The implications of public interest considerations in the interpretation and application of the failing-firm doctrine in South African merger analysis*

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OPSOMMING

Die implikasies van openbare belang-oorwegings vir die uitleg en toepassing van die mislukkende onderneming-leerstuk in Suid-Afrikaanse samesmeltingsanalise

Die doel van die assessering van samesmeltings is om te verseker dat korporatiewe transaksies nie die struktuur van die bepaalde relevante mark negatief affekteer nie en dat die mededingende markstruktuur dus beskerm word. Hierdie doel word bereik waar die mislukkende onderneming-leerstuk uitgelê word as ŉ verweer deur ŉ streng toets aan te wend om te bepaal of ŉ mislukkende onderneming ŉ party tot ŉ samesmelting is. Sodanige benadering maak dit egter toenemend moeilik, indien nie onmoontlik nie, om die verweer suksesvol te opper. Wat die Suid-Afrikaanse posisie betref, kan dus gevra word wat die effek is van openbare belange-oorwegings op die uitleg en toepassing van die mislukkende onderneming-leerstuk in die konteks van regulering van samesmeltings in Suid-Afrika. Openbare belange-oorwegings moet volgens die *Competition Act* 89 van 1998 in ag geneem word. Die artikel ondersoek hierdie en ander verwante aspekte en toon onder andere aan dat die insluiting van die openbare belang in die assessering van samesmeltings nie lei tot goedkeuring van anti-mededingende samesmeltings nie, alhoewel dit in beginsel ŉ toevlug kan bied vir mislukkende onderneming-argumente.

1 INTRODUCTION

In 1998, South Africa adopted a comprehensive new competition statute, the Competition Act.[1] However, prior thereto a host of statutes existed that were all repealed on the basis of either material deficiencies or for being out of touch with the changing socio-economic and political environment.[2]

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1 89 of 1998 (hereafter “the Act”).

2 Pre-1998 statutes include the Regulation of Monopolistic Conditions Act 24 of 1955 (the 1955 Act) and the Maintenance and Promotion Act 96 of 1979 (the 1979 Act). For criticism and shortcomings of these statutes, see Government of South Africa *Report of the commission of inquiry into the Regulation of Monopolistic Conditions Act, 1955* RP64/1977 (“the Mouton Commission”) paras 47 126–129 223 (weaknesses of the

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The new Act aims to establish an effective competition regulatory system that reflects the country's socio-economic needs.[3] The Act's objectives go beyond the traditional goal of promoting and maintaining competition through the regulation of anti-competitive market behaviour to encompass broader policy considerations in the form of so-called non-competition factors.[4] This feature mirrors the country's social and economic development and is an acknowledgement of the notion that the law derives its credibility from the environment in which it operates, and that hence it must not ignore the practical realities existing in such an environment.[5] It must be noted that this characteristic is not alien to South Africa as it is common in many developing countries' competition statutes which have been adopted as part of broader economic reform programmes.[6] However, what sets the South African system apart from other jurisdictions is its demonstrated effectiveness in the application of these public interests considerations in competition matters, and especially in merger regulation. The Act clearly defines the public interest concept and how it is applied in merger regulation.[7] Furthermore, the institutions mandated with merger regulation are well-structured to support an effective system.[8]

Conforming to contemporary practices, the system principally is concerned with merger regulation[9] and the prohibition of anti-competitive conduct.[10] There are two main reasons why the article focuses on the regulation of corporate mergers and acquisitions.[11] Firstly, merger control is central to South African competition law and policy.[12] Secondly, the impact of public interest considerations

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enforcement mechanisms); Naude "South African competition policy: Challenges and pitfalls" 1986 *MBL* 76 77; Bekker "Monopolies and the role of the Competition Board" 1992 *TSAR* 618 629 (weakness of the competition regulatory authority); Kemp and Sutherland *Competition law of South Africa* (service issue 12 loose-leaf 2009) 3-30 (influence of the minister and lack of independence of the regulatory authority) and 3-39 (lack of political commitment); Chetty "The place of public interest in South Africa's competition legislation: Some implications for international antitrust convergence" ABA section of antitrust law 53rd meeting, Washington DC 30 March–1April 2005) 4; Lewis "South African competition law: Origins, content and impact" in Dhall (ed) *Competition law today: Concepts, issues and the law in practice* (2007) 340 343.

