. The purpose of the Competition Act is very clear in its text that in the competition authorities in their

\textsuperscript{205} Para 91 of Massmart/Walmart case. CAC decision.
\textsuperscript{206} Section 2 of the Competition Act.
pursuit to promote and maintain they must also seek to promote employment and other public interest goals.

Lastly the competition authorities have in the last ten years used the Competition Act to protect employment and other public interest issues. The CAC has shown in Walmart/Massmart that the competition authorities would stop at nothing to ensure that the ambitions of the legislature are given meaning in their judgments. The decision of the CAC on Walmart/Massmart stands out as far as the reinstatement order of some 503 employees who were retrenched by Massmart before Walmart signalled its intention to acquire it. The Walmart/Massmart case raised significant policy issues and it remains to be seen whether the legislature will amend the Competition Act to give a Minister of Economic Development powers to veto a merger on public interest.

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