

**THE ROLE OF PUBLIC INTEREST IN MERGER EVALUATION IN SOUTH
AFRICA**

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SUMMARY OF DISSERTATION

The South African Competition Act, 89 of 1998 (as amended) is written in a way that explicitly acknowledges the importance of public interest and therefore provides a role for the consideration of factors that go beyond the boundaries of competition. This is initially stated in the preamble and purposes of the Act and then stipulated as a specific consideration in the assessment both of exemptions and mergers.

This paper looks at the development of South Africa's Competition policy, where major focus falls on the public interest objectives explicitly included in the Act and decisions in merger review, where public interest issues have materially impacted decisions by competition authorities. The intention of this paper is to study the role of public interest in merger evaluations and to note how traditional competition goals are reconciled with public interest considerations. The content, purpose and potential effect of the draft *Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)* will be deliberated. In addition, this paper will seek to analyse comparative jurisprudence with reference to two other developing countries in relation to their merger evaluation processes. Lastly, this paper will show the importance of the public interest objectives included in the South African Competition Act to South Africa.

Annexure G

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CHAPTER 1

BACKGROUND TO STUDY

1. INTRODUCTION

On 23 January 2015 the Competition Commission of South Africa (“the Commission”) published draft *Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)* for public comment. This study considers the important role that public interest plays in respect of merger evaluation in South Africa. The aim of the study is to discuss the objectives set out in the draft guidelines and to determine its effect, whether positive or negative, specifically in respect of merger evaluation.

These draft public interest guidelines consider the numerous concerns regarding prospective mergers and embody the Commission’s attempt to strike a balance between the two issues of competition and public interest when evaluating the outcome of a merger.¹ The Competition Act 89 of 1998 (as amended) (“the Competition Act”) has an express public interest test included into its merger evaluation criteria.² The list of public interest factors set out in the Act includes the impact of the merger in a particular industrial sector or region; employment; the ability of small businesses or firms controlled by historically disadvantaged persons to become competitive; and the ability of national industries to compete internationally.³ The inclusion of public interest in merger policy in South Africa was largely driven by the need for economic redistributive justice.⁴ In a developing economy such as South Africa, the inclusion of public interest in the Act is necessary where the industrial policy plays an important role, where unemployment is common, and in which the distribution of wealth and ownership is so unequal.⁵ This model of competition policy foresees Competition Authorities engaging in the balancing of various interests namely those of workers and consumers when adjudicating

¹ Odendaal N, “Competition authorities should balance public interest, competition considerations in merger decisions”, www.engineeringnews.co.za, [accessed on 10 March 2015].

² Lewis D, “The role of public interest in merger evaluation”, International Competition Network, Naples 28 - 29 September 2002, www.compcom.co.za, [accessed on 10 March 2015].

³ Balkin J & Mbikwa M, “Public interest test in Competition Act: Have the competition authorities applied the test correctly?” www.ensafrica.com, [accessed on 10 March 2015].

⁴ Anonymous, “The rise of public interest: Recent high profile mergers”, www.africanlii.org, [accessed on 10 March 2015].

⁵ Balkin J & Mbikwa M, “Public interest test in Competition Act: Have the competition authorities applied the test correctly?” www.ensafrica.com, [accessed on 10 March 2015].

competition matters. The regulation of competition is considered an instrument for economic development which seeks to correct socio-economic imbalances as a result of its peculiar history and development. In South Africa the government's industrial objectives are specifically incorporated into the competition legislation by means of the role that the Act assigns to the public interest.⁶

2. HISTORY OF SOUTH AFRICA'S COMPETITION POLICY AND LEGISLATION

2.1 The Maintenance and Promotion of Competition Act, 96 of 1979

The Maintenance and Promotion of Competition Act, 96 of 1979 controlled competition in South Africa since 1979. This act established the Competition Board, appointed by the Minister for Administration and Economic Co-ordination,⁷ who was tasked with the adjudication of matters pertaining to competition and investigated matters at its own initiative.⁸ Restrictive practices⁹ included *inter alia* price collusion, market division and resale price maintenance, which were completely illegal. However no provision was made for obligatory enforcement and merger control. South Africa's competition policy was less developed due to its apartheid legacy,

⁶ Chetty V, ABA Section of Antitrust Law, "The place of public interest in South Africa's competition legislation", Washington D.C, 30 March – 1 April 2005.

⁷ Sec 3 Maintenance and Promotion of Competition Act 96 of 1979.

⁸ Sec 6(1)(a) Maintenance and Promotion of Competition Act 96 of 1979.

⁹ "Restrictive practice' means –

- (a) any agreement, arrangement or understanding, whether legally enforceable or not, between two or more persons; or
- (b) any business practice or method of trading, including any method of fixing prices, whether by the supplier of any commodity or otherwise; or
- (c) any act or omission on the part of any person, whether acting independently or in concert with any other person; or
- (d) any situation arising out of the activities of any person or class or group of persons, which restricts competition directly or indirectly by having or being likely to have the effect of -
 - (i) restricting the production or distribution of any commodity; or
 - (ii) limiting the facilities available for the production or distribution of any commodity; or
 - (iii) enhancing or maintaining the price of or any other consideration for any commodity; or
 - (iv) preventing the production or distribution of any commodity by the most efficient and economical means; or
 - (v) preventing or retarding the development or introduction of technical improvements or the expansion of existing markets or the opening up of new markets; or
 - (vi) preventing or restricting the entry of new producers or distributors into any branch of trade and industry; or
 - (vii) preventing or retarding the adjustment of any profession or branch of trade or industry to changing circumstances."

which led to its banishment from the international economy. Companies expanded their activities, investing in an assortment of dissimilar economic activities, and concentrated on the domestic markets, due to economic sanctions. It is for this reason that competition policy reform was high on the priority list of the new government of South Africa after the first democratic elections in 1994.¹⁰ Subsequently, the African National Congress (“the ANC”) proceeded to draft guidelines for competition policy to address the legacy effect of apartheid and economic isolation on domestic markets.¹¹

The Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development published by the Department of Trade and Industry provided that due to challenges that flowed from the Apartheid era, a unique approach to competition policy was required. These guidelines proposed to the public that competitiveness and efficiency were to be pursued and secondly by adopting this process, previously disadvantaged citizens would have an equal opportunity to participate in the economy.¹²

The central principles which laid the groundwork for the competition policies included, but were not limited to, public interest considerations with regard to competitiveness and development, objectives to limit market dominance, ensuring socio-economic backlogs and capacities got addressed, prohibition of anti-competitive conduct (which includes mergers and acquisitions which do not serve public interest), focusing on consumer interest and empowering of black entrepreneurs and “the acceptance of the logic of free and active competition in markets, the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources” and so forth.¹³ The government found substantive and logistical problems with the Maintenance and

¹⁰ Hartzenberg T, “Competition Policy and Enterprise Development: The role of public interest objectives in South Africa’s Competition Policy”, p. 3 <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1>, [accessed on 17 December 2015].

¹¹ Ibid.

¹² Department of Trade and Industry, “Proposed guidelines for competition policy: A framework for competition, competitiveness and development”, 27 Nov 1997, par 4, www.dti.gov.za, [accessed on 17 December 2015].

¹³ Ibid, par 2.4.

Promotion of Competition Act.¹⁴ The four main substantive problems identified were:¹⁵

- a) that the act did not report on the degree of concentration of ownership or market share;
- b) no provisions addressed vertical or conglomerate dealings;
- c) there were practically no measures in place to avert mergers and acquisitions which increased concentration; and
- d) the act did not contain strong prohibitions of anti-competitive activity.¹⁶

Logistical problems were noted as:

- a) a duplication of work between the Competition Board and the Minister of Trade and Industry;
- b) the possibility of political meddling in the Board's activities;
- c) the distribution of jurisdiction to other regulatory authorities;
- d) inadequate guidelines relating to state-owned enterprises; and
- e) ineffective remedies and penalties.¹⁷

The ANC acknowledged that unemployment, low levels of domestic and foreign investment, as well as the history of excessive government regulation would have to be addressed by a range of policies, economic and social, and further to fundamental focus on trade and industrial policies for transformation of the economy, the ANC looked to competition policy as option for the regulation and development of enterprise to improve the economic prospects and participation in the formal

¹⁴ Maintenance and Promotion of Competition Act, 96 of 1979.

¹⁵ Department of Trade and Industry, "Proposed guidelines for competition policy: A framework for competition, competitiveness and development", 27 Nov 1997, par 3.3.

¹⁶ Department of Trade and Industry, "Proposed guidelines for competition policy: A framework for competition, competitiveness and development", 27 Nov 1997, par 3.3.5 states the following: "The Act's failure to prohibit anti-competitive acts means that although firms may have engaged in forms of anti-competitive conduct and causing substantial harm to competitors and consumers over an extended period of time, they can escape culpability simply by desisting from the particular conduct at any time before a formal investigation is launched by the board."

¹⁷ Department of Trade and Industry, "Proposed guidelines for competition policy: A framework for competition, competitiveness and development", 27 Nov 1997, par 3.4.

economy of black South Africans.¹⁸ Thus more than mere regulation of competition was envisaged to be addressed by the new competition legislation – it was clearly also intended to be a tool for addressing important public interest concerns.

2.2 The Competition Act 89 of 1998, as amended

The basis for the 1998 Competition Act stems from Section 9(2) of the Constitution of the Republic of South Africa, 1995 (the “Constitution”) which states the following:

“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination, may be taken”.

The Competition Act is written in a way that explicitly acknowledges the importance of public interest and therefore provides a role for the consideration of factors that go beyond the general boundaries of competition. This is initially stated in the preamble and purposes of the Act and then stipulated as a consideration in the assessment both of exemptions and mergers¹⁹. The preamble of the Act reads as follow:²⁰

“The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against 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.

¹⁸ Hartzenberg T, “Competition policy and enterprise development: The role of public interest objectives in South Africa’s competition policy”, p. 6

<http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1> [accessed on 17 December 2015].

¹⁹ Hodge J, Goga S & Moahloli T, “Public interest provisions in the South African Competition Act: A critical review”, Moodaliyar K & Roberts S (ed), *The development of competition law and economics in South Africa*, 2012, 2, p. 3.

²⁰ Preamble of Competition Act No 89 of 1998 (as amended).

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

In order to –

Provide all South Africans equal opportunity to participate fairly in the national economy;

Achieve a more effective and efficient economy in South Africa;

Provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and service they desire;

Create greater capability and an environment for South Africans to compete effectively in international markets;

Restrain particular trade practices which undermine a competitive economy;

Regulate the transfer of economic ownership in keeping with the public interest;

Establish independent institutions to monitor economic competition; and

Give effect to the international law obligations of the Republic”.

The Act’s policy purposes begin with economic efficiency, but extend much further. The general purpose, to “promote and maintain competition”, is enhanced by six particular sets of goals. The first of these goals is the efficiency, adaptability and development of the economy.²¹ Due to South Africa’s political and economic history, the economy was largely controlled by white hands. The high level of vertical integration and interlocking shareholding and directorship, caused the structure of the economy to be problematic to potential investors.²² Secondly, the competitive prices and choices for consumers, promotes the foundation of an economics-based policy in concerns about consumer welfare. The other four sets of policy goals represent other public interest issues that have been important to stakeholders in debate: employment and social economic welfare, opportunities to participate in world markets, equitable opportunities for small and medium sized enterprises to participate in the economy, and increasing the ownership stakes of historically

²¹ OECD Peer Review, Burgeat E (Director) Competition Law and Policy in South Africa, 2003, p. 17.

²² Brassey M (ed), Campbell J *et al*, *Competition Law*, 2002, p. 87.

disadvantaged persons.²³ The preamble reaffirms the political motivations; it illustrates the problem that the law seeks to address, that past practices, including apartheid, led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. All of these are concerns about equity and justice.²⁴

The preamble discusses the context and reasons for legislating the Act, and it is here where public interest is referred to directly. By the inclusion of public interest objectives in the Act, the Act significantly differs from those in other jurisdictions, as discussed in more detail in chapter 4 of this paper. Public interest objectives form part of the assessment of competition issues, rather than as a separate consideration.²⁵ The Act reformed South Africa's competition legislation by establishing applicable authorities and strengthening their powers, bringing their functions in line with those of the European Union, The United States of America and Canada.²⁶ The Act established various prohibitions on anti-competitive conduct, restrictive practices and "abuses" by "dominant" firms.²⁷ In respect of mergers and acquisitions, a notification and prior approval procedure are set out. Should these procedures not be followed, the Act provides for significant penalties; the effects of which stretch beyond South Africa, reaching economic activity in and outside the borders of the country.²⁸

The Government saw the new legislation as a significant instrument in industrial and social policy. Not only was the Act introduced to deal with competition issues, but it was also envisioned to be a tool to reform industry in the country as well as to meet rights of previously disadvantaged communities, small businesses and labour. It is therefore not surprising that the legislation goes further than similar legislation in other countries and operates on both a competition level as well as on broader social, economic and political levels.²⁹

²³ Section 2 of the Competition Act 89 of 1998 (as amended).

²⁴ OECD Peer Review, Burgeat E (Director) Competition Law and Policy in South Africa, 2003, p. 18.

²⁵ Moodaliyar K & Roberts S (ed), *The development of competition law and economics in South Africa*, 2012, p. 2.

²⁶ South African Yearbook, Webber Wentzel, "South African Competition Law", <http://www.southafrica.info/business/investing/regulations/competition-policy.htm#.VVbyciGqqko>, [accessed on 16 May 2015].

²⁷ Section 4 to Section 9 of the Competition Act 89 of 1998 (as amended).

²⁸ *Ibid.*

²⁹ Brassey M (ed), Campbell J *et al*, *Competition Law*, 2002, p. 88.

3. SCOPE AND NATURE OF STUDY

This study will focus on the significant role that public interest plays in the context of merger evaluation in South Africa. It will consider each of the specific public interest considerations that the Competition Act 89 of 1998 mandates should be taken into account in the process of merger evaluation. The recently proposed public interest guidelines will also be considered in order to assess how they contribute in the context of merger evaluation. Subsequently a comparative study will be undertaken of comparative jurisdictions and the role, if any, that public interest plays in their competition legislation in order to juxtapose and critically assess the elevated role of public interest in South African competition legislation.

The study will be undertaken by means of a literature study comprising of legislation, books, articles and case law relevant to the study.

CHAPTER 2

MERGER EVALUATION AND PUBLIC INTEREST

1. TYPES OF MERGERS

The key provisions of the Competition Act that relate to public interest are located in three parts: the preamble and purpose of the Act, the consideration of mergers and the provisions relating to exemptions.³⁰ For purposes of this dissertation, the main focus will be that of mergers. A merger as contemplated in the Competition Act occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business or another firm.³¹ The definition covers horizontal, vertical and conglomerate mergers; in this specific order they invite lessening levels of concern. A horizontal merger can be defined as a merger between firms selling the same or similar products in the same geographic area, having the result of removing competition between the two firms. An example of a horizontal merger is that of firms competing with each other in a horizontal relationship, for example manufacturers of training shoes such as Nike and Puma.³² On the other hand vertical mergers occur between firms in a vertical relationship with each other, i.e. a producer and its wholesaler. Conglomerate mergers are mergers between firms that do not produce the same products nor are they situated in the same geographic area; there is thus no relationship between the merging firms, such as a motor manufacturing company and a diamond-cutting company.³³

The Competition Act classifies mergers into three categories on the basis of the total turnover or assets of the parties to the merger.³⁴ Section 11 of the Competition Act provides that the Minister of Trade and Industry, in consultation with the Competition Commission, must determine the thresholds and categories of mergers.³⁵ Section 11(5) of the Competition Act refers to the three thresholds and categories in relation

³⁰ Moodaliyar K & Roberts S (ed), *The development of competition law and economics in South Africa*, 2012, p. 5.

³¹ Section 12(1)(a) of the Competition Act 89 of 1998. "Firm" is defined to include "a person, partnership or a trust": see Section 1(1)(xi).