3 See, generally, the preamble to the Competition Act 1998 and s 2; the Explanatory Memorandum to the Competition Act 89 of 1998; the Competition Bill [GN89/1998].

4 The preamble refers to the need to "regulate the transfer of economic ownership in keeping with the public interest". S 2(c)–(f) provides the purposes of the Act, namely, employment promotion, expansion of opportunities for South African participation in the external market economy, ensuring equal opportunities for economic participation to small and medium sized enterprises, and widening the ownership base of historically disadvantaged persons.

5 Lewis (fn 2) 359.

6 See, eg, s 31 read with s 32 of the Zimbabwe Competition Act 7 of 1996 which uses the public interest standard in determining competition matters.

7 S 12A(3).

8 Lewis (fn 2) 345.

9 See, generally, Ch 3: Merger control.

10 Ch 2 of the Act.

11 The terms "merger" and "acquisition" are used interchangeably to denote any situations where two or more business entities combine through the establishment or acquisition by direct or indirect means, of a controlling interest in the whole or part of the business of another entity. See s 12(1)(a) read with para (b) for statutory definitions.

12 Competition policy generally refers to the legal and policy instruments designed to regulate firm behaviour in order to primarily protect the competitive structure of the market and to

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on the South African competition system is defined more clearly in merger regulation. The Competition Act provides in section 12A(3) an elaborate list of factors that must be taken into account when assessing the public interest component of mergers. Furthermore, provision is made for interventions by interested parties in merger proceedings, which are primarily on public interest grounds. Public interest issues feature more prominently in merger proceedings than any other competition matters.

The system employs a compulsory pre-merger notification concept whereby corporate transactions that meet or are above specified threshold levels are required to be notified and authorised before implementation.[13] Non-compliance with this requirement is sanctionable.[14] Upon notification, the relevant merger regulatory authority[15] is required to review the merger and determine the fate of the merger within the prescribed timeframes.[16] This process mainly involves scrutinising and analysing a notified merger in order to determine whether to approve or prohibit it.

The Act provides for a three-pronged substantive assessment test as a standard for merger review. This test is: (a) a determination of whether or not the merger is likely to substantially lessen or prevent competition;[17] (b) if it raises competition

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advance other policy objectives, including consumer welfare, economic development, industrial policy and other social considerations. Competition law is the mechanism used to enforce competition policy. It is thus a component of competition policy. For the significance of merger control in South African competition law and policy, see Lewis (fn 2) 345; Fox "Economic development, poverty and antitrust: The other path" 2007 *Southwestern J of L and Trade in the Americas* 211 223 who, after noting the central role that merger policy plays in the South African competition policy, submitted that South African competition policy is "merger policy".

13 S 11(5)(a), (b) and (c) classify mergers as being small, intermediate or large. S 13A(1), (2) and (3) provide for the notification of intermediate and large mergers. S 13(2) and (3) provide for circumstances under which small mergers may be notified. For classification of a merger as small, intermediate or large, see s 11(5)(a), (b) and (c) respectively. For threshold levels, see s 11 (1) of the Act and the Department of Trade and Industry *Determination of merger thresholds and methods of calculation* GN 216/2009 in *GG* 31957 of 6 March 2009.

14 S 60(1) empowers the Tribunal to order divesture as a remedy for implementing a merger without notification: s 59(1)(d)(iv) read with s 13A(3) (imposition of administrative penalties in case of implementing a large or intermediate merger without notification) and s 59(1)(d)(i) read with s 13(3) (penalties related to implementing a small merger requiring notification). See *Caxton & CTP Publishers & Printers Ltd v NaspersLtd* 16/FN/Mar04; *Blumer (SA) (Pty) Ltd/Distillers Corp (SA) Ltd* 94/FN/Nov00 (parties ordered to file notification); *Competition Commission v Edgars Consolidated Stores Ltd (Edcon) and Retail Apparel Group (RAG*) 95/FN/Dec05 (fine of R1.00 imposed for non-compliance). However, cf *Competition Commission v Tiso Consortium* 82/FN/Oct04 para 11 (where the Tribunal adopted a skeptic view) and *Commission v Structa Technology (Pty) Ltd* 83/LM/Nov02; *Competition Commission v Citibank NA South Africa Branch/Mercantile Bank Ltd* 91/LM/Nov04 and *Competition Commission v Dorbyl Engineering Management Co (Pty) Ltd/Fastpulse Trading 26 (Pty) Ltd* 83/LM/Nov02. See also Competition Tribunal *Rules for the conduct of proceedings in the Tribunal* paras 42 43 and Kemp and Sutherland (fn 2) ch 12.

15 These are the Competition Commission and the Competition Tribunal established in terms of ss 19 and 26 respectively. Although the Competition Appeals Court established in terms of s 36 is part of the competition authority, no merger notification can be made to it.

16 Ss 13(5)(b), 14(1) and 14A(1).

17 S 12A(1).

concerns, to assess whether the merger is likely to result in any benefits, be they efficiency gains or public interests, that could outweigh the anticompetitive effects;[18] and (c) regardless of the results of (a) and (b), whether the merger can or cannot be justified under substantial specified public interest grounds.[19]

In assessing the first leg of the test, the Act enjoins the competition authorities to consider a non-exhaustive list of factors[20] provided for under the Act.[21] One of the considerations is assessing "whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail".[22] This consideration is known as the failing-firm doctrine in merger analysis and owes it roots in the classic United States Supreme Court decision of *International Shoe Co v FTC*.[23] If established, it is regarded as an absolute defence to justify the approval of an otherwise anti-competitive merger in various jurisdictions.[24] Although the South African Competition Act recognises the failing-firm consideration in merger analysis, it does not automatically justify approval of an otherwise anti-competitive merger, unlike the case elsewhere. The doctrine is merely one of the many factors in determining only one leg of the test.[25] The fact that merging parties establish the doctrine does not necessarily mean that the merger in question will be approved. Furthermore, it is still expected to go through the other legs of the test and it can only be approved after passing the public interest limb of the test.

Subjecting a merger to further scrutiny even after thorough assessment of the failing-firm doctrine raises the question as to what the implications are of the inclusion of public interest provisions in the South African merger regulatory system in general, and for the interpretation and application of the failing-firm doctrine in particular. In other words, whether the public interest limb of the substantive test has the effect of either facilitating the approval of an otherwise anti-competitive merger if it can provide substantial public interest benefits, or blocking a merger that raises no competition issues if it is not beneficial to the public interest.

The entire exercise of merger regulation in competition law is designed to ensure that corporate transactions do not negatively alter the competitive structure of the market. In other words, that the competitive structure of the market is

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18 S 12A(1)(a) (i) and (ii).

19 S 12A(1)(b).

20 *Industrial Development Corporation of South Africa v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital (Pty) Ltd/Anglovaaal Mining Ltd* 45/LM/Jan02 and 46/LM/Jun02; *Santam Ltd/Emerald Insurance Co Ltd and Emerald Risk Transfer (Pty) Ltd* 57/LM/Aug02 para 52; *Schuman Sasol/Price's Dealite (Pty)* Ltd 10/CAC/Aug01 5.

21 S 12A(2).

22 S 12A(2)(g).

23 *International Shoe Co v FTC* 280 US 29 298 (1930).

24 US Department of Justice (DOJ) and the Federal Trade Commission (FTC) *Horizontal merger guidelines* (19 August 2010) s 11, available at http://bit.ly/2mHmNQp (accessed on 11 February 2013), and the European Commission *Guidelines on the assessment of horizontal mergers under the council regulation on the control of concentrations between undertakings* OJ C31/2004 of 5 February 2004 para 89.

25 *Schuman Sasol (South Africa) (Pty) Ltd/Price's Daelite (Pty) Ltd* 33 LM/May01 para 52; *Iscor Limited/Saldanha Steel (Pty) Ltd* 67/LM/Dec01 para 101 and *Phodoclinics/Protector Group Medical Services* 122/LM/Dec05.

protected from such transactions.[26] A narrow and strict approach to the doctrine is generally considered necessary to protect the competitive structure of the market from potentially anti-competitive transactions, thus the application of the doctrine as a defence to anti-competitive mergers as adopted, *inter alia*, by the US merger regulatory system. However, the effect of adopting a narrow and strict approach to the doctrine is that it becomes increasingly difficult – though not impossible – to successfully invoke the defence.[27] However, the rationale for a strict approach is that it potentially leads to the approval of anti-competitive mergers, provides a platform for assessing the degree of anti-competitive behaviour, as well as possible collusive practices. The approach is thus necessary to protect the competitive market structure. However, the question is whether this same goal cannot be achieved by interpreting the doctrine not as an absolute defence to an otherwise anti-competitive merger, but rather a mere factor in determining whether the merger is likely to substantially lessen or prevent competition, that is, a factor in determining one of the legs in the three-pronged substantive test.