³² Brasseley M (ed), Campbell J *et al*, *Competition Law*, 2002, p. 225.

³³ *Ibid*.

³⁴ Neuhoff M (ed), Neuhoff M *et al*, *A practical guide to the South African Competition Act*, 2006, p. 211.

³⁵ Sec 11(1) of the Competition Act 89 of 1998.

to mergers, i.e. large, intermediate or small mergers. A merger constitutes a large merger where the greater of the combined annual turnover and/or asset value of both the consolidated acquiring group and the target firm is valued at or above R6.6 billion and the annual turnover or asset value of the target firm is valued at or above R190 million.³⁶ An intermediate merger is where the greater of the combined annual turnover and/or asset value of both the consolidated acquiring group and the target firm is valued at or above R560 million and the greater of the annual turnover or asset value of the target firm is valued at or above R80 million, but does not meet the large merger threshold.³⁷ Lastly, a small merger is where the financial values fall below the thresholds pertaining to an intermediate merger.³⁸

2. AUTHORITIES TASKED WITH THE EVALUATION OF MERGERS

2.1 The Competition Commission

There are three authorities established by and tasked with the regulation provided for in the Competition Act, namely the Competition Commission, the Competition Tribunal and the Competition Appeal Court. The Competition Commission (the “Commission”) consists of a Commissioner and one or more Deputy Commissioners.³⁹ The Commissioner appoints investigators⁴⁰ and staff⁴¹ to support the Commission in carrying out its tasks under the Act. The main purpose of the Commission is to investigate and evaluate alleged prohibited practices as included in Chapter 2,⁴² to consider applications for exemptions from the provisions of Chapter 2,⁴³ and to consider mergers of which it received notice in terms of Section 3.⁴⁴ Primarily, the Commission acts as the entry point to the procedures provided for in the Act.⁴⁵ In respect of mergers, all mergers that fall within the definition of an

³⁶ Government Gazette No 31957, 6 March 2009, Vol 525, p.90, www.greengazette.co.za, [accessed on 29 March 2016].

³⁷ Ibid.

³⁸ Ibid.

³⁹ Section 19(2) of the Competition Act 89 of 1998.

⁴⁰ Section 24 of the Competition Act 89 of 1998.

⁴¹ Section 25 of the Competition Act 89 of 1998.

⁴² Section 21(1)(c) of the Competition Act 89 of 1998.

⁴³ Section 21 (1)(d) of the Competition Act 89 of 1998.

⁴⁴ Section 21 (1)(e) of the Competition Act 89 of 1998.

⁴⁵ Brassey M (ed), Campbell J et al, *Competition Law*, 2002 p. 287.

intermediate or large merger must be notified to the Commission.⁴⁶ In the event that a merger falls within the definition of a small merger, it need not be notified to the Commission, unless so required by the Commission within six months of the implementation of a merger.⁴⁷ When the Commission receives notification of a small or intermediate merger, it must either approve the merger conditionally or unconditionally, or prohibit its implementation.⁴⁸ If the Commission either approves a small or intermediate merger conditionally or prohibits it, a merger party may request the Competition Tribunal to consider the conditions or prohibition.⁴⁹ If the Commission approves an intermediate conditionally or unconditionally, registered trade unions or employees of the merger parties who participated in the Commission's proceedings may request the Tribunal to consider such approval.⁵⁰ In the event of the Commission receiving notification of a large merger, the Commission must refer that notice to the Competition Tribunal together with a recommendation as to whether the merger should be approved, either conditionally or unconditionally, or prohibited.⁵¹

2.2 The Competition Tribunal

The Competition Tribunal (the "Tribunal") consists of a chairperson and between three and ten other members.⁵² Each member of the Tribunal is required to have "suitable qualifications and experience in economics, law, commerce, industry or public affairs".⁵³ The primary functions of the Tribunal are to adjudicate on any conduct prohibited in terms of Section 2; to determine whether prohibited conduct has occurred, and, if so, to impose a remedy provided for in the Act; to adjudicate in any other matter that may, in terms of the Act be considered by it, and make any order provided for in the Act; and to hear appeals from, or review any decision of, the Commission that may, in terms of the Act, be referred to it.⁵⁴ In respect of merger evaluations, the Tribunal is tasked with the consideration of large mergers, referred to it by the Commission and either to approve such mergers conditionally or

⁴⁶ Section 13A of the Competition Act 89 of 1998.

⁴⁷ Section 13 (1) – (3) of the Competition Act 89 of 1998.

⁴⁸ Section 13(5)(b), Section 14(1)(b) of the Competition Act 89 of 1998.

⁴⁹ Section 16(1)(a) of the Competition Act 89 of 1998.

⁵⁰ Section 16(1)(b) read with Section 13A(2) of the Competition Act 89 of 1998.

⁵¹ Section 14(A)(1) of the Competition Act 89 of 1998.

⁵² Section 26(1) and (2) of the Competition Act 89 of 1998.

⁵³ Section 28(2)(b) of the Competition Act 89 of 1998.

⁵⁴ Section 27(1) of the Competition Act 89 of 1998.

unconditionally, or prohibit them.⁵⁵ The Tribunal must further consider small and intermediate mergers referred to it by a merger party in circumstances where such mergers have either been approved conditionally or prohibited by the Commission; or intermediate mergers referred to it by registered trade unions or employees of the merger parties in circumstances where such mergers have been approved, either conditionally or unconditionally.⁵⁶

2.3 The Competition Appeal Court

The third authority provided for in the Act, is the Competition Appeal Court (the “CAC”). The CAC is a court of record and has a status similar to that of a high court.⁵⁷ The CAC consists of at least three judges and any number of acting judges, each of whom must be a judge of the High Court.⁵⁸ The CAC may review any decision of the Tribunal;⁵⁹ it may also consider an appeal against the Tribunal’s final decisions, except a consent order, or any of its interim or interlocutory decisions that may, in terms of the Act, be taken on appeal.⁶⁰

3. MERGER ANALYSIS

The competition policy standard, which must be assessed first, is whether the merger “*is likely to substantially prevent or lessen competition*”. That determination requires a multi-factor enquiry, which is incorporated in the statute to measure the prospect that the merging firms will contend and co-operate after the merger.⁶¹ These factors encompass the consideration of *inter alia* import competition, ease of entry into the market, tariff and regulatory barriers, concentration and the removal of an effective competitor, to name a few.⁶²

⁵⁵ Section 16(2) of the Competition Act 89 of 1998.

⁵⁶ Section 16(1) of the Competition Act 89 of 1998.

⁵⁷ Section 36(1) of the Competition Act 89 of 1998.

⁵⁸ Section 36(2) and (4) of the Competition Act 89 of 1998.

⁵⁹ Section 37(1)(a), Section 61 (1) of the Competition Act 89 of 1998.

⁶⁰ *Ibid.*

⁶¹ OECD Peer Review, Bugeat E (Director) Competition Law and Policy in South Africa, 2003, p. 27.

⁶² *Ibid.*

3.1 Merger evaluation and public interest grounds

3.1.1 Section 12A of the Act

The concept of public interest with regards to the consideration of mergers is more fully developed in Section 12A of the Act, which states that in addition to competition and efficiency considerations, it is also necessary to assess whether a merger can or cannot be justified on substantial public interest grounds. Section 12A reads as follows:

1. “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 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). “

As is clear from Section 12A above, the test applied in evaluating mergers is three-fold. In the first instance it has to be established whether a merger is likely to substantially prevent or lessen competition (SLC test). Secondly, in the event that the merger will substantially prevent or lessen competition, then it must be determined whether the merger will result in ‘technological, efficiency or other pro-competitive gains’ that will outweigh the anti-competitive effect of the merger. In the last instance, irrespective of the outcome of the assessment of the competition

impact of the merger, a public interest test has to be conducted.⁶³ Although the merger may not have an adverse effect on competition, it still has to be judged on public interest grounds. In the event that a merger is likely to substantially prevent or lessen competition, the authority must then consider whether the merger transaction will result in any efficiency gains. The efficiency test can be considered as justification for an anti-competitive merger transaction. The balancing of the SLC test and the efficiency test is however not without difficulties as the authorities are tasked with weighing up compromising competition and efficiency benefits.⁶⁴

Substantial public interest grounds as referred to in subsection (3) must be considered when assessing the effect of a merger. These factors are scrutinised to determine the effect that a merger will have on:

- i. a particular industrial sector or region;
- ii. employment;
- iii. the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive; and
- iv. the ability of national industries to compete in international markets.⁶⁵

The public interest test, different from the efficiency defence, holds a “janusfaced” quality, which means that it can save a merger that would have been rejected on pure competition criteria, but it may also lead to the rejection of a merger, which is not anti-competitive.⁶⁶ However, the competition authorities are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, purely on public interest grounds.⁶⁷ In respect of whether the competition authorities are required to consider all four of the public interest grounds, the wording of section 12A(3) is important. The use of the word “and” rather than “or” in section 12A(3) is proof that all public interest grounds should be considered when evaluating a merger. It has to be reiterated that even though a merger may not have an adverse effect on competition, it still has to be reviewed on public interest grounds.

⁶³ Hartzenberg T, “Competition Policy and Enterprise Development: The role of public interest objectives in South Africa’s Competition Policy”, p. 15 <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1> [accessed on 17 December 2015].

⁶⁴ Ibid, p. 15

⁶⁵ Neuhoff M (ed), Neuhoff M *et al*, *A Practical Guide to the South African Competition Act*, 2006, p. 196.

⁶⁶ Reyburn L (ed), Reyburn *et al*, *Competition Law of South Africa*, 2008, p.10 - 93.

⁶⁷ Ibid.

The inclusion of the public interest test in the Act is unique for various reasons. As can be seen from the content of section 3 above, the public interest considerations are very specific and it is clear that only a selection of public interest concerns enjoy focus in the framework of South Africa's competition policy hence it can be regarded as a closed list. Furthermore, the test permits the competition authorities to disallow or allow a merger that does or does not, respectively, comply with the SLC test. Thirdly, the capability to approve or prohibit a merger is afforded to the competition authority and not the Minister⁶⁸ or stakeholders.⁶⁹ The law set out in the Act in respect of mergers strive for the prevention of the abuse of market power, rather than trying to control it.⁷⁰

3.1.2 Interpretation of Section 12A of the Act

Over the past 13 years the Tribunal has assessed numerous mergers with a public interest component as discussed in more detail later in this chapter. Although some mergers have been approved subject to conditions relating to public interest, there has not been an instance where a merger case was decided on the basis of public interest considerations alone.⁷¹ The process the authorities follow when determining whether to approve or disapprove a merger, is to balance the facts and the competitive arguments of each case, deliberate the factors involved, evaluate the advantages and disadvantages of the practice or merger and then make a decision one way or the other. Such a flexible approach may be inevitable, but it does make the law less certain.⁷² It is for this reason that regard is to be had to the approach that the competition authorities follow in taking public interest grounds into consideration in merger evaluation.

⁶⁸ The Act does require that the Minister of Trade and Industry (or another Minister directly affected by the merger) be served a copy of the merger notification, so that they can plead the case before the competition authorities - Hartzenberg T, "Competition Policy and Enterprise Development: The role of public interest objectives in South Africa's Competition Policy", p. 17 <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1>, [accessed on 17 December 2015].

⁶⁹ Hartzenberg T, "Competition Policy and Enterprise Development: The role of public interest objectives in South Africa's Competition Policy", p. 16 <http://citeseerx.ist.psu.edu/viewdoc/summary?doi=10.1.1.201.1>, [accessed on 17 December 2015].

⁷⁰ Myeni W, *Public interest and merger controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations*, LLM Dissertation, 2006, University of Cape Town, p. 15.

⁷¹ Moodaliyar K & Roberts S (ed), *The development of competition law and economics in South Africa*, 2012, p. 9.

⁷² Brassey M (ed), Campbell J et al, *Competition Law*, 2002 p. 259.

In the case of *Harmony Gold Company Limited and Goldfields Limited*,⁷³ the Tribunal rightly determined that the principal concern for the Tribunal in merger evaluation is to evaluate competition and that it is not a public interest evaluation; the reason being that the wording of the Competition Act requires it to so evaluate competition.⁷⁴ Should the authorities find that the proposed merger will not have a negative effect on competition; the merger will, in addition, then possibly be permitted on public interest grounds, with or without the imposition of conditions; or disapproved on public interest grounds, regardless of being found not to be anticompetitive.⁷⁵ In the event that the proposed merger is assessed to be anticompetitive, the finding may be strengthened by the merger being against public interest as well; alternatively the merger may perhaps even be permitted on public interest grounds, despite the merger being anticompetitive.⁷⁶

In interpreting the wording of Section 12A, one can again refer to the *Harmony/Goldfields*⁷⁷ matter. Goldfields was of the opinion that the words “can or cannot be justified”, found in sections 12A(1)(a)(ii) and 12A(1)(b), infer that, for a merger to be permitted, the Tribunal must be of the view that the merger is both not anticompetitive *and* in favour of the public interest.⁷⁸ The Tribunal did not agree with this interpretation and submitted that the words imply that “the public interest can have both adverse and benign effects” in merger evaluation,⁷⁹ which means that the assumption on the public interest can either aid to support the finding of the competition analysis, or have the Tribunal disapprove or impose conditions on an otherwise competitive merger. Furthermore, the Tribunal stated that the evaluation of the public interest grounds do not always have the same outcome, i.e. the approval of a merger with conditions, and subsequently the authorities must ensure that they

⁷³ *Harmony Gold Mining Company Limited and Goldfields Limited* 93/LM/Nov04.

⁷⁴ *Ibid* par 41.

⁷⁵ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 18 - 19.

⁷⁶ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 par 214.

⁷⁷ *Harmony Gold Mining Company Limited and Goldfields Limited* 93/LM/Nov04.

⁷⁸ *Ibid*, par 33-34.

⁷⁹ *Ibid*, par 54.

balance the grounds so as to determine the net conclusion on public interest.⁸⁰ It is subsequently not required for all the public interest grounds listed in section 12A(3) to point to an identical direction prior to a merger being approved, approved with conditions, or rejected on public interest consideration;⁸¹ instead, a balancing exercise is needed.⁸² The aforementioned approach may cause some difficulty for the competition authorities and a procedure was determined in *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd*⁸³ for addressing such situations. In this matter the Tribunal explicitly recognised the likelihood of conflicting public interest concerns⁸⁴ and subsequently promoted the following three-stage approach to be followed by the authorities:⁸⁵

- a. Each asserted public interest ground must be considered in isolation and it must be determined whether such ground is substantial.
- b. If the answer to the above is in the affirmative, and there are at least two contradictory grounds, then the competition authority must attempt to reconcile the conflicting grounds.
- c. If the competition authority is unable to reconcile the substantial contradictory grounds, then the grounds must be balanced and the competition authority must reach a net conclusion as to the public interest.

This method mirrors the language of the sections and agrees with notions of common sense thinking.⁸⁶ Considering the above, it is clear that public interest considerations may well save a proposed merger, or prohibit it. The favoured approach followed by the competition authorities is that when public interest considerations affect a pro-competitive merger, the authorities are likely to approve the merger but impose certain conditions on their approval designed to safeguard

⁸⁰ Ibid.

⁸¹ Reyburn L (ed), Reyburn *et al*, *Competition Law of South Africa*, 2008, (note 4) p.10-34.

⁸² Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 19.

⁸³ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

⁸⁴ Ibid, par 214-215.

⁸⁵ Ibid par 217.

⁸⁶ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 20.

the public interest grounds.⁸⁷ To illustrate this process a number of cases will be discussed below in relation to each of the public interest considerations provided for in section 12A(3) of the Act.

3.1.3 The effect the merger will have upon a particular industrial sector or region⁸⁸

3.1.3.1 Industrial Corporation of South Africa Limited and Anglo-American Holdings Limited⁸⁹

The effect the merger will have upon a particular industrial sector or region is the first public interest ground, required by the Act, to be considered when a proposed merger is to be evaluated. The reason for the legislator's use of the words "sector or region" is significant; the reason being that these words are broader in meaning than the word "market" and permits for a more extensive series of issues to be taken into account in the public interest inquiry. In *Industrial Corporation of South Africa Ltd and Anglo-American Holdings Ltd* 25/LM/Jun02 and 46/LM/Jun02 the Tribunal stated:

"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 intrusive. Clearly the legislature intended that in undertaking the analysis of the public interest, the competition authorities were to have regard to some sphere of economic activity, wider than the mere relevant market, the traditional tool of analysis of pure competition law issues."⁹⁰ The legislature wanted the competition authorities to evaluate the merger effect on a sector or region in its entirety because a specific merger may not have public interest effects in a defined relevant market but may have significant effects in a particular sector.⁹¹ This merger did not bring about any competition issues, but the Tribunal permitted it on specific conditions as a result of the effect of the merger on public interest concerns.

⁸⁷ Ibid p. 21.

⁸⁸ Section 12A(3)(a) of the Competition Act 89 of 1998.

⁸⁹ *Industrial Corporation of South Africa Ltd and Anglo-American Holdings Ltd* 25/LM/Jun02 and 46/LM/Jun02.

⁹⁰ Ibid par 43.

⁹¹ Monareng KD, *Using competition law to promote the broader public interest issues in merger regulation*, LLM Dissertation, 2014, University of Pretoria, p. 21.

3.1.3.2 *Nasionale Pers Limited and Education Investment Corporation Limited*⁹²

In this matter the Tribunal considered a merger in the education sector. The words “a particular industrial sector” were interpreted to incorporate issues of education,⁹³ while the education sector is not an industrial sector.⁹⁴ The Tribunal recognised education to be an essential sector of the South African economy. As a result of the apartheid policies, many people were excluded from obtaining an education and entering the labour market and subsequently the Tribunal was cautious when considering this merger⁹⁵. The Tribunal therefore paid full attention to the merger to safeguard the access of prospective students to education and consequently giving effect to the purpose of section 12A(3)(a) of the Competition Act. The merger was approved with conditions, with the main condition being the divestiture of Success College.⁹⁶

3.1.3.3 *PSG Investment Bank and Real Africa Durolink*⁹⁷

In this matter the Tribunal was tasked with the consideration of a merger between two banks. As part of the Tribunal’s inquiry to the public interest considerations, it deliberated the negative impact of Real Africa Durolink’s exit from the market, should the merger be approved.⁹⁸ The Tribunal was not clear in stating which public interest consideration they based this on. Reyburn⁹⁹ is of the opinion that the Tribunal’s decision was based upon the effect this merger would have upon a “particular industrial sector”. Although the Commission did not provide for whether the merger could be justified on any public interest ground, it considered the ability of small banks to grow and to become competitive, as well as the fact that smaller banks

⁹² *Nasionale Pers Ltd and Education Investment Corporation Ltd* 45/LM/Apr00.

⁹³ *Ibid* par 24, 47.

⁹⁴ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p 25.

⁹⁵ *Nasionale Pers Ltd and Education Investment Corporation Ltd* 45/LM/Apr00, par 24.

⁹⁶ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertaion, 2014, University of Pretoria, p. 18.

⁹⁷ *PSG Investment Bank Holdings Ltd and Real Africa Durolink Holdings Ltd* 31/LM/May01.

⁹⁸ *Ibid*, par 8 – 9.

⁹⁹ Reyburn L (ed), Reyburn *et al*, *Competition Law of South Africa*, 2008, (note 4) p. 10-96.

have black economic empowerment components. The merger was approved without any conditions.

3.1.3.4 *Industrial Development Corporation and Rio Tinto South Africa Ltd*¹⁰⁰

In this matter the Commission recorded that the merger would result in diversion of locally produced Dense Medium Separation (“DMS”) iron ore to the merging firms, which would harm local customers of DMS iron ore.¹⁰¹ Due to the importance of DMS iron ore in the domestic coal industry, the procurement of DMS iron ore by domestic customers is essential.¹⁰² The Commission submitted that post-merger the domestic customers to DMS iron ore would experience difficulty in accessing adequate volumes of this product. The Tribunal proceeded to approve the merger with the condition that the local customers, who need DMS iron ore, would be granted access to it. This matter did not raise any competition concerns, but it was nevertheless approved with conditions due to the effects it could have on public interest.¹⁰³

It is clear from the cases discussed above that the industrial sector or region consideration plays a vital role in the evaluation of mergers.¹⁰⁴ The Tribunal’s willingness to interpret the Legislature’s intention with this public interest consideration can thus be regarded as a step in the right direction of developing jurisprudence.

3.1.4 **The effect of a merger on employment**¹⁰⁵

South Africa has one of the highest unemployment rates in the world, which is, according to Country Economy, currently approximately 25%.¹⁰⁶ Employment is one

¹⁰⁰ *Industrial Development Corporation and Rio Tinto South Africa Ltd* Case no: 016329.

¹⁰¹ Ibid par 50.

¹⁰² Ibid. DMS is used in the washing of coal to improve its quality.

¹⁰³ Monareng KD, *Using Competition law to promote broader public interest issues in merger regulation*, LLM Disstertation, University of Pretoria, 2014, p 21.

¹⁰⁴ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertaion, 2014, University of Pretoria, p. 19.

¹⁰⁵ Section 12A(3)(b) of the Competition Act 89 of 1998.

¹⁰⁶ Expansión/CountryEconomy.com , “Unemployment Rate”, <http://www.countryeconomy.com/unemployment>, [accessed on 26 January 2016].

of the public interest grounds that have received a reasonable amount of consideration¹⁰⁷ and authorities have a tendency to place great emphasis on the effect of a proposed transaction on employment.¹⁰⁸ The question however arises to what extent the competition authorities must take the effect on employment into account and which matters relating to employment must be scrutinised. The Tribunal stated in the *Distillers Corporation (SA) Ltd* matter¹⁰⁹ that the competition authorities need to bear in mind that there are a number of legislation that safeguard employees more directly, and furthermore, the authorities will not be willing to interfere in disputes relating to wages, collective bargaining and working conditions.¹¹⁰ The authorities generally request participation from all parties involved in a merger transaction, including affected employee groups and trade unions, to enable them to properly evaluate the result that the merger will have on employment.¹¹¹ The Act provides for trade unions and / or employee representatives of affected employees to be informed of any planned mergers that are notifiable to the competition authorities.¹¹² In considering the effect of a merger on the public interest ground of employment, a brief discussion of pertinent cases is appropriate.

3.1.4.1 *Unilever PLC / Competition Commission and Chemical, Energy, Paper, Printing, Wood and Allied Workers Union*¹¹³ (hereinafter “CEPPWAWU”)

In this matter a great concern was the number of potential job losses in South Africa as a result of the merger. A pre-condition of approval of the proposed merger was put in place by the Tribunal who required the parties to discuss the issue regarding job losses with the trade unions.¹¹⁴ The Tribunal referred to Section 13A of the Act,¹¹⁵ which deals with notification and implementation of other mergers and specifically argued subsection (2)(a) which states that:

¹⁰⁷ Chetty V, ABA Section of Antitrust Law, “The place of public interest in South Africa’s competition legislation”, Washington D.C, 30 March – 1 April 2005. p. 16.

¹⁰⁸ Neuhoff M (ed), *A Practical guide to the South African Competition Act*, 2006, p. 197.

¹⁰⁹ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

¹¹⁰ *Ibid*, par 233 – 243.

¹¹¹ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disertation, University of Pretoria, 2014, p. 20.

¹¹² Section 13A of the *Competition Act* 89 of 1998.

¹¹³ [2001 – 2002] CPLR 336 (CT).

¹¹⁴ *Ibid* par 1.

¹¹⁵ *Ibid* par 40.

“(2) In the case of an intermediate or a large merger, the primary acquiring firm and the primary target firm must each provide a copy of the notice contemplated in subsection (1) to –

- (a) any registered trade union that represents a substantial number of its employees; or
- (b) the employees concerned or representatives of the employees concerned, if there are no such registered trade unions. “

The Tribunal further added that the Act granted the right of timeous information in relation to potential job losses resulting from the merger to employees and unions.¹¹⁶ However the Tribunal was of the opinion that unions should address employment related issues arising from mergers through legislation regulating labour issues, being the Labour Relations Act.¹¹⁷ The Commission, although concerned about the number of potential job losses, did not think that this warranted a prohibition of the merger “as long as there are remedies for the anti-competitive implications of the proposed transaction.”¹¹⁸ The Tribunal remarked that although there was a strong indication of the ‘worst case’ scenario referred to by the merging parties, in relation to the number of potential job losses, it was the most pessimistic view of the impact of the merger on employment.¹¹⁹ The Tribunal approved the merger with certain conditions, some of which were kept confidential between the merging parties and the Competition Commission in order to preserve the value of the assets to be divested.¹²⁰ The main condition in relation to employment was an obligation on the merging parties that once an agreement had been concluded with the proposed buyer of the divested assets, they consult with the Unions or their employees on this issue.¹²¹

3.1.4.2 *Tiger Brands Limited and Ashton Canning Company Limited and others*¹²²

¹¹⁶ Ibid par 43.

¹¹⁷ Labour Relations Act 66 of 1995.

¹¹⁸ [2001 – 2002] CPLR 336 par 36.

¹¹⁹ Ibid, par 42.

¹²⁰ [2001 – 2002] CPLR 336 (CT) par 1.

¹²¹ Ibid, par 42.

¹²² 46/LM/May05.

In this matter the Commission was concerned about the potential number of job losses that would occur when the merger was approved. The parties projected a loss of 45 permanent jobs and 1000 seasonal jobs as a result of the merger.¹²³ Subsequently the Commission approved the merger and imposed a condition that provided for the establishment of a training fund in the amount of R2 million to help retrenched employees, seasonal farmers and members of the Ashton community.¹²⁴ This condition did not decrease job losses, but the Commission was of the view that it would assist in developing the skills of the retrenched employees and farmers to prepare them for other potential opportunities. This matter set the tone in considering employment as a ground for merger evaluation.¹²⁵

3.1.4.3 *Metropolitan Holdings Limited and Momentum Group Limited*¹²⁶

This case highlights the connection between the public interest consideration, employment, and competition efficiencies. The Tribunal provisionally approved the acquisition of 100% of the issued ordinary share capital of Momentum by Metropolitan. In considering the merger, the Tribunal carried out a competition test and decided that the merger did not pose any threat to competition. The secondary leg of the test was then considered in that the Tribunal had to determine whether the merger had any detrimental effects on public interest¹²⁷. The merging parties originally projected 1000 job losses due to a duplication of roles and the need to improve efficiencies in the merged entity¹²⁸. The Tribunal approved the merger dependent on a limited moratorium on retrenchments for two years with terms that clarified the conditions on the merged entity. The following terms were provided¹²⁹:

- a. The merged entity was to ensure that there were no retrenchments in South Africa subsequent to the merger for a period of 2 years from the effective date of the proposed transaction;

¹²³ Ibid, par 132.

¹²⁴ Ibid.

¹²⁵ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertation, University of Pretoria, 2014, p. 26.

¹²⁶ 41/LM/Jul10.

¹²⁷ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertation, University of Pretoria, 2014, p. 23.

¹²⁸ *Metropolitan Holdings Limited and Momentum Group Limited* 41/LM/Jul10, par 61.

¹²⁹ Ibid par 64.

- b. The condition in (a) would apply to the 204 management positions set out in the table included in the record; and
- c. Metropolitan and Momentum had to circulate conditions (a) and (b) to all their employees within 7 days of the date of the order.

In an attempt to dismiss the job loss concerns, the merging parties submitted that there was a plan to redeploy, retain and offer early retirement packages to some employees, which would result in a decrease of potential job losses from the initial 1500 to 1000 employees. However, the Tribunal found that the parties were unable to show “*a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary*”.¹³⁰ The Tribunal stressed that while an adverse influence on employment may evidently be associated to a particular claimed efficiency which does not release the parties of their duty to show that the losses could be rational for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger.¹³¹ The parties were unable to discharge that onus and as a result the merger was approved subject to the above conditions. This case has since been used as precedent in other following cases,¹³² including the Wal-Mart / Massmart merger discussed below.

3.1.4.4 *Wal-Mart Stores Incorporated and Massmart Holdings Limited*¹³³

The target firm in this “notorious” merger was Massmart Holdings, a local wholesaler and retailer of groceries, liquor and general merchandise. The acquiring firm was Wal-Mart, the largest retailer in the world.¹³⁴ The merger did not raise any competition issues; it did not threaten to substantially prevent or lessen competition. The concerns to be considered in this matter as public interest grounds were

¹³⁰ Ibid par 70.

¹³¹ Ibid par 71.

¹³² Anonymous, “The rise of public interest: Recent high profile mergers”, www.africanlii.org, [accessed on 10 March 2015].

¹³³ *Wal-Mart Stores Incorporated and Massmart Holdings Limited* 73/LM/Nov10.

¹³⁴ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertation, University of Pretoria, 2014, p. 21.

employment and industrial sector. These concerns were of a serious nature, which required intervention by third parties who all opposed the merger.¹³⁵

The first public interest concern raised was that the government, together with Southern African Clothing and Textile Union (SACTWU) were worried that should the merger be approved, the merged entity would no longer procure products from the local markets and would rather import products which would influence the demand of products from the domestic suppliers and subsequently they would be forced to shut down¹³⁶. In addition, a further concern was an increase in market share of the merged entity as a result of the lower prices it could offer due to its greater procurement power in products sourced abroad¹³⁷. The intervening parties proposed that either the merger had to be prohibited, or there had to be an import quota imposed to limit the amount of imports in relation to local products. However, these conditions, if imposed, were not without problems. Firstly, by imposing import quotas, the merged entity would contravene international trade law and conditions of the World Trade Organisation. The merging parties suggested an investment remedy directed at local suppliers in the amount of R100 million over a 3 year period, to assist local suppliers of goods to retail stores, particularly Wal-Mart. The investment remedy programme was required to be administered by the merged entity, advised by a committee established by it and on which representatives of trade unions, business and the government would be invited to serve. The merged entity was also required to establish a training programme to train local South African suppliers on how to do business with the merged entity and with Wal-Mart.¹³⁸ The Tribunal favoured the investment remedy proposed as it felt that it sought to make local industries more competitive. The investment remedy was imposed, which was a major development in merger law in South Africa.¹³⁹

A second public interest concern raised was the effect of the proposed merger would have on employment, specifically the potential number of job losses through retrenchments after the merger. In assessing the merger, the Tribunal noted,

¹³⁵ Ibid par 2.

¹³⁶ Ibid par 73.

¹³⁷ Tavuyanago S, *Public Interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, University of Pretoria, 2014, p. 18.

¹³⁸ *Wal-Mart Stores Incorporated and Massmart Holdings Limited 73/LM/Nov10*, par 119.

¹³⁹ Tavuyanago S, *Public Interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, University of Pretoria, 2014, p. 19.

however, that there was no evidence that retrenchments would result from the merger and that the merger was likely to create jobs.¹⁴⁰ The Tribunal was cautious of relying on the documentary proof filed by the merging parties in relation to the job growth, as there was no guarantee that the South African entity would do well and therefore not be required to retrench employees. The parties undertook that there would be no retrenchments in South Africa for a period of 2 years; an undertaking similar to the moratorium in the *Metropolitan* merger.¹⁴¹ Protection of employment extended further post-merger in that the Tribunal imposed two conditions with regard to trade unions, namely that the merged entity was to continue honouring the existing labour agreements and that the merged entity was not to challenge SACCWU as the largest representative union within the merger entity for an appropriate period determined by the Tribunal.¹⁴²

This case not only indicates the importance of considering employment as a public interest ground in the evaluation of a merger, but it also highlights the significance of trade unions as employee representatives to ensure the views of the employees are heard and addressed.