What are the implications of the public interest consideration for the interpretation and application of the failing-firm doctrine in merger regulation in South Africa? By providing further scrutiny of mergers involving failing firms even after the competition assessment, does the public interest leg of the test provide an even sterner test for mergers involving failing firms, or does it offer a second chance to mergers involving failing-firm claims? This article explores this and related issues and argues that the inclusion of public interest considerations in the South African merger regulatory framework in general has no effect on the system's ability to effectively deal with mergers involving a failing firm. Even though South Africa interprets the doctrine differently from other countries in that, rather that it being an absolute stand-alone defence, it may be taken into account as a factor of the first leg of the three-pronged substantive assessment test, and of the public interest leg. There are sufficient mechanisms in place to ensure that the goal of protecting the competitive structure of the market is achieved as in cases where a narrow and strict approach is followed. Accordingly, it is demonstrated that the inclusion of public interest considerations does not result in the approval of anti-competitive mergers even though this is possible in theory.

To advance the above thesis, the article first examines the substantive assessment test as provided for in the Competition Act, with the aim of placing the public interest leg into context. This is followed by a discussion of the failing-firm doctrine as applied in South Africa. The implications of public interest considerations are then considered by analysing the failing-firm doctrine within the broader context of the substantive test. Conclusions are drawn which reiterate that public interest considerations are a feature of the South African competition policy and merger regulation and, as such, their implications for the failing firm may be regarded as nothing more than an attempt to balance the orthodox merger assessment standards with the country's broader policy objectives.

26 See Goldberg (fn 2) 93.
27 See Valentine "Horizontal issues: What's happening and what's on the horizon?" (1995), available at http://bit.ly/2lmrvaD (accessed on 1 February 2017).

2 COMPETITION ACT 1998 AND MERGER REGULATION: AN OVERVIEW

The Competition Act provides for merger regulation[28] and provides that merging parties must notify the competition authorities of all transactions defined as notifiable mergers.[29] The Act consequently establishes a compulsory prior-merger notification approach.[30] Prior-merger notification largely is regarded as a more effective method of merger regulation as it enables the regulatory authorities to scrutinise as many transactions as possible and assess their likely effects on the competitive structure of the market.[31] This approach is also less expensive and practical as authorities are not expected to head-hunt transactions and try to undo them once established that they are anti-competitive.[32]

Merger notification must be done in accordance with specified formalities.[33] Notifying parties need to, *inter alia*, supply sufficient information regarding the details of the transaction.[34] This is intended to enable the authorities to speedily review the merger.[35] Provision is also made for the notice of filing to be served on the Minister of Trade and Industry[36] who is responsible for the Act, and on organised labour representing the merging parties' employees.[37] These provisions reflect the significance of public interest in merger regulation in South Africa. The requirement to notify these parties is meant to afford them an opportunity to make submissions before the Commission and the Tribunal who are the competition authorities and the ultimate decision-makers in merger regulation.[38] However, this requirement places an additional burden on merging parties to notify other entities besides the competition authorities, a situation that is likely to have both cost and time implications. As to whether this has any implications on the merger regulatory system, in general, and the failing-firm doctrine in particular, is explored in detail below.

Merger provisions apply to transactions that are mergers as defined. Section 12 defines a merger as any situation where "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm".[39] The statutory definition is broadly framed to cover

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28 See Ch 3 of the Act.

29 Ss 13(3) s 13A(1).

30 See Goldberg (fn 2) 96.

31 *Bromer Foods (Pty) Ltd/National Brands Ltd* 19/LM/Feb00 paras 35–36.

32 *Ibid*.

33 S 13A (1). Rule 27 of the Competition Commission Rules titled "Joint merger notifications" provides the basic notification form. Rule 28 prescribes when to notify. Competition Commission of South Africa "Notification Fees", available at http://bit.ly/1JGr1jO (accessed on 26 March 2012) provides for the filing fees.

34 Form CC4(2). See also *Anglo-American Holdings Ltd/Kumba Resources Ltd (with the Industrial Development Corporation intervening)* 46/LM/Jun02 para 30.

35 S 18(1) of the Act. Para 2(c) of the Competition Commission of South Africa *Practitioner's guide issue 6: Complete merger filing requirements* (2010), available at http://bit.ly/1hOayQn (accessed on 26 March 2012). See *Medicross Healthcare Group (Pty) Ltd v Commission* 55/CAC/Sep05 paras 33–34. See also Legh and Dini "South African merger control" in Davies (ed) *Merger control: The international regulation of mergers and joint ventures in 65 jurisdictions worldwide* (2011) 350.

36 S 18(1).

37 S 13A(2).

38 Lewis (fn 2) 349.

39 S 12(1)(a).

all types of mergers. The phrase "business of another" does not specify which other, hence it covers mergers involving parties at the same level of economic activities (horizontal mergers), between parties at different levels (vertical mergers), as well as between non-economically related parties (conglomerate mergers).[40] The operational element of the definition is the acquisition or establishment of control.[41] A merger, for purposes of merger regulation, occurs only where control has been acquired or established in such a manner as to influence the merging firm's behaviour on the market.[42] This behaviour includes production and distribution patterns and affects the competitive structure of a given market.

Once a transaction that constitutes a merger has been duly notified, the competition authorities have to review it. The purpose of such a review is to make a determination as to whether the merger must be approved with or without conditions or whether it must be prohibited.[43] This determination is done by employing a statutorily-provided substantive-assessment test.

2 1 Substantive-assessment test

The substantive-assessment test is provided for by section 12A of the Act. Section 12A provides a three-pronged substantive-assessment test for merger review.[44]

2 1 2 Competition leg: Whether the merger is likely to substantially lessen or prevent competition

The first leg of the test is a determination of the merger's likely effects on competition. Section 12A(1) provides that "[w]henever 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".[45]

This wording acknowledges that a merger may raise competition concerns. The inquiry is a predictive one as is implied by the use of "likely" and does not purport to imply a conclusive determination on the effects of the merger.[46] However, such a prediction must not be arrived at using unsubstantiated speculation.[47] The aim is to protect the competitive structure of the market, hence the reference to "substantial lessening or prevention". The use of "substantial" demonstrates the legislative intention to regulate only the material consequences of the merger, rather than prohibiting any merger.[48]

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40 See Goldberg (fn 2) 93.

41 For a detailed discussion, see *Distillers Corp (South Africa) Ltd and Stellenbosch Winery Group Limited v Blumer (SA) (Proprietary) Ltd and Seagram Africa (Proprietary) Ltd* 08/CAC/May01.

42 See European Commission decision in Case No. IV/M.890 *Blokker/Toys 'R' Us* L316/1, l316/3 para 13 9 (possibility of excising decisive influence on a firm, in particular by ownership or otherwise).

43 Ss 13(5)(b)(i), (ii), (iii) and (iv) and 13A(3).

44 See *IDC v Anglo-American* (fn 20) para 22.

45 S 12A(1).

46 *Schuman Sasol* (fn 20) 5.

47 *Mond Ltd and Kohler Cores and Tubes v CompetitionTribunal* [2003] 1 CPLR 25 (CAC) 33c.

48 See *Schuman Sasol* (fn 20) where the substantial lessening of competion (SLC) test was also applied. See also the US Supreme Court decision in *International Shoe Co* (fn 24)

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In order to make the above determination, a non-exhaustive list[49] of factors is provided in section 12A(3). These factors essentially reflect the standard criteria employed in merger regulation.[50] They include: an appraisal of the actual and potential level of import competition;[51] entry barriers;[52] concentration trends and levels and the market's collusion history;[53] the countervailing power possibility;[54] innovation levels and product differentiation;[55] the failing-firm and failing-division doctrines;[56] and the elimination of an effective competitor.[57]

If a given merger raises competition concerns after an assessment of these factors, that is, that the merger is likely to materially lessen or prevent competition, the next step is to assess whether the merger may be justified on the basis that it is likely to result in substantial benefits capable of neutralising the raised competitive concerns.