Even though there is legislation specifically tasked with protecting employees, the competition authorities have an obligation imposed by the Competition Act to extend the protection of employment in the public interest. The considerable significance of the public interest ground of employment in the context of merger regulation is demonstrated by the above cases in which job losses were addressed by imposing conditions on the approval of the relevant mergers.¹⁴³

3.1.5 The effect that a merger will have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive¹⁴⁴

In considering the preamble of the Act it is evident that one of the purposes of competition regulation in South Africa is to open the economy to larger ownership by

¹⁴⁰ Ibid par 39.

¹⁴¹ Ibid par 91.

¹⁴² Ibid par 59.

¹⁴³ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertation, University of Pretoria, 2014, p. 26.

¹⁴⁴ Section 12A(3)(c) of the Competition Act 89 of 1998.

a larger number of South Africans. In chapter one reference is made to the historical conditions in South Africa that prohibited companies owned by disadvantaged persons to participate in the country's economy. It is for this reason that the competition authorities are tasked to take into account the effect that a merger would have on businesses owned by previously disadvantaged persons to compete with established firms.¹⁴⁵ To demonstrate the consideration the authorities give to effect of a merger on the ability of small business or firms controlled by previously disadvantaged persons, a few cases will be highlighted below.

3.1.5.1 *Anglo American Holdings Limited and Kumba Resources Limited, Industrial Development Corporation Intervening*¹⁴⁶

Kumba Resources Limited was a black economic empowered company, which Anglo American Holdings Ltd (Anglo) attempted to purchase. Industrial Development Corporation ("IDC"), a statutory body tasked with the fostering of economic development pertaining to black owned businesses, intervened in the public interest ground provided in section 12A(3)(c) of the Act. IDC submitted that the merger would form a barrier to entry for prospective black firms and subsequently hinder empowerment in the industry.¹⁴⁷ IDC recommended that Kumba continue to be an independent black owned company. The IDC recorded that the Tribunal was to respect the object of promoting a greater spread of ownership by historically disadvantaged persons.¹⁴⁸ The Tribunal was requested to adopt a purposive interpretation and not confine itself to the literal wording of the Act. The IDC wanted the provision to be interpreted widely in light of the preamble and section 2 of the Competition Act. They referred to the economic system during Apartheid which led to excessive concentration of white majority owned businesses in the economy and that one of the goals of the Competition Act was to promote a wider spread of ownership of economic assets by a greater number of South Africans.¹⁴⁹

¹⁴⁵ Monareng KD, *Using Competition law to promote broader public interest issues in merger regulation*, LLM Dissertation, University of Pretoria, 2014, p. 23.

¹⁴⁶ *Industrial Development Corporation of South Africa Limited and Anglo American Holdings Limited* 45/LM/Jun02 and 46/LM/02.

¹⁴⁷ *Ibid* par 148 – 152.

¹⁴⁸ *Ibid* par 147 – 150.

¹⁴⁹ *Ibid* par 148.

Anglo submitted that the Tribunal ought not to use a broad interpretation of these provisions, as this approach would have uncertain policy consequences as it would transform the Act from an antitrust statute into an unchecked vehicle for redistribution.¹⁵⁰ In the Tribunal's findings it did not indicate which interpretation was correct. It indicated however that should IDC's approach be followed, there was no indication to suggest that the merger would frustrate the Act's purpose. The Tribunal further found no evidence to suggest that the merger would close the door on growth of historically disadvantaged persons' ownership in the industry. It was also not sufficiently proven that the interests of the black owners of Kumba would not be increased despite the merger since Anglo had given notice of an undertaking to comply with all the regulations that required empowerment transactions to take place.¹⁵¹ Anglo further completed a memorandum of understanding with the Government in which it agreed to promote the interest of previously disadvantaged persons. The Tribunal proceeded to approve the merger with the aforementioned conditions. It stated that although it did not find in favour of IDC, it benefited from its involvement as an intervening party, given the economic and social significance of this transaction.

3.1.5.2 *Shell South Africa (Pty) Limited and Tepco Petroleum (Pty) Limited*¹⁵²

Thebe, a black economic empowerment company attempted to sell off its subsidiary Tepco to Shell South Africa due to financial difficulties. Tepco was suffering net losses due to the advanced nature of the oil industry and high structural barriers to entry.¹⁵³ The Tribunal determined that the merger did not pose any danger to competition and moved its focus to the public interest test. Considering the fact that Tepco was owned by black persons, the Tribunal had to consider whether the merger would have an effect on the ability of small or black controlled or owned firms to become competitive. Initially the Commission imposed a condition that Tepco remain independent, but jointly controlled by Thebe and Shell South Africa.¹⁵⁴ The Tribunal did not agree with this condition as the original deal had to be restructured

¹⁵⁰ Ibid.

¹⁵¹ Ibid par 168.

¹⁵² *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* 66/LM/Oct01.

¹⁵³ Ibid par 11.

¹⁵⁴ Ibid par 2.

into one that neither the parties desired.¹⁵⁵ The Tribunal recorded that the Commission was responsible for the promotion and protection of competition and public interest; it was not tasked with doubting commercial decisions of precisely that element of public interest it is ordered to defend.¹⁵⁶ The merger was found to be commercially sound and not to pose any threat to public interest. Subsequently, the merger was approved without conditions.

It is submitted that the above cases reflect that the competition authorities have given due recognition to industrial policy to provide greater access to markets for small businesses and businesses owned by historically disadvantaged persons.¹⁵⁷

3.1.6 The effect of a merger on the ability of national industries to compete in international markets¹⁵⁸

The competition authorities may decide to approve a merger on the ground that it permits a merged entity to compete in international markets, even though the participation in the international market will be at the expense of domestic companies. The preamble of the Act outlines its goal to create ability and an environment for South Africans to compete effectively in the global environment. Furthermore, the Act's purpose is to extend opportunities for South Africans to participate in world markets and recognise the role of foreign competition in South Africa.¹⁵⁹ During the apartheid era South African companies were sanctioned from participating in the global markets. On 2 December 1950 the United Nations General Assembly passed a resolution that declared apartheid a policy of racial segregation.¹⁶⁰ As a result of the Apartheid regime which withheld education and skills to the majority of people in the country, this group of people were unable to own businesses. The Act specifically addresses apartheid and other discriminatory laws and practices of the past which caused excessive concentrations of ownership

¹⁵⁵ Ibid par 42.

¹⁵⁶ Ibid par 51.

¹⁵⁷ Monareng KD, *Using Competition law to promote broader public interest issues in merger regulation*, LLM Dissertation, 2014, University of Pretoria, p.25.

¹⁵⁸ Section 12A(3)(d) of the Competition Act 89 of 1998.

¹⁵⁹ Preamble and Section 2(d) of the Competition Act 89 of 1998.

¹⁶⁰ www.un.org/en/events/mandeladay/apartheid.shtml, [accessed on 28 January 2016].

and control within the national economy.¹⁶¹ As mentioned in paragraph 3.4 above, the competition authorities extend their responsibilities by protecting employment in considering the impact a merger will have on employment. The same can be said about the ability of small businesses and businesses owned by previously disadvantaged persons in that a lot of opportunities were unavailable to these groups, hence the authorities also considering this as a public interest ground in the evaluation of mergers. Below two cases will be highlighted where the authorities considered the effect of a merger on the ability of national industries to compete in international markets.

3.1.6.1 *Nampak Limited and Malbak Limited*¹⁶²

The parties involved in this merger were both involved in the packaging industry, with overlapping activities in folding cartons and flexible plastic packaging.¹⁶³ Their motivation for the merger was that as a merged entity they would be able to compete more effectively for the business of multinational customers, which would also increase their penetration into export markets.¹⁶⁴ In their submissions they produced evidence in connection with a scale of operation required to be an effective competitor for business of multinational consumers. They stated that a would-be supplier would be unable to compete without the scale and concomitant technology to match the output of the world scale. They were of the opinion that the merger would provide them with such capacity.¹⁶⁵

The Tribunal took cognisance of the parties' argument and noted that its decision was based on the important developments in the manner in which multinational corporations structured their global production.¹⁶⁶ Subsequently, the Tribunal established that the pro-competitive arguments raised by the parties justified the merger on the public interest of promoting international competitiveness as envisaged by section 12A(3)(d) and proceeded to approve the merger.¹⁶⁷

¹⁶¹ Preamble of the Competition Act 89 of 1998.

¹⁶² *Nampak Ltd and Malbak Ltd* [2004] 2 CPLR 337 (CT).

¹⁶³ *Ibid* par 5-6.

¹⁶⁴ *Ibid* par 9.

¹⁶⁵ *Ibid* par 50.

¹⁶⁶ *Ibid* par 63.

¹⁶⁷ *Ibid* par 65.

3.1.6.2 *Tongaat-Hullet Group Limited and Transvaal Suiker*¹⁶⁸

The parties' argument in support of the merger was based on the same reason as in *Nampak Ltd/Malbak Ltd* as discussed above, that the merged entity's ability to compete in the global markets will be greater than each party's own ability due to their greater scale of entity after the merger.¹⁶⁹ The Tribunal was wary to consider the argument that domination of a local market by a merged entity was essential for competing in international markets.¹⁷⁰ The size of the merged firm in itself would not be a decisive factor and where a merger did not grow the size of productive units, or allow them to operate more effectively, the Tribunal would not allow an anti-competitive merger on that basis.¹⁷¹ The merger was subsequently prohibited.

The Tribunal's decision to prohibit the *Tongaat-Hullet/Transvaal Suiker* merger, illustrated the dual application of the public interest test. On the one hand the test may be used to contest a merger that is not anti-competitive and does not pose any threat to competition based on the negative effect such a merger would have on any of the listed public interest grounds. On the other hand, the test may be used to attempt to approve an anti-competitive merger on the basis that the benefit to public interest would balance the anti-competitive effects of it.¹⁷²

The cases referred to above demonstrate the way in which public interest provisions in the South African Competition Act are interpreted by the competition authorities in their evaluation of mergers. Even though the public interest test in merger evaluation is clearly specified, Myeni points out that the Tribunal has been vigilant in its consideration of this test. The authorities are unlikely to prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, on public interest grounds. They are mindful of the fact that that Competition law is not directly aimed at protecting any of the public interest objectives.¹⁷³ The Tribunal has decided that in

¹⁶⁸ *Tongaat-Hullet Group Limited and Transvaal Suiker* 83/LM/Jul00.

¹⁶⁹ *Ibid* par 114.

¹⁷⁰ *Ibid* par 115.

¹⁷¹ Sutherland P & Kemp K, *Competition Law of South Africa*, 2013, p. 10-99.

¹⁷² Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Disstertation, University of Pretoria, 2014, p. 31.

¹⁷³ Myeni W, *Public interest and merger controls in South Africa: The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations*, LLM Dissertation, 2006, University of Cape Town, p. 39.

various instances their jurisdiction in relation to the public interest area is subordinate to their role in promoting competition, due to there being other statues and institutions that are better equipped and resourced to deal directly and effectively with these issues than they are.¹⁷⁴

¹⁷⁴ Ibid p. 40.

CHAPTER 3

GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO 89 OF 1998

1. INTRODUCTION

On 23 January 2015 the Commission published draft guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended) (“the guidelines”). The guidelines were drafted in terms of Section 79(1) of the Act, which provides that the Commission may prepare guidelines to indicate its policy approach to any matter within its jurisdiction in terms of the Competition Act.¹⁷⁵

The guidelines were published for public comment and a number of stakeholders provided the Commission with their input and comment with regard to the guidelines. A second version of the guidelines was published for further comment in the Government Gazette of 22 December 2015 and it was indicated that this version was the final draft for comments.¹⁷⁶ It is not yet clear when these guidelines will come into effect.

2. OBJECT AND PURPOSE OF THE DRAFT GUIDELINES

The Public Interest Guidelines commence with the statement that in the preamble to the Competition Act, it is acknowledged that more South Africans should participate in the country’s economy and that a resourceful, competitive commercial environment, balancing the interest of workers, owners and consumers and dedicated to development, will favour all South Africans.¹⁷⁷ It is pointed out that there were a number of cases dealt with by the competition authorities which caused debates regarding the assessment standard for public interest issues and that even

¹⁷⁵ Section 79(1) of the Competition Act 89 of 1998.

¹⁷⁶ Government Gazette of the Republic of South Africa, Vol. 606, 22 December 2015, No.39560.

¹⁷⁷ Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 3, www.compcom.co.za, [accessed on 23 January 2016].

though the CAC and the Tribunal gave important guidance in certain areas of public interest considerations, there is still a large area in Competition Law that remains undeveloped.¹⁷⁸ The Commission indicated that it found that parties to merger proceedings often failed to provide enough information in respect of public interest grounds, specifically relating to the effect the merger might have on employment.¹⁷⁹ This resulted in delays to the Commission's assessment of the merger, as further information have to be obtained.¹⁸⁰ The Guidelines thus seek to offer assistance regarding the Commission's analysis of mergers by indicating the approach the Commission is likely going to follow and by indicating the information that the Commission may need when assessing the public interest considerations in terms of section 12A(3) of the Act.¹⁸¹

This paper will refer to both the first version draft guidelines, published on 23 January 2015 and to the final version of the Guidelines published in the Government Gazette of 22 December 2015 to illustrate the changes the Commission made, taking into account the stakeholders' comment on the first version of the guidelines. Due to space constraints and also because it is essentially a refinement of the first guidelines, the final version of the Guidelines will be discussed in more detail.

3. GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO 89 OF 1998 (AS AMENDED): FIRST VERSION PUBLISHED ON 23 JANUARY 2015

3.1 General approach to assessing public interest provisions

As indicated, the Guidelines provide for a general approach that the Commission will adopt when assessing each of the public interest provisions. It stated that the

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Competition Commission, "Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)", 21 December 2015, p. 4, www.compcom.co.za, [accessed on 23 January 2016].

Commission will generally take the following steps in their evaluation of a proposed merger:¹⁸²

- a. It will determine the likely effect of the merger on the public interest;
- b. Thereafter it will determine whether such effect on a specific public interest is a result of that merger or is “merger specific”. In other words, is there a sufficient casual nexus between the merger and the alleged effect;
- c. Subsequently it will be determined whether these affects are substantial;
- d. Afterwards it will consider whether the merging parties can justify the likely effect on the particular public interest; and
- e. Finally the Commission will consider possible remedies to address any likely negative effect on the public interest.

The Commission indicated that , in applying the general approach, where an effect is found to be non-merger specific, the enquiry should stop at that stage. Where an effect is found to be merger specific but not substantial it is indicated that the enquiry should stop at that stage; subsequently there is no need for parties to justify an effect that is not substantial.¹⁸³ The Guidelines provide for three possible scenarios in the general approach. Firstly, in the first line of public interest enquiry following from a negative competition finding, the Commission will consider what the effects are. In the event of the merger having positive effects on public interest, the Commission will assess whether the claimed positive effects are merger specific and substantial such that the claimed positive effects could outweigh the negative competition effects. In this instance, the merging parties will have to justify the substantial positive effects on public interest. This will be followed by a balancing of the negative competition effects and the positive public interest effects. Secondly, in the event that the competition finding is negative and the public interest effect is negative, the Commission will consider whether these are merger specific and substantial. In this case, the Commission would consider the prohibition of the merger. Thirdly, in the second line of enquiry following from a positive competition finding, the Commission will determine whether the public interest effects are positive, negative or neutral. In

¹⁸² Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 23 January 2015, p. 9, www.compcom.co.za, [accessed on 23 January 2016].