2 1 3 Is the merger likely to result in substantial benefits that neutralise the anti-competitive effects

A merger that raises competition concerns following the first leg of the test must be assessed for any likely benefits. If these benefits are established, it must be determined whether they are likely to outweigh the established anti-competitive effects. It is only after being satisfied that the said benefits counteract the anti-competitive effects of the merger that the merger may be deemed to be justified as being more beneficial than harmful. This balancing act, which is a feature of merger regulation,[58] is provided for in section 12A(1)(a). The section provides for an assessment of whether the merger is likely to result in, *inter alia*, efficiency or technological benefits. However, these benefits are not limited to those expressly stated as evidenced by the use of the phrase "or any other pro-competitive gain".[59]

Section 12A(1)(a)(ii) provides that, regardless of whether or not a merger is likely to substantially lessen or prevent competition, a determination must be made as to whether such a merger can or cannot be justified on public interest grounds. The inclusion of public interest considerations here is a straightforward matter. If a merger is found to be anti-competitive under the first leg of the test, an establishment of substantial public interests benefits that can outweigh the anti-competitive effects may facilitate the approval of the merger.

(referring to the use of "significant" in s 7 of the Clayton Act) and *Standard Fashion Co Magrare-Houston Co* 258 US 346 357 (1922). S 2 of the Act justifies resorting to foreign and international law in interpreting such aspects of the meaning of "significant".

49 Fn 20 above.
50 Lewis (fn 2) 350.
51 S 12A(3)(a).
52 S 12A(3)(b).
53 S 12A(3)(c).
54 S 12A(3)(d).
55 S 12A(3)(e).
56 S 12A(3)(g)
57 S 12A(3)(h).
58 See Goldberg (fn 2) 97.
59 S 12A(1)(a)(i).

Regardless of the results of the first two legs of the test, the competition authorities must still assess whether the merger may be justified on substantial public interest grounds.[60]

2 1 4 Public interest: The ultimate test

The final leg of the substantive assessment test is an assessment of the public interest compatibility of the merger. This test must be done regardless of the fact that the merger raises competition concerns.

Section 12(A)(b) provides that the competition authorities must "otherwise" make a determination on "whether the merger can or cannot be justified on substantial public interest grounds". These public interests grounds are specified in section 12A(3) as an assessment of the effect of the merger on (a) a particular industrial sector or region;[61] (b) employment; [62](c) the ability of small businesses or firms controlled by historically-disadvantaged persons to compete effectively;[63] and (d) the ability of national industries to compete in the global market.[64] These grounds are a mixture of social (employment), economic (small businesses competitiveness), political (empowerment of previously-disadvantaged persons) and industrial policy (enhancing of national industries' competitiveness) and are an extension of the government's broader policy objectives. This is reflected in the contextual evolution of the current Act.[65]

3 FAILING-FIRM DOCTRINE WITHIN THE CONTEXT OF THE THREE-PRONGED SUBSTANTIVE TEST

In assessing the likely effects of a merger on competition, the competition authorities must take into account, where necessary, "whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail".[66] In merger regulation, the consideration of whether the business has failed or is likely to fail is commonly known as the failing firm or company doctrine, whereas that of whether it is the part of a business that has failed or is likely to fail is referred to as the failing-division doctrine.[67]

The essence of considering the financial status of merging firms in merger review is to determine, generally, whether the contemplated merger would negatively alter the competitive structure of the market and, in particular, whether the removal of the failing firm through the merger would have any negative implications on the competitive structure of the market. This is easily illustrated by considering whether the merger would result in the elimination of an effective competitor, that is, whether or not the failing firm is a significant competitive factor

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60 S 12A(b).
61 S 12A(3)(a).
62 S 12A(3)(b).
63 S 12A(3)(c).
64 S 12A(3)(d).
65 See Lewis (fn 2) 340–344; Kemp and Sutherland (fn 2) 3-45; Chetty (fn 2) 5; OECD "Competition law and policy in South Africa" *OECD Global Forum on Competition Peer Review* (Paris 11 February 2003) 7.
66 S 12A(2)(g).
67 See, generally, OECD "Roundtable on the failing firm defence" (2009) *(DAF/COMP (2009)*; ABA section of antitrust law *Antitrust law developments* (2007) 363–368; Arquit *The failing firm defence and related issues* (1991); Valentine 27; and Wait "Surviving the shipwreck: A proposal to revive the failing division defence" 2003 *Will & Marry LR* 429.

in the relevant market whose elimination would negatively alter the competitive structure thereof.[68] The justification of the doctrine lies in establishing that the alleged failing firm inevitably would exit the relevant market if not acquired by another; thus, with or without the proposed merger said market conditions would deteriorate anyway,[69] that the failing status of the target firm renders it an insignificant competitor,[70] and that its acquisition by another in the current merger does not constitute an elimination of an effective competitor.[71]

Establishing the failing-firm doctrine involves meeting required criteria. In both the United States and the European Union where the doctrine is more established, these criteria are derived from case law.[72] Although the Competition Act in section 12A(2)(g) gives statutory effect to both the failing-firm and failing-division doctrines, it does not provide any criteria for its application. This has led the responsible enforcement authorities to assess the doctrine using the criteria laid down in other jurisdictions, albeit with modifications to suit the South African context.[73]

Before turning to the application of the doctrine in South Africa, a number of aspects must be pointed out. Section 12A(1) clearly provides that the competition authorities may only assess the non-exhausted list of factors, including the failing-firm doctrine, when determining the likely competitive effect of the merger. Thus, the doctrine is provided as one of many factors in determining only a single leg of a multiple test. This entails that regardless of satisfying whatever criteria preferred for establishing the requirements of the doctrine, the merger cannot be approved on that basis alone as it is subjected to further scrutiny. The failing-firm doctrine thus is not a defence to an anti-competitive merger,[74] but a mere factor in determining one of the three legs of the substantive test.

Before considering the public interest test, it is important to consider the way in which the failing-firm doctrine has been applied in South Africa.

3 1 Failing-firm doctrine in practice

The logical point of departure is to ask how the competition authorities determine whether the doctrine has been established? In other words, what criteria are used? Selected decisions may be used to answer these questions.

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68 *Santam Ltd* (fn 20) para 84; *Tiger Brands Ltd/Ashton Canning Co (Pty) Ltd Newco and Langeberg Foods International Ashton Canning Co (Pty) Ltd* 46/LM/May05 para 84. See also EC decisions Case No IV/M053 *Aerospatiale-Alenia/de Havilland* OJ L334/42 para 31.

69 This is known as the lack of causality principle and is the central consideration in the EU review of mergers involving failing-firm claims; see EC *Horizontal merger guidelines* para 91.

70 *United States v General Dynamics Corp* 415 US 504 (1974).

71 See fn 69 above.

72 S 11 of the US *Horizontal merger guidelines* reflects the criteria set out in *Citizen Publishing Co v United States* 394 US 131 (1969) and paras 89–91 of the EU *Horizontal merger guidelines* reflect the criteria in Case COMP/M.2314, *BASF/Eurodiol/Potachim* [2002] OJ L132/45 paras 140–142.

73 See *Iscor/Saldanha Steel* (fn 25) paras 108 110(2) (4).

74 *Supra* para 56.

3 1 2 *Schuman Sasol/Price's Daelite:* Laying down the criteria

The applicability of the failing-firm doctrine in South African merger regulation was first considered by the Competition Tribunal in a proposed acquisition by Schuman Sasol (South Africa) (Pty) Ltd of the entire share capital of Price's Daelite (Pty) Ltd.[75] This proposed merger was prohibited on the basis that it would have prevented or lessened "competition in the candle wax market and the upstream market" by raising entry barriers in those markets in addition to further strengthening Schuman's dominant position.[76]

The merging parties invoked the failing-firm doctrine and argued that the merger be reviewed using a lower standard since the target was a failing firm which, in the absence of the proposed merger, would fail and exit the relevant market together with its productive assets.[77] They argued that such a situation would constitute a net loss to competition given that the target was an effective competitor.[78]

In considering this argument, the Tribunal noted that the failing-firm concept "is a term of art" and therefore "the facts of each case will take precedence over the application of a derived formula".[79] This signalled the Tribunal's preparedness to apply a flexible approach to the established criteria. It went on to lay down the criteria for the doctrine.[80]