¹⁸³ Ibid.

the event that the public interest effects are positive, the enquiry will stop. However, should the public interest effects be negative, the Commission will proceed to determine whether these are merger specific, substantial and justifiable. Where the public interest effect is neutral, the Commission will consider what the negative and positive effects are and balance these. The Commission will also determine whether these are merger specific and substantial.¹⁸⁴

4. COMMENT RECEIVED FROM VARIOUS ROLE PLAYERS IN RESPECT OF THE DRAFT GUIDELINES

Since publication of the initial draft guidelines, the Commission has received comment thereto from a number of role players in the competition industry. A selected number of these comments will be dealt with below:

4.1 Comments by Tabacks Attorneys (“Tabacks”)

Three concerns regarding the initial guidelines were raised; the first being that the guidelines appeared to pursue particular pre-determined outcomes. Reference was made to the Tribunal’s decision in the merger between *Wal-Mart Stores and Massmart Holdings Limited*¹⁸⁵ that stated: “Our [competition authorities] job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction....”¹⁸⁶

Tabacks was of the opinion that the guidelines were drafted with specific focus to use mergers and public policy as an instrument for resolving the high unemployment rates in the country,¹⁸⁷ while the Tribunal recorded that “protecting existing rights is legitimate, creating new rights is beyond our competence.”¹⁸⁸ In conclusion to their first submission Tabacks stressed that when the Commission considers public policy in relation to labour matters, it should be done to protect existing labour rights, rather

¹⁸⁴ Ibid, p.10.

¹⁸⁵ 73/LM/Dec10.

¹⁸⁶ *Wal-Mart Stores and Massmart Holdings Limited* 73/LM/Dec10, par 32, p. 11.

¹⁸⁷ Tabacks Attorneys, “Submissions on the guidelines for the assessment of public interest provisions in merger regulation”, 20 February 2015, p. 2, www.compcom.co.za, [accessed on 5 February 2016].

¹⁸⁸ *Wal-Mart Stores and Massmart Holdings Limited* 73/LM/Dec10, par 68, p. 34.

than attempting to expand labour rights and that they should develop a competitive economic environment where the interest of owners, consumers, and (not solely) the interest of the workers are taken into account.¹⁸⁹

The second concern raised was that the guidelines did not reflect the Commission's independence. Reference was made to *Hulett Group Ltd and Transvaal Suiker Bpk*¹⁹⁰ where it was held that in order for the Commission to promote a competitive environment, the Commission is required to be an independent competition regulator that encourages a "... credible competition law, and effective structures to administer that law..".¹⁹¹

Thirdly it was noted that the guidelines impose a substantial obligation on merging parties in that it include 80 separate steps for analysis that require merging parties to expand on existing public policy considerations in merger notification.¹⁹² According to Tabacks, the initial guidelines added at least three additional dimensions to the public policy consideration by creating a rebuttable presumption that mergers are originally contrary to public interest and subsequently the parties carry the onus of discharging this presumption from the moment that the idea to merge is considered.¹⁹³ They submitted that discharging this onus would result in increased costs of merger notification in that public policy is a multifaceted matter that would require additional hours of legal and economic input based on these guidelines. Subsequently, public policy debates would arise and merging parties would be defending their submissions as opposed to encouraging engagement between the parties and the Commission.¹⁹⁴

¹⁸⁹ Tabacks Attorneys, "Submissions on the guidelines for the assessment of public interest provisions in merger regulation", 20 February 2015, p. 3 www.compcom.co.za [accessed on 5 February 2016].

¹⁹⁰ *Hulett Group Ltd and Transvaal Suiker Bpk* 83/LM/Jul00,

¹⁹¹ Tabacks Attorneys, "Submissions on the guidelines for the assessment of public interest provisions in merger regulation", 20 February 2015, p. 4 www.compcom.co.za [accessed on 5 February 2016].

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid p. 5.

4.2 Comments by Baker & Mckenzie

The law firm Baker and Mckenzie generally submitted that caution should be exercised to ensure that the guidelines are not over-emphasised to the detriment of healthy economic activity, competition and ultimately consumers.¹⁹⁵ They further submitted that a comparative approach should be followed with reference to anti-trust jurisdictions where public interest considerations are not regarded as superior to the benefits of merger activity and the promotion of competition.¹⁹⁶

4.3 Comments by the South African Property Owners Association (“SAPAO”)

SAPAO submitted that the general approach to assessing the public interest provisions is based on whether these effects are substantial; this is incorporated in Step 3 of the different approaches pertaining to each of the public interest considerations. SAPAO highlighted that the word “substantial” has not been defined and subsequently it is unknown what interpretation competition authorities will follow as set standard, whether a narrow or a wide interpretation.¹⁹⁷ SAPOA submitted that a wide interpretation should rather be followed as it would have more favourable support. Furthermore, it was pointed out that when public interest grounds are considered, a balanced approach is required which would ensure that the objectives of the Competition Act are reached but also ensure that mergers which could be advantageous for the economy are not compromised.¹⁹⁸ In relation to employment, SAPAO recorded that the competition authorities should consider the long term benefits of a merger, given that the economy is likely to benefit in the future from the merger by creating more job opportunities. According to SAPAO realisation of employment opportunities must encompass the strategies of business as well as long term desired outcomes.¹⁹⁹ The last concern raised by SAPAO was that justification of public interest in respect of merger evaluation must be considered

¹⁹⁵ Baker & Mckenzie, “Submission of comments in respect of the draft guidelines on the assessment of public interest provisions in merger regulation”, undated, p. 1, www.compcom.co.za, [accessed on 5 February 2016].

¹⁹⁶ Ibid p. 2.

¹⁹⁷ SAPAO Submission document, “Draft guidelines in the assessment of public interest provisions in merger regulation”, undated, p 2, www.compcom.co.za, [accessed on 5 February 2016].

¹⁹⁸ Ibid p. 3.

¹⁹⁹ Ibid p. 3.

within reason and realistic parameters must be set in order for a defined analysis of efficiency gains²⁰⁰ of a merger to be assessed and policy requirements to be met.²⁰¹

4.4 Comments by Bowman Gilfillan

A number of general comments by Bowman Gilfillan Attorneys were brought to the attention of the Commission, the first being that the guidelines are non-binding on the Commission as provided in section 79 of the Act. However these guidelines provide for a wide discretion in the application thereof, according to the general methodology set out in the guidelines. On the other hand, the objective of the draft guidelines is to “promote guidance in the Commission’s approach to analysing mergers by indicating the approach that the Commission is likely to follow.”²⁰² Bowman Gilfillan submitted that the non-binding nature of the guidelines, together with the wide discretion given to the Commission, may contradict the stated goal of indicating the approach the Commission is likely to follow in assessing the public interest grounds. They proposed that the five-step general approach to assessing public interest provisions and the specific approach to evaluating each of the public interest grounds respectively, should be made more “concrete” in the interest of objectivity and certainty.²⁰³ They stated further that it is unclear as to what would constitute a justification raised by the merging parties in relation to negative public interest effects and requested the Commission to clearly communicate their views in this regard.²⁰⁴

The Commission took into consideration the comments they received to the first version of the Guidelines and proceeded to publish the final version for public comment in the Government Gazette of 22 December 2015, which will be discussed in more detail below.

²⁰⁰ In essence, any conduct that lessens competition, but that allows for the better utilisation of a firm’s resources, or for production at lower cost, or that encourages innovation, qualifies as efficiency enhancing conduct. Neuhoff M (ed), Neuhoff M et al, *A practical guide to the South African Competition Act*, 2006, p. 54.

²⁰¹ SAPAO Submission document, “Draft guidelines in the assessment of public interest provisions in merger regulation”, undated, p. 3, www.compcom.co.za, [accessed on 5 February 2016].

²⁰² Bowman Gilfillan, “Public comments on draft guidelines on the assessment of public interest provisions in merger regulation”, 18 March 2015, p. 2, www.compcom.co.za [accessed on 5 February 2016].

²⁰³ Ibid p. 2.

²⁰⁴ Ibid p. 3.

5. GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO 89 OF 1998 (AS AMENDED): FINAL VERSION FOR COMMENT PUBLISHED IN THE GOVERNMENT GAZETTE OF 22 DECEMBER 2015

One of the first amendments to the final version for public comment was the inclusion of two further terms in the definition of the Guidelines, namely, “Negative competition finding” and “Positive competition finding”.²⁰⁵ No definition was however included for “substantial”, being one of the comments made by SAPAO. The final version of the Guidelines will be discussed in more detail below.

5.1 General approach to assessing public interest provisions

The general approach was slightly amended in relation to the first version. It stated that the Commission will generally take the following steps in their evaluation of a proposed merger:²⁰⁶

- a. It will determine the likely effect of the merger on the listed public interest grounds;
- b. Thereafter it will determine whether such effect, if any, is “merger specific”. (The Guidelines explain that the concept “merger specific” or “merger specific effect” is a public interest effect that is casually related to, or results or arises from, the merger);
- c. Subsequently it will be determined whether such effect, if any, is substantial;
- d. In the first line of enquiry referred to above, the Commission will substantiate the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may result in the approval of the merger, with or without conditions; and

²⁰⁵ “Negative competition finding” means a finding that a merger is likely to lead to a substantial prevention or lessening of competition and “Positive competition finding” means a finding that a merger is not likely to lead to a substantial prevention or lessening of competition, Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 2, www.compcom.co.za, [accessed on 23 January 2016]

²⁰⁶ Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 7, www.compcom.co.za, [accessed on 23 January 2016].

- e. The Commission will consider possible remedies to address the substantial negative public interest effect.

Should it be found that an effect is non-merger specific, the enquiry will usually stop at that stage; the same will happen where an effect is found to be merger specific but not substantial.²⁰⁷ The Guidelines make further provision for three possible scenarios:²⁰⁸

Scenario one: In the event that a merger is to be found to have a negative impact on competition, the Commission will take into account how public interest grounds are affected. Should the proposed merger, despite its negative effect on competition, have a positive effect on public interest, the Commission will assess whether the alleged positive effects are merger specific and substantial in that the alleged positive effects could justify the approval of the anti-competitive merger. In this case, the merging parties will be given the opportunity to substantiate the substantial positive effects on public interest.

Scenario two: In the event that the proposed merger does not have a negative effect on competition, the Commission will determine what the public interest effects of the merger are. Should the public interest effects be positive, then the enquiry will stop and the Commission will likely approve the merger without imposing any conditions.

Scenario three: Following from a positive competition finding and in the event that the public interest effects are negative; the Commission will proceed to determine whether these effects are merger specific and substantial. If so, the merging parties will be given an opportunity to furnish arguments and information to justify any substantial negative public interest arising from the merger and, if successful, this may lead to the approval of the merger. Should the arguments however fail to justify the negative public interest effects and approval of the merger, the Commission may consider imposing remedies or prohibiting the merger depending on the substantiality of the public interest effects.²⁰⁹

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid p. 8.

5.2 Specific approaches followed pertaining to each of the four public interest grounds provided for in the Act

For each of the public interest grounds provided for in the Act, the guidelines specify a different analysis that the Commission will perform when evaluating a proposed merger. All four approaches will be set out below.

5.2.1 The effect on a particular industrial sector or region

In this instance, the Guidelines provide that the Commission will take into account the entire value chain within the relevant sector or region. The following analysis will be performed:²¹⁰

- As a first step the Commission will determine the likely effect of the merger on the industrial sector or region;
- Step two will entail a determination of whether the likely effect on the industrial sector or region is merger specific;
- The third step will be to determine whether the likely effect on the industrial sector or region is substantial;
- Step four: in the first line of enquiry referred to above, the Commission will substantiate the likely positive effects to justify the approval of the merger or provide information or arguments on whether the likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions; and
- As a fifth step the Commission will consider possible remedies to address the substantial negative public interest effect on the industrial sector or region.”

5.2.2 The effect on employment

In terms of the Guidelines the Commission will undertake the following analysis when a proposed merger’s effects on employment need to be considered:²¹¹

²¹⁰ Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 9, www.compcom.co.za, [accessed on 23 January 2016].

- As a first step it will determine the likely effect of the merger on employment;
- Step two will entail a determination of whether any identified effect on employment is specific to the proposed merger;
- Step three will be to determine whether the likely effect on employment is substantial;
- Step four entails that in the first line of enquiry referred to above, substantiate the likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions; and
- The fifth step will be to consider possible remedies to address the likely substantial negative effect on employment.

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

Generally, the Commission will take into account the ability of small businesses (“SMEs”), or firms controlled or owned by historically disadvantaged persons (“HDIs”), to become competitive in assessing a proposed merger, by following the approach below:²¹²

- Step one will be to determine the likely effect of the merger on the ability of SMEs and HDIs to become competitive;
- Step two will be to determine whether any identified effect on the ability of SMEs and HDIs to become competitive is specific to the proposed merger;
- Step three will be to determine whether the likely effect of the merger on the ability of SMEs and HDIs to become competitive is substantial;
- Step four will entail that in the first line of enquiry referred to above, the Commission will substantiate the likely positive effects of the merger to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions;

²¹¹ Ibid p. 13.

²¹² Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 25, www.compcom.co.za, [accessed on 23 January 2016].

- Step five will be to consider possible remedies to address the likely substantial negative or positive effect on the ability of SMEs and HDIs to become competitive.

5.2.4 The ability of national industries to compete in international markets

When assessing arguments in support of this public interest ground, the Commission will follow the process below:²¹³

- Step one will be to determine the likely effect on the ability of national industries to compete in international markets;
- Step two will be to determine whether the likely effect on the ability of national industries to compete is merger specific;
- Step three will be to determine whether the likely effect on the ability of national industries to compete is substantial;
- Step four will entail that in the first line of enquiry referred to above, the Commission will substantiate the likely positive effects to justify the approval of the merger or the Commission will determine whether a likely negative effect in the second line of enquiry can be justified which may lead to the approval of the merger, with or without conditions; and
- Step five will be to consider possible remedies to address the substantial negative public interest effect on the ability of national industries to compete in international markets.”

The Commission concedes that these Guidelines present a broad approach that would be followed in assessing public interest issues in merger analysis. However, it points out that these Guidelines do not take away the discretion of the Commission to consider other factors on a case-by-case basis, if necessary.²¹⁴

²¹³ Ibid p. 29.

²¹⁴ Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, p. 33, www.compcom.co.za, [accessed on 23 January 2016]. The Commission does not state what these other factors are. As the Act currently contains a closed list of public interest factors it is submitted that these “other factors” must be interpreted to refer to factors other than public interest factors.

6. CONCLUSION

From the comments discussed above, it is clear that the commentators want the Commission to keep in mind its independence and the reason for its establishment and not to get carried away by the public interest mandate imposed by the Competition Act in the context of merger regulation. While public interest concerns are explicitly incorporated into the merger assessment process by the provision that is made for it in the Competition Act, it is recognised that they should be interpreted cautiously, and that the role of other policy initiatives in promoting those public interest objectives may be far more important than that of competition policy and law.²¹⁵ Attention should be drawn to the specific wording used in the preface of the Guidelines, specifically paragraph 1.2 which states that:

“These guidelines seek to provide guidance on the Commission’s approach to analysing mergers by indicating the approach that the Commission is *likely* to follow and the types of information that the Commission *may* require when evaluating public interest grounds in terms of section 12A(3) of the Act.” (*own emphasis*)

It is submitted that the interpretation of the word “likely” and “may” above do not offer any certainty as to whether the Commission will and must follow the approach as set out in the Guidelines. The next paragraph of the preface makes provision for the Commission’s discretion to request information, or assessing other factors not indicated in the Guidelines, on a case-by-case basis.²¹⁶ It is submitted that the preface of the Guidelines,²¹⁷ results in a contradiction between the illustration of the approach that the Commission is likely to follow, but also in providing for the Commission’s discretion to take into account other factors not stipulated in the Guidelines.

With specific reference to scenario one in paragraph 5.1 above, where an anti-competitive merger may be approved on public interest grounds, one must ask the question whether this approach does not defy the rationale of competition law, which

²¹⁵ Hartzenberg T, “Competition policy and enterprise development: The role of public interest objectives in South Africa’s competition policy”, August 2004, p. 28, <http://citeseerxist.psu.edu/viewdoc/summary?doi=10.1.1.201.1> [accessed on 17 December 2015].

²¹⁶ Competition Commission, “Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No 89 of 1998 (as amended)”, 21 December 2015, par 1.3, p. 1, www.compcom.co.za, [accessed on 23 January 2016].

²¹⁷ *Ibid*, par 1.2 and 1.3, p. 1

in essence is the aim to ensure and sustain a market where vigorous – but fair – competition will result in the most efficient allocation of economic resources and the production of goods and services at the lowest price.²¹⁸ It will thus be interesting to see how merger evaluation will progress when the guidelines become effective on the date still to be announced.

Another aspect that one may infer from the proposed issuing of the public interest guidelines is that Government is not likely to remove the public interest considerations from the ambit of merger regulation but rather that it is intent on strengthening the application of these considerations by allowing the issue of the proposed guidelines.

²¹⁸ Neuhoff M (ed), Neuhoff M *et al*, *A practical guide to the South African Competition Act*, 2006, p. 12.

CHAPTER 4

COMPARATIVE ANALYSIS

1. INTRODUCTION

No consideration of the public interest factors in the context of merger regulation is complete without enquiring whether South Africa is unique in containing these factors in its competition legislation or whether there are other countries that follow a similar approach. As indicated in Chapter One, the initial development of South Africa's competition policy has occurred in the historical context where white minority controlled the country and the economy.²¹⁹ Over the years, the gaping wealth between the white minority and the black majority increased as black people were denied access to the same standard of education as white people or the opportunity to effectively participate economically with white-owned and controlled companies, to name but a few ill effects of this regime.²²⁰ The Competition Act has played an important role in industrial and social policy. It was not only envisioned to address competition issues but was also drafted as an instrument to reform industry in South Africa and to meet rights of previously disadvantaged communities, small businesses and labour.²²¹ Due to South Africa's political and socio-economic history, and its status as a developing country, public interest plays a more vital role in South African competition law in comparison to competition law of developed nations such as United States of America or the United Kingdom.²²² Public interest will frequently play a more significant role in the competition laws of developing countries than in that of developed countries.²²³ It is accordingly submitted that comparing the role of public interest in South African competition law with that of another developing country, instead of comparing it with the role of public interest in a developed

²¹⁹ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 52.

²²⁰ Ibid.

²²¹ Brassey M (ed), Campbell J *et al*, *Competition Law*, 2002, p. 88.

²²² Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 51.

²²³ Ibid.

country that does not have dire socio-economic problems such as unemployment that require to be addressed, would contribute significantly to assessing the role of public interest in a developing country such as South Africa. A further analysis thus continues below so as to highlight why such importance has been accorded to the public interest in the South African Competition Act, by way of a comparative study between competition policy in three developing countries, South Africa, Brazil and Kenya.

2. SOUTH AFRICA

The Competition Act²²⁴ is tailored in a way that it seeks to provide a platform for increasing the participation by the disempowered in the economy. Although the public interest grounds as provided for in the Act have not been incorporated to benefit only the black population, the majority of the people it influences will be black, due to black people being the majority of South Africa's population²²⁵ and the Act specifically targets the promotion of the interests of historically disadvantaged persons.²²⁶ Competition policy thus became the policy option for the regulation and development of enterprise to increase the economic opportunities and participation in the formal economy of black South Africans.²²⁷ Hartzenberg remarks that the most distinctive pillar of the public interest in South African competition legislation is empowering historically disadvantaged persons and it is in this respect that the Act repeats the focus in the South African Constitution on full and equal enjoyment of all rights and freedoms, and enshrines the economic empowerment of black persons in South Africa.²²⁸ The well-known competition law scholar Professor Eleanor Fox considered the role of equality in South Africa's competition law and stated that "until the disempowered fully participate in the economy, the efficiency potential of the

²²⁴ Competition Act 89 of 1998.

²²⁵ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 53.

²²⁶ See section 12A(3)(c) of the Competition Act 89 of 1998 as an example.

²²⁷ Hartzenberg T, "Competition Policy and Enterprise Development: the role of public interest in objectives in South Africa's competition policy", p. 7, <http://citeseerxistpsu.edu/viewdoc/summary?doi=10.1.1.201.1> [accessed on 12 December 2015].

²²⁸ *Ibid* p. 13.

nation is not likely to be realised”.²²⁹ Her argument is that competition laws may be personalised to fit environments, particularly in developing countries where a part of the population is disempowered and denied access to participation in the economy.²³⁰ Fox’s view that competition laws of a country should be tailored to fit its background can be agreed with.

World Economic Situation and Prospects (“WESP”) classifies all countries of the world into one of three broad categories namely developed economies, economies in transition and developing countries. Countries are classified by their level of development as measured by per capita gross national income (“GNI”) and subsequently countries are being grouped as high income, upper middle income, lower middle income and low-income.²³¹ The threshold levels of GNI per capita are established by the World Bank. Countries with less than \$1005 GNI per capita are classified as low-income countries, those with between \$1 006 and \$3 975 as lower middle income countries, those with between \$3 976 and \$12 275 as upper middle income countries, and those with income more than \$12 276 as high-income countries.²³² According to WESP, Brazil and Kenya were each categorised as a developing economy, just like South Africa,²³³ where Brazil and South Africa were classified as upper middle income economies per capita GNI in 2011 and Kenya classified as a low-income economy per capita GNI in 2011.²³⁴

The question that arises however is whether the approach towards public interest in South African competition legislation is appropriate and whether we have something to learn from the approaches taken by other developing countries with regards to public interest and its interaction with and role in

²²⁹ Fox E.M, “Equality, Discrimination, and Competition law: Lessons from and for South Africa and Indonesia” (2000) 41 Harvard International Law Journal, 579, p. 593.

²³⁰ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 52.

²³¹ World Economic Situation and Prospects 2015, Hong P (Director), Update as of mid-2015, p. 132

²³² Ibid.

²³³ Ibid, p. 135.

²³⁴ Ibid, p. 137.

competition law. Hence the general role of public interest in another developing jurisdiction, namely that of Brazil, will now be discussed.

3. BRAZIL

3.1 Introduction

Nearly all Latin American countries have competition laws and agencies to enforce them. However these laws and agencies are relatively young. Competition policy is a tool to overcome anti-market traditions in Latin America.²³⁵ These traditions rooted in the competition law, which was enacted in 1994. The problems facing competition law in Brazil were, *inter alia*, the unproductive manner in which the three separate competition authorities coordinated their activities, the delay in finalisation of investigations where too many resources were dedicated to merger review, where the majority of mergers posed no threats to competition, where little attention was paid to prosecuting hard core cartels. Further to this, the competition authorities suffered from insufficient resources and disproportionate rates of staff turnover.²³⁶ In a relatively short time, Brazil has however become the greatest success story of competition policy in the region.²³⁷

The preamble of the Federative Republic of Brazil Constitution, 1988, states the following:

“We the representatives of the Brazilian People, convened in the National Constituent Assembly to institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes, promulgate,

²³⁵ Fox E.M and Sokol D.D, “Introduction” Fox E.M and Sokol D.D (ed), *Competition law and policy in Latin America*, 2009, 1, p. 2.

²³⁶ OECD Peer Review, Clark J, *Competition Law and Policy in Brazil*, 2010, p. 9.

²³⁷ *Ibid*, p. 4.

under the protection of God, this CONSTITUTION OF THE FEDERATIVE REPUBLIC OF BRAZIL.”

Article 1 of the Brazilian Constitution²³⁸ further provides that:

“The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:

1. sovereignty;
2. citizenship;
3. the dignity of the human person;
4. the social values of labour and of the free enterprise;
5. political pluralism.”

The Brazilian Congress approved a new competition bill on 5 October 2011. On 30 November 2011, the Brazilian president, Dilma Rouseff, formally legislated Law 12.529 (“Law 12.529”),²³⁹ the New Brazilian Competition Law,²⁴⁰ which became effective on 29 May 2012, replacing Law 8.884 (“Law 8.884”),²⁴¹ which was enacted in 1994.²⁴²

Law 12.529 presented various changes to the Brazilian antitrust legislation in order to promote its transparency and the efficiency of its competition regime.²⁴³ Casagrande and Neto stated that Law 12.529 aimed to tackle the merger review regime, which was probably the most difficult to address, the previous competition legislation, recognised a non-suspensory regime in Brazil in that parties were allowed to close a transaction prior to the competition authority

²³⁸ Art 1 of the Constitution of the Federal Republic of Brazil, 1988.

²³⁹ Law no 12.529 of November 30, 2011.

²⁴⁰ Casagrande P.L and Da Silva Pereira Neto M, “Merger control under the New Brazilian Competition Law”, <http://www.competitionpolicyinternational.com/merger-control-under-the-new-brazilian-competition-law/> [accessed on 24 March 2016].

²⁴¹ Brazilian Antitrust Law, Law No 8.884/94 of June 11, 1994.

²⁴² Casagrande P.L and Da Silva Pereira Neto M, “Merger control under the New Brazilian Competition Law”, <http://www.competitionpolicyinternational.com/merger-control-under-the-new-brazilian-competition-law/> [accessed on 24 March 2016].

²⁴³ Pavon-Villamayor V, “Merger Control Reform in Brazil”, <http://www.competitionpolicyinternational.com/merger-control-reform-in-brazil/> [accessed on 24 March 2016].

deciding on the matter.²⁴⁴ This meant that a merger between firms may be concluded without the approval of the competition authorities, irrespective of whether the proposed merger would have been allowed or even prohibited. This being unusual compared to most jurisdictions, it also brought significant challenges to the authorities and many uncertainties to merging parties, especially in complicated transactions.²⁴⁵ Three changes were central to the reform, namely: the introduction of a pre-merger review system, the implementation of new notification thresholds and the allocation of merger review responsibilities to a single authority.²⁴⁶

3.2 Competition authorities in Brazil's competition law

Prior to the enactment of Law 12.529 the Brazilian competition regime distributed responsibilities between three agencies. The Economic Law Secretariat of the Ministry of Justice ("SDE") was the principal investigative body in matters related to anti-competitive practices. The Administrative Council for Economic Defense ("CADE") was the administrative tribunal, making conclusive decisions in relation to anti-competitive practices and merger review.²⁴⁷ The Secretariat of Economic Monitoring of the Ministry of Finance ("SEAE") was responsible for drawing up a non-binding economic opinion and had fact-finding powers, including requesting of data and documents from the parties and/or third parties.²⁴⁸

Since enactment of Law 12.529, the SEAE has been tasked to issue opinions on legislative proposals; this function was normally carried out only at the request from the Ministry of Finance. Furthermore, the SEAE was given a role in reviewing existing laws and regulations at the federal, state, municipality and

²⁴⁴ Casagrande P.L and Da Silva Pereira Neto M, "Merger control under the New Brazilian Competition Law", <http://www.competitionpolicyinternational.com/merger-control-under-the-new-brazilian-competition-law/> [accessed on 24 March 2016].

²⁴⁵ Ibid.

²⁴⁶ Pavon-Villamayor V, "Merger Control Reform in Brazil", <http://www.competitionpolicyinternational.com/merger-control-reform-in-brazil/> [accessed on 24 March 2016].

²⁴⁷ OECD Peer Review, Follow-up to the nine peer reviews of competition law and policy of Latin American countries: Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru, 2012, p. 39.

²⁴⁸ De ArrudaSampaio O.C and De ArrudaSampaio A.C, "Brazil", Bellis J, Elliott P, Van Beal and Bellis (ed), *Merger Control: Jurisdictional comparisons*, 2011, 69, p. 70.

federal district levels²⁴⁹ and participates in the legislative-making process by issuing opinions for changes to draft laws in the case of regulated sectors.²⁵⁰ The SEAE is further required to study the evaluation of competition in various sectors of the Brazilian economy, at its own decision or at the request of the CADE, the Consumer Rights Department or the Ministry of Justice. A newsletter, monitoring the indices for particular sectors, is also produced every month by the SEAE.²⁵¹

3.3 Brazil's competition policy in respect of merger evaluation

The Brazilian Antitrust Law²⁵² does not provide for specific objectives that the Act seeks to achieve. Instead, it lists in general and vague terms, a particular object in article 1:

“This Law structures the Brazilian System for Protection of Competition – SBDC and sets forth preventative measures and sanctions for violations against the economic order, guided by the constitutional principles of free competition, freedom of initiative, social role of property, consumer protection and prevention of the abuse of economic power.”

It further indicates that “The People are the holders of the legal interest protected by this Law.”²⁵³ In comparison with section 2 of the South African Competition Act,²⁵⁴ which lists specific objectives namely, “to promote the efficiency, adaptability and development of the economy”,²⁵⁵ “to promote employment and advance the social and economic welfare of South Africans”²⁵⁶ and “to promote a greater spread of ownership, in particular to increase the ownership stakes of

²⁴⁹ OECD Peer Review, *Follow-up to the nine peer reviews of competition law and policy of Latin American countries: Argentina, Brazil, Chile, Colombia, El Salvador, Honduras, Mexico, Panama and Peru*, 2012, p. 39.

²⁵⁰ Ibid p. 37.

²⁵¹ Ibid p. 38.

²⁵² Law no 12.529 of November 30, 2011.

²⁵³ Art 1 of Law no 12.529 of November 30, 2011.

²⁵⁴ Competition Act, 89 of 1998.

²⁵⁵ Sec 2(a) of the Competition Act, 89 of 1998.

²⁵⁶ Sec 2(c) of the Competition Act, 89 of 1998.

historically disadvantaged persons”,²⁵⁷ article 1 of the Brazilian Competition legislation refers to broad constitutional principles contained in the Federal Constitution of Brazil.²⁵⁸ These principles are found in article 170 of the Brazilian Constitution,²⁵⁹ pertaining to all economic activity within Brazil. The Brazilian Constitution states that:

“The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

1. national sovereignty;
2. private property;
3. the social function of property;
4. free competition;
5. consumer protection;
6. environment protection;
7. reduction of regional and social differences;
8. pursuit of full employment;
9. preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil.”

It further provides that “Free exercise of any economic activity is ensured to everyone regardless of authorisation from government agencies, except in the cases set forth by law.”

These principles provide some guidance on the competition law in Brazil, but the specific objectives are no clearer.²⁶⁰ On the one hand, these principles echo “public interest” goals, i.e. employment and preferential treatment of small enterprises, but it also mirrors traditional market-economy goals by emphasis on

²⁵⁷ Sec 2(f) of the Competition Act, 89 of 1998.

²⁵⁸ Constitution of the Federal Republic of Brazil, 1988.

²⁵⁹ Ibid.

²⁶⁰ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 63.

private property.²⁶¹ Article 173, paragraph 4 of the Federal Constitution provides that: “The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits.”

It appears that competition law in Brazil pursues the enhancement of consumer welfare by curbing abuses of economic power which may result in market dominance, to the detriment of consumers, elimination of competition to the detriment of consumers and the arbitrary increase of profit to the detriment of consumers.²⁶² Furthermore, the preamble of article 170 is evidence of Brazilian competition law seeking to balance free enterprise with concerns of social justice.²⁶³

This paper now turns to consider the extent to which Brazil includes public interest objectives in merger evaluation. Article 88 (§ 5) and (§ 6) of Chapter 1 under Title VII, dealing with Concentration Acts of Brazilian Antitrust Law,²⁶⁴ mergers, provides as follows:

“§ 5 The concentration acts involving elimination of competition in a substantial portion of the relevant market, which could create or strengthen a dominant position or that can result in the domination of the relevant market of goods or services shall be prohibited, except as set forth in § 6 of this article.

§ 6 states that “The acts referred to in § 5 of this Article may be permitted, provided they are within the limits strictly necessary to achieve the following objectives:

I – cumulatively or alternatively:

- a) increase productivity or competitiveness;
 - b) improve the quality of goods or services; or
 - c) encourage efficiency and technological or economic development;
- and

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid

²⁶⁴ Law no 12.529 of November 30, 2011.

II – a relevant part of the resulting benefits are transferred to consumers.”

Further to article 88 above, vertical and horizontal mergers are reviewed based on objective criteria set out in the Brazilian Horizontal Merger Guidelines. The purpose of these Guidelines, which were released by SEAE and the SDE in 2001, is to provide greater clarity to market players with regard to applicable rules which they are bound by.²⁶⁵ No revised merger guidelines were issued after the enactment of the Brazilian Antitrust Law²⁶⁶. CADE has been taking into account the case law and regulations under the previous law, including the SDE and SEAE Horizontal Merger Guidelines, which set forth a traditional merger analysis.²⁶⁷ The procedure followed by SEAE and SDE for the analysis of mergers will consist of five main stages, namely:²⁶⁸

Step One: This step entails definition of the relevant market.

Step Two: During this step there will be a determination of the market share that is under the control of the petitioning firms. The transactions that do not generate control of a sufficiently large share of the market will obtain a favourable opinion from SEAE and SDE, without further analysis. Other transactions will be subject to the subsequent steps.

Step Three: This step entails examination of the probability of the exercise of market power. When the exercise of market power is not probable, the concentration will receive a favourable opinion. When the exercise of market power is probable, the concentration will be subject to investigation during Step Four as indicated below.

Step Four: Examination of the efficiencies generated by the transaction.

²⁶⁵ Gaban M.G, “Brazil”, Parr N and Hammon C (ed), *Merger Control*, 2011, 11, p. 13.

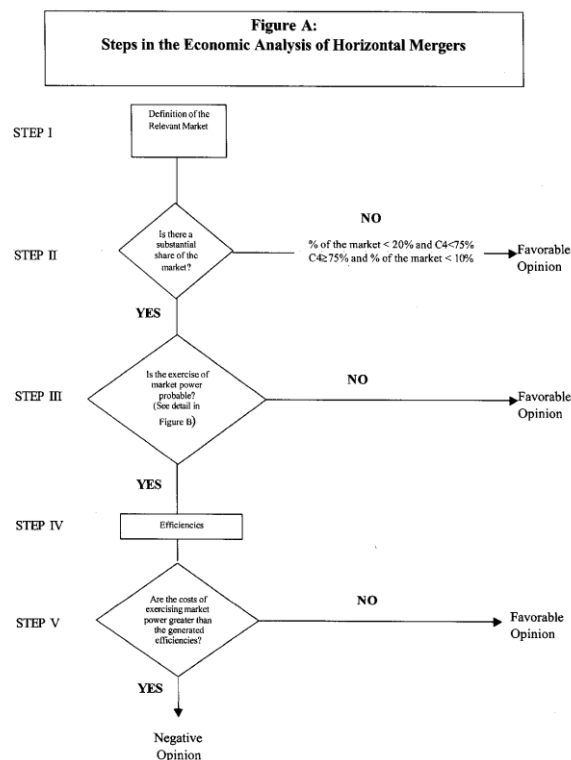
²⁶⁶ Law no 12.529 of November 30, 2011.

²⁶⁷ Faraco A.D, Martinez A.P and Taveres de Araujo M, “Merger Control 2016 Brazil”, <http://www.latinlawyer.com/reference/topics/54/jurisdictions/6/brazil> [accessed on 26 March 2016].

²⁶⁸ Joint Directive: Ministry of Finance and Ministry of Justice, Horizontal Merger Guidelines, par 25. www.cade.gov.br/internacional/Horizontal_Merger_Guidelines.pdf [accessed on 26 March 2016].

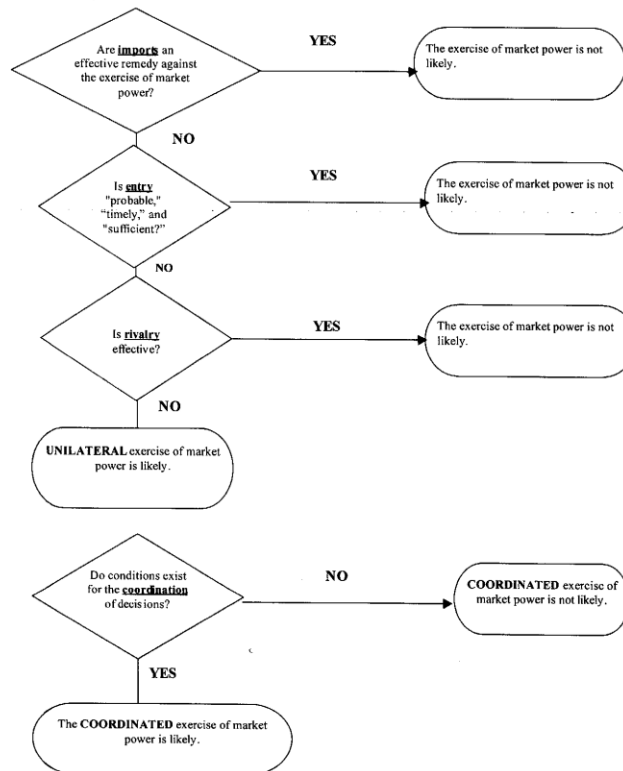
Step Five: This final step entails an evaluation of the relationship between costs and benefits arising from the merger and issuance of a final opinion on whether to approve, disapprove or approve the merger with conditions. If efficiencies are equal or greater than costs (a non-negative liquid effect) SDE and SEAE will issue an opinion approving the merger. If efficiencies are inferior to costs, the merger will not be allowed or will have its approval conditioned to the adoption of measures that are considered necessary.”

The following figures have been included to illustrate the abovementioned process as a whole (Figure A) and to illustrate Step Three in more detail (Figure B).²⁶⁹



²⁶⁹ Ibid, p. 6 – 7.

Figure B:
Detail of Step III – Exercise of Market Power



The Brazilian Horizontal Merger Guidelines, under Law 8.884, the previous competition legislation,²⁷⁰ together with the Brazilian Antitrust Law²⁷¹ indicate that, specifically in relation to merger evaluation, the competition authorities consider only traditional competition goals, and not the public interest, and in the event that the public interest is to be considered and plays a minor role in the evaluation process,²⁷² it is referred to only as the “effect on the economy as a whole” of the proposed merger.²⁷³

²⁷⁰ Joint Directive: Ministry of Finance and Ministry of Justice, Horizontal Merger Guidelines, www.cade.gov.br/internacional/Horizontal_Merger_Guidelines.pdf [accessed on 26 March 2016].

²⁷¹ Law no 12.529 of November 30, 2011.

²⁷² Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 66.

²⁷³ Joint Directive: Ministry of Finance and Ministry of Justice, Horizontal Merger Guidelines, par 23 www.cade.gov.br/internacional/Horizontal_Merger_Guidelines.pdf [accessed on 26 March 2016].

3.4 Contrasting Brazilian and South African competition laws

Whilst the objectives of Brazilian competition law are not explicitly provided for in the Brazilian Antitrust Law,²⁷⁴ the legislation reveal that the authorities consider traditional competition law goals and do not specifically take into account public interest objectives.²⁷⁵ Competition legislation and the competition practice environment in South Africa, however specifically recognises certain public interest grounds that are to be taken into account in merger evaluation.²⁷⁶ As discussed in Chapter 2 of this paper, South African competition authorities are required to evaluate a proposed merger in relation to its effect on public interest grounds, although the authorities have been cautious to approve or disapprove a merger on this basis only. The Brazilian competition authorities are also reluctant in this regard; the difference between the two countries herein is that Brazil's competition policy does not explicitly include any specific public interest objectives and rather refer to general principles enshrined in the Brazilian Constitution.²⁷⁷

A further comparative analysis of the role of public interest in competition law in Kenya will now be undertaken.

4. KENYA

4.1 Introduction

Kenya has enjoyed a history of economic leadership in East Africa as the biggest and most progressive economy in the region. Kenya is known as the transportation, communication and financial hub of East Africa and has now completely liberalised its economy by eliminating hurdles that previously

²⁷⁴ Law no 12.529 of November 30, 2011.

²⁷⁵ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p 66.

²⁷⁶ Ibid.

²⁷⁷ Ibid, p. 67.

hindered the free flow of trade and foreign private investment.²⁷⁸ These obstacles included exchange controls, import and export licensing and restrictions on remittances of profits and dividends; all of these hurdles no longer exist.²⁷⁹ The Economic Recovery Strategy for Wealth and Employment Creation was adopted in 2003 by the Government of Kenya, specifically the Ministry of Planning and National Development, which was intended to reverse years of slow and stagnant economic growth in the country undermining the well-being of Kenyans.²⁸⁰ The main purposes of this strategy was “job creation through sound macroeconomic policies, improved governance, efficient public service delivery, an enabling environment for the private sectors to do business, and through public investments and policies that reduce the cost of doing business”.²⁸¹ In a statement by the Minister for Planning and National Development, forming part of this strategy, he stated that during the past two decades, Kenya slid into a void of underdevelopment and bleakness, where poverty increased, unemployment increased, corruption and bad governance became rooted as political oppression weighed worryingly on the people.²⁸² It is submitted that the Kenyan government is faced with similar challenges as the ones facing South Africa and subsequently a comparative analysis of their respective competition laws will offer a greater insight to the importance of public interest in competition laws of developing economies.

4.2 History of competition law in Kenya

The Restrictive Trade Practices, Monopolies and Price Control Act (“the RCT Act”) came into operation on 1 February 1989,²⁸³ when the Kenyan economy started to move away from a price control regime, with significant state

²⁷⁸ COMESA, “Member States, Republic of Kenya”, www.comesa.int/ [accessed on 12 April 2016].

²⁷⁹ Ibid.

²⁸⁰ Ministry of Planning and National Development, Preamble of the Economic Recovery Strategy for Wealth and Employment Creation, Ministry of Planning and National Development, June 2003.

²⁸¹ Ibid.

²⁸² Ibid, p. v.

²⁸³ The Restrictive Trade Practices, Monopolies and Price Control Act, 1989, Cap 504 of the Laws of Kenya.

intervention to a market economy,²⁸⁴ realising the necessity of competition law.²⁸⁵ The preamble of the RCT Act stated the following:

“An Act of Parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and process and for connected purposes.”²⁸⁶

The RCT Act provided for the control of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and the control of mergers and takeovers.²⁸⁷ Yet, no reference was made to abuse of dominance and the RCT Act contained exemptions which excluded regulated sectors of the economy from the scope of competition law.²⁸⁸ The RCT Act covered three main areas. The first area was found in section 4 to section 21 of the RCT Act namely restrictive trade practices, which addresses associations, discrimination in supply, predatory trade practices, collusive tendering and collusive bidding at an auction. The second area covered by the RCT Act was governed by section 22 to section 32 where the provisions for the control of monopolies, mergers and takeovers were defined. The third area the RCT Act addressed was control and display of prices, under sections 33 to 39, where the provisions relating to price control were defined.²⁸⁹ Unfortunately, the RCT Act was not as effective, due to it being a transitional piece of legislation to enable Kenya to move from a price control regime to a market regime.²⁹⁰ There were a few prominent weaknesses in the RCT Act namely the fact that it preserved price control provisions, its enforcement procedures were complicated, the Commissioner only played an advisory role and the remedial processes were not effective.²⁹¹ The government

²⁸⁴ CUTS International, “Competition law in Kenya – a snapshot”, Briefing paper, Africa Resource Centre, Nairobi, 2010, p. 1, www.cuts-international.org/Nairobi [accessed on 12 April 2016].

²⁸⁵ Ibid.

²⁸⁶ The Restrictive Trade Practices, Monopolies and Price Control Act, 1989, Cap 504 of the Laws of Kenya.

²⁸⁷ CUTS International, “Competition law in Kenya – a snapshot”, Briefing paper, Africa Resource Centre, Nairobi, 2010, p. 1, www.cuts-international.org/Nairobi [accessed on 12 April 2016].

²⁸⁸ Ibid.

²⁸⁹ Ibid, p. 2.

²⁹⁰ Competition Authority of Kenya, “Competition Policy and Law”, p. 3, www.cak.go.ke/ [accessed on 12 April 2016].

²⁹¹ Ibid.

recognised the importance of competition in economic development and a decision was taken to introduce further legal reforms.²⁹²

4.3 Competition Act, 2009 (as amended)

The Competition Act, 2009 came into force on 1 August 2011. This Act repealed the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 of the Laws of Kenya.²⁹³ The preamble of the Competition Act, 2009 states “to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct to provide for establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.”²⁹⁴ The object of the Competition Act, 2009 is contained in section 3 and is:

“to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to:

- a. increase efficiency in the production, distribution and supply of goods and services;
- b. promote innovation;
- c. maximise the efficient allocation of resources;
- d. protect consumers;
- e. create an environment conducive for investment, both foreign and local;
- f. capture national obligations in competition matters with respect to regional integration initiatives;
- g. bring national competition law, policy and practice in line with best international practices; and
- h. promote the competitiveness of national undertakings in world markets.”²⁹⁵

²⁹² Ibid.

²⁹³ Bowman Gilfillan Africa Group, “Kenya”, www.bgafrica.com/Competition-Law-Africa/kenya.asp [accessed on 12 April 2016].

²⁹⁴ Preamble of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

²⁹⁵ Sec 3 of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

4.3.1 Authorities established under the Competition Act, 2009

The Competition Act, 2009 established an independent Competition Authority,²⁹⁶ whose functions include, *inter alia*, the promotion and enforcement of compliance with the Competition Act, 2009,²⁹⁷ the advancement of public awareness and understanding of the responsibilities, rights and remedies under the Competition Act, 2009 and the obligations, roles and activities of the Competition Authority,²⁹⁸ attending to inquiries, studies and research in relation to competition matters and the protection of the interests of consumers,²⁹⁹ and the analysis of weaknesses to competition, inclusive of the entry to and exit from markets, in the economy as a whole or in specific sectors and publicise the results of such an investigation.³⁰⁰ Section 71 of the Competition Act, 2009 provides for the establishment of the Competition Tribunal, which is tasked with the hearing of reviews and appeals to the Competition Authority's determinations.³⁰¹

4.3.2 Merger evaluation as prescribed by the Competition Act, 2009

Part IV of the Competition Act, 2009 deals with mergers. Section 43³⁰² provides that when a merger is proposed all relevant parties should notify the Competition Authority of the proposal in writing³⁰³ and the Competition Authority may approve the implementation of the mergers, prohibit the merger or approve the merger with conditions.³⁰⁴ In the Competition Authority's consideration of the merger, section 46(2)³⁰⁵ provides that the following be taken into account in the assessment of a merger:

²⁹⁶ Sec 7 of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

²⁹⁷ Sec 9(a) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

²⁹⁸ Sec 9(c) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

²⁹⁹ Sec 9(g) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰⁰ Sec 9(i) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰¹ Part VII, Sec 71 of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰² Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰³ Sec 43(1) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰⁴ Sec 46(1) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³⁰⁵ Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

“The Authority may base its determination in relation to a proposed merger in any criteria which it considers relevant to the circumstances involved in the proposed merger, including:

- a. the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
- b. the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- c. the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
- d. the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
- e. the extent to which the proposed merger would be likely to affect employment;
- f. the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
- g. the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and
- h. any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.”

Guidelines have been developed in order to provide clear criteria in relation to the Public Interest Test (“PIT”) in merger evaluations under the Competition Act, 2009, Public Interest Test in Merger Determinations.³⁰⁶ The main purpose of these guidelines is to promote transparency and predictability in the merger enforcement process, enhancing accountability in the Competition Authority’s

³⁰⁶ Competition Authority of Kenya, “Public interest test in merger determinations”, par 1, p. 1, www.cak.go.ke, [accessed on 11 April 2016].

decision making process in relation to PIT due to it being extensive and may result in different interpretations or misinterpretations.³⁰⁷ The guidelines take into consideration the importance of promoting and sustaining employment by, *inter alia*, supporting the enhancement procedures to ensure no substantial job losses occur as a result of mergers, ensuring the salvaging of failing and dormant firms and to ensure the encouragement of mergers of media firms that will enhance production of local content and programmes and subsequent the support of youth employment.³⁰⁸ Two further objects of the guidelines specifically refer to the public interest, namely that the guidelines attempt to “ensure the vulnerable members of the society are not affected as a result of mergers, sectors which have high impact on the poor with have in-depth scrutiny” and “the guidelines are predicated upon the need for media plurality. This is aimed at ensuring that no media house should and will be allowed, through mergers, to control and manipulate the media output to the detriment of public interest.”³⁰⁹

The guidelines specifically provide for both the Substantial Lessening of Competition (“SLC”) and the PIT. SLC criteria is aimed at economic efficiency and consumer benefit concerns, which include the extent to which the merger would likely prevent or lessen competition or restrict output, lead to acquisition or strengthening of dominance positions in a market and lessen efficiency in production and distribution.³¹⁰ On the other hand, the PIT considers the extent to which a merger would affect employment; the ability of small and medium enterprises to gain access or to compete in any market; the ability of national industries to compete in international markets and a particular industrial sector and; the salvaging of dormant and failing firms.³¹¹ When notifying the Competition Authority of a proposed merger transaction, the parties are required to give a complete analysis of the impact of the merger on employment. With the aim of satisfying the Competition Authority, “the parties must show that:

³⁰⁷ Ibid.

³⁰⁸ Ibid, par 5, p. 2.

³⁰⁹ Ibid, par 8, p. 2.

³¹⁰ Ibid, par 10, p. 2.

³¹¹ Ibid, par 11, p. 2.

- i. A rational process has been followed to arrive at the determination of a number of jobs to be lost. That is, the reason for the job reduction and the number of jobs proposed to be lost are rationally connected, and;
- ii. The public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.³¹²

The Competition Authority must consider the efficiency argument for significant job losses, whether the efficiencies are reasonable on a consideration that is public in nature to countervail the public interest in conserving jobs. Therefore although a party is successful in showing that the employment loss is connected to an efficiency claim, this would on its own, not be enough if the efficiency gain is an isolated one,³¹³ and stakeholders' interest is considered to be purely isolated.³¹⁴ However, the guidelines indicate that merger efficiencies will always be balanced against the impact of the job losses on public interest.³¹⁵ In relation to the effect of a merger on a certain industrial sector, the guidelines state that the focus of the Competition Authority will be to ensure stability and growth. This means that when a firm acquires another firm, specifically where dominance is obvious, and there is no other credible acquirer, the merger may be allowed on condition that the acquiring firm proceeds to manufacture the products of the firm acquired, for a specific period to be based on the time which new entry in the said market is viable.³¹⁶ In conclusion the guidelines specifically state that the Competition Authority will always determine remedies in relation to public interest on a case-by-case basis and will impose rational, proportionate and enforceable conditions, if necessary.³¹⁷

4.4 Contrasting Kenyan and South African competition laws

It appears that similarly to South Africa's competition law, Kenyan competition law explicitly provide for public interest grounds to be taken into consideration

³¹² Ibid, par 13, p. 3.

³¹³ Ibid, par 14, p. 3.

³¹⁴ Ibid, par 15, p. 3.

³¹⁵ Ibid, par 16, p. 3.

³¹⁶ Ibid, par 17, p. 3.

³¹⁷ Ibid, par 24, p. 3.

when evaluating a merger. South African competition authorities are required to evaluate a proposed merger in relation to its effect on public interest grounds, although, as pointed out in Chapter Two, the authorities have been cautious to approve or disapprove a merger on this basis only. Section 46(2) of the Kenyan Competition Act, 2009 specifically provides for the effect a merger would have on public interest grounds, namely a particular industrial sector or region,³¹⁸ employment,³¹⁹ the ability of small industries to gain access to or to be competitive in any market³²⁰ and the ability of national industries to compete in international markets.³²¹ As discussed in Chapter 2 of this paper, these public interest grounds are also to be considered in merger evaluation in South Africa. Not only do the Kenyan competition law explicitly provide for public interest as a consideration in merger evaluation, but Kenya has also issued guidelines in relation to the application of public interest in merger determinations.³²² The approach to merger evaluation in Kenya seem similar to the approach followed in South Africa; where economic criteria are important, however the focus is on the inclusion of additional objectives. It is argued that the specific needs of a developing country justify the use of competition policy to attain macro-economic stability and growth. David Lewis,³²³ previous chairman of the South African Competition Tribunal, stated that in a developing country where distributional and poverty problems appear large and where all social and economic policy, no less competition policy, is expected to contribute to the alleviation of these first order problems, is inevitable.

³¹⁸ Sec 46(2)(k) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³¹⁹ Sec 46(2)(l) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³²⁰ Sec 46(2)(m) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³²¹ Sec 46(2)(n) of the Competition Act, 2009 (as amended), Cap 504 of the Laws of Kenya.

³²² Competition Authority of Kenya, "Public interest test in merger determinations", www.cak.go.ke, [accessed on 11 April 2016].

³²³ Lewis D, ISCCO Conference, "Competition regulation: The South African experience", Teipei, 21 June 2000.

CHAPTER 5

CONCLUSION

1. INTRODUCTION

This dissertation considered the role of public interest in respect of merger evaluation and discussed the objectives set out in the draft guidelines. The South African Competition Act is considered to have an unusually obvious public interest test included into its merger evaluation criteria³²⁴ and subsequently explicitly acknowledges the importance of public interest, providing a role for consideration of factors that go beyond the boundaries of competition. As explained in this dissertation, the inclusion of public interest in merger policy in South Africa was largely driven by the need for economic redistributive justice.³²⁵ It was also pointed out that in a developing country such as South Africa, the inclusion of public interest in the Act is necessary where industrial policy plays an important role, where unemployment is common, and in which the distribution of wealth and ownership is so unequal.³²⁶ The role of competition law in any country must however always be primarily concerned with the promotion and maintenance of competition. Put otherwise: competition should never be the servant of public interest. The Act thus specifically provides for competition considerations to be assessed first and public interest considerations second.³²⁷ These two aspects need to be assessed together; one aspect cannot be assessed without considering the other, which clarifies why the competition authorities have not made a decision based on public interest considerations only.³²⁸ This model of competition policy foresees the competition authorities engaging in the balancing of various interests namely those of workers and consumers when adjudicating competition matters. The balancing of public interest and competition considerations is improved by having public interest evaluated separately from competition analysis. The structure of the Act, by explicitly

³²⁴ Lewis D, International Competition Network, “The role of public interest in merger evaluation”, Naples, 28 -29 September 2002.

³²⁵ Anonymous, “The rise of public interest: Recent high profile mergers”, www.africanlii.org, [accessed on 10 March 2015].

³²⁶ Balkin J and Mbikiwa M, “Public interest test in Competition Act: Have the competition authorities applied the test correctly?” 28 February 2014, www.ens.co.za, [accessed on 10 March 2015].

³²⁷ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, 2014, University of Pretoria, p. 48.

³²⁸ Ibid.

providing for competition considerations as the primary concern, results in the competition evaluation to be completed as the first step in the evaluation process and that the public interest test is directed through the sieve of a completed competition finding.³²⁹ Subsequently, a check is created for the competition considerations, through assessing their effect on the public and striking a compromise that is advantageous to both competition policy and public interest.³³⁰

It is submitted that as a result of the uniqueness of South Africa's socio-economic context and history, the inclusion of public interest as a secondary consideration in merger evaluation is cardinal. The past and the present context requires the competition authorities to cautiously weigh the public interest to ensure that sound decisions are made and the decided cases strengthens and uphold the objectives of the law.³³¹ The most significant tool in a developing country, such as South Africa, is the effective and consistent implementation of competition law.³³² Every jurisdiction is unique and its policies should be personalised to fit in society.³³³ David Lewis aptly stated that:

“No public agency that relies on public support can escape the influence of a strongly held public interest. It is inevitable that in a developing country such as South Africa, where distributional poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems.”³³⁴

Socio-economic needs of South Africans are addressed directly by the inclusion of public interest grounds in the Competition Act.³³⁵ Tavuyanago is of the opinion that public interest plays a central role in restoring past inequalities and the realisation of public interest does not evade the purpose of the Act, but assist in advancing its

³²⁹ Myeni W, *Public interest and merger controls in South Africa: the role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations*, LLM Dissertation, 2006, University of Cape Town, p. 59.

³³⁰ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, 2014, University of Pretoria, p. 49.

³³¹ Hartzenberg T, “Competition policy and enterprise development: the role of public interest objectives in South Africa’s competition policy”, August 2004, p. 31, <http://citeseerxistpsu.edu/viewdoc/summary?doi=10.1.1.201.1>, [accessed on 17 December 2015].

³³² Ibid.

³³³ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, 2014, University of Pretoria, p. 49.

³³⁴ Lewis D, International Competition Network, “The role of public interest in merger evaluation”, Naples, 28 - 29 September 2002, p. 3.

³³⁵ Tavuyanago S, *Public interest considerations and their impact on merger regulation in South Africa*, LLM Dissertation, 2014, University of Pretoria, p. 49.

objectives namely employment creation and the spread of ownership to more South Africans.³³⁶

2. CRITICISM AGAINST THE INCLUSION OF PUBLIC INTEREST

The inclusion of public interest consideration in merger evaluation is however not without criticism. Reekie viewed the inclusion of public interest considerations contained in section 12A(3) of the Act undesirable, when he stated that:

“The scope for error, flexible interpretation, and subjectivity of judgement seems great. Prospective local or foreign investors could then well be deterred from takeover activity of there are to unknown and unpredictable reactions by the new authorities. A brake on such activities could adversely affect exports, corporate tax revenue, and hamper possible spin-off demand for the products of small and medium scale enterprises. A second problem with the definition of the ‘public interest’ is what it *includes*. The socio-economic objectives incorporate redistribution, labour interest and black economic empowerment. Relying on competition policy to achieve these objectives is inappropriate. There are more specific (and hence more effective) policies that can be used.”³³⁷

Angumuthoo commented on the inclusion of public interest considerations in respect of merger evaluations and said that even though competition law can assist to create demand, stimulate growth and, subsequently increase job opportunities, a fine balance is required between guarding the public interest and at the same time building an attractive business environment and encouraging investment.³³⁸ She further cautioned that highlighting public interest issues can weaken competition considerations in mergers and so harm the general public interest that competition policy seeks to promote.³³⁹ Wood added that it is necessary for competition

³³⁶ Ibid, p. 50.

³³⁷ Reekie W.D, “The Competition Act, 1998: An economic perspective” (1999), 67(2), South African Journal of Economics, 258, p. 284.

³³⁸ Angumuthoo M and Wood S, “The role of competition law in industrial policy”, www.bowman.co.za/News-Blog/Blog/Role-of-competition-law-in-industrial-policy, [accessed on 29 March 2016].

³³⁹ Ibid.

authorities and other regulators to provide investors with “greater certainty and clarity by issuing clear guidance relating to public interest considerations.”³⁴⁰

Balkin and Mbikiwa share Angumuthoo’s view and stated that regardless of the importance of the inclusion of public interest considerations in the Act, these considerations may lead to a contradiction in that public interest grounds are frequently separated from, and at times, directly in conflict with the primary objectives of competition law and policy.³⁴¹ According to Monareng stated that the overenthusiastic ambitions of the Competition Act in relation to public interest will not be realised if the competition authorities do not implement an approach that seeks to give a meaning to the purpose of the Competition Act.³⁴²

3. GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED)

It is submitted that the published Guidelines do not provide for an alternative or new approach than the one already followed by the Commission in the evaluation of mergers. The Guidelines merely formulate the competition authorities’ task contained in section 12A of the Competition Act, in providing specific steps likely to be followed in merger evaluations. The Guidelines further provide clarity in respect of the documents to be submitted with merger applications in that the parties to the merger are informed as to what the Commission may require to complete the public interest test. It is thus submitted that the revised Guidelines on the assessment of public interest provisions in merger regulation under the Competition Act No. 89 of 1998 (as amended) published on 21 December 2015 will provide necessary assistance to the competition authorities in merger evaluations when trying to balance competition goals and public interest. It will also provide clarity to merging parties on the steps that will be taken by the competition authorities during public interest assessment. Wood indicated that the issuing of these guidelines is a vital step in establishing

³⁴⁰ Ibid.

³⁴¹ Balkin J and Mbikiwa M, “Public interest test in Competition Act: Have the competition authorities applied the test correctly?” 28 February 2014, p. 2, www.ens.co.za, [accessed on 10 March 2015].

³⁴² Monareng K.D, *Using competition law to promote broader public interest issues in merger regulation*, LLM Dissertation, 2014, University of Pretoria, p. 46.

greater clarity on how South African competition authorities will approach the public interest considerations set out in the Competition Act.³⁴³

4. COMPARATIVE ANALYSIS

The national legislature of any country has the right to adopt ordinary competition law principles, with minor adjustments to take into account the different context of that specific country and its nation. A consideration of the political and socio-economic circumstances of certain developing countries reveals that the difficulties faced by and experienced in those nations, are sometimes noticeably different in nature to those experienced in developed nations.³⁴⁴ Socio-economic concerns such as dire poverty and substantial unemployment influence the economy of developing nations and, as such, inevitably influence the competition laws of developing nations.³⁴⁵ Lewis states that:

“No public agency that relies on public support can escape the influence of a strongly held public interest. It is inevitable that in a developing country such as South Africa, where distributional poverty problems are at the forefront, all social and economic policies are expected to contribute to the alleviation of these problems.”³⁴⁶

The South African Competition Act is, primarily, a competition statute, however it reflects South Africa's past, and subsequently it is particularly concerned with the interest of its people. The significance of public interest in South Africa, and for other developing countries, requires the competition authorities to, though in highly unlikely situations allow a merger that is anticompetitive on the grounds that it promotes the public interest to a substantial degree.³⁴⁷

³⁴³ Angumuthoo M and Wood S, “The role of competition law in industrial policy”, www.bowman.co.za/News-Blog/Blog/Role-of-competition-law-in-industrial-policy, [accessed on 29 March 2016].

³⁴⁴ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important role in the competition laws of South Africa and of developing nations*, LLM Dissertation, 2009, University of Cape Town, p. 70.

³⁴⁵ Ibid.

³⁴⁶ Lewis D, International Competition Network, “The role of public interest in merger evaluation”, Naples, 28 – 29 September 2002, p. 3.

³⁴⁷ Teague IG, *The role of public interest in competition law: a consideration of the public interest in merger control and exemptions in South Africa and how the public interest plays a more important*

5. CONCLUSION

Lewis, with reference to public interest, significantly stated that “no public agency that relies on public support can escape the influence of a strongly held public interest.”³⁴⁸ I concur that public interest should be considered in merger evaluations as I believe that pro-competitive gains are interlinked with non-competition objectives; healthy competition cannot be enhanced by having a disregard of public support. Competition Law in a developing country such as South Africa cannot be ignored as a method to target and promote certain public interest considerations, like employment and a greater spread of black ownership. The role of South Africa’s industrial policy is that much greater, than for instance a developed country such as the United States of America, in that South African competition authorities are still involved in a struggle to achieve credibility and legitimacy.³⁴⁹ The competition authorities have been dealing with competition concerns in a practical and sensible way; this is evident from the approval or prohibition of a merger on public interest concerns only, but public interest accounting for the imposition of conditions created to better the negative public interest effect. I conclude this dissertation by quoting Lewis once again:

“Developing country agencies gave a long way to go in achieving this credibility and it will not be achieved by standing aloof from those issues that most engage popular sentiment.”³⁵⁰

role in the competition laws of South Africa and of developing nations, LLM Dissertation, 2009, University of Cape Town, p. 71.

³⁴⁸ Lewis D, International Competition Network, “The role of public interest in merger evaluation”, Naples, 28 - 29 September 2002, p. 2.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

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