3 1 2 1 Criteria for the failing-firm doctrine

The criteria can be derived from the analysis employed by the Tribunal in assessing the merger that was presented in the form of an inquiry. This inquiry is:

(a) Whether the alleged failing firm is failing or is likely to fail[81]

The Tribunal accepted that the target firm was in a dire financial situation.[82] However, this was not enough to justify approval of the merger. In other words, the fact that the target firm was factually in a precarious position was considered inadequate evidence of "failing" in the statutory sense of the word. The Tribunal focused not on what is "failing", but rather on what brought about the alleged failure.[83] It noted that such a consideration is necessary to assess how the contemplated merger would address the causes and resuscitate the allegedly failing firm.[84] It concluded that despite its precarious financial position, a firm cannot be regarded as a failing firm if such a position is occasioned by a management decision.[85] A similar approach was adopted in the EU where the Commission rejected claims that the target firm was failing and noted that its impending exit from the relevant market was a result of a management decision to shut it down and reinvest somewhere else.[86] *In casu,* the fact that Price's Daelite had excess

75 *Schuman Sasol* (fn 25) para 2.
76 Para 31.
77 Para 57.
78 *Ibid*.
79 Para 59.
80 Paras 60–68.
81 Para 60.
82 *Ibid*.
83 Paras 61–62.
84 Para 62.
85 *Ibid*.
86 Case IV/M.053 *Aerospatiale –Alenia/de Havilland* [1991] OJ L334/42 L334/51 para 31.

capacity was regarded as an indication of the firm's potential and hence it was difficult to contemplate how it could have been in a financially dire situation.[87]

A firm can only be deemed to be failing if, absent the merger, it is bound to exit the relevant market due to a hopeless financial situation that is not self-induced.

(b) Whether or not there are less anti-competitive alternative purchasers[88]

The merging parties seeking refuge under the failing-firm doctrine must demonstrate that the proposed acquirer is the only available purchaser as there are no other acquirers whose acquisition of the alleged failing firm poses a less competitive threat than the proposed transaction.[89] This can be done by demonstrating that a genuine attempt was made to find an alternative purchaser.[90] Such an effort must be inclusive and not predetermined.[91] It was found that this was not met when only external firms were selected.[92] However, it is acceptable that for purposes of maintaining a competitive market structure, a purchaser can only be regarded as an alternative if it meets the market profile of the allegedly failing entity.[93] This means that it must be able to influence the positive competitive behaviour of other firms on the market.

(c) Whether there are any prospects of reorganising the failing firm besides the merger[94]

Evidence that the failing firm cannot be resuscitated to become a viable business entity again gives credence to the doctrine.[95] Resuscitation could take place through a capital injection or other statutory reorganisation mechanisms.[96] *In casu*, it was concluded that an indication by Schuman that it would bring viability to Price's Daelite shows that the latter could still be resuscitated without resorting to the anti-competitive merger.

(d) What will happen to the failing firm's market share in the event of its failure and exiting the relevant market?[97]

The failing-firm doctrine can only be upheld if it can be shown that in the event of failure, the vacant market share that would be left by the exiting failing firm

87 *Schuman Sasol* para 62.
88 Para 64.
89 *Ibid*. See also *International Shoe Co* (fn 23) 301 302–303 and Case IV/M.308 *Kali und Salz/mDk/Treuhand (I),* [1994] OJ L186/56 para 80.
90 See *Kali und Salz* (fn 89) para 81 (met when reasonable efforts made through engaging an investment bank to solicit tenders). See also Arquit (fn 67) 16.
91 *Schuman Sasol* (fn 24) 64.
92 *Ibid*. See also *Blokker/Toys 'R' Us* (fn 41) L316/15 para 113 (refused claim that only the acquirer met the seller's requirement of having sufficient knowledge of a particular market and necessary infrastructure).
93 See *Pioneer Hi Bred International Inc/Panaar Seed (Pty) Ltd v The Competition Commission/African Centre for Biosafety* 113/CAC/Nov11 para 20. See also Case No. COMP/M.2816 *Ernst & Young France/Andersen France*, Commission decision of 5 September 2002 para 80.
94 *Schuman Sasol* (fn 25) para 65.
95 See, eg, s 11 of the US *Horizontal merger guidelines* which requires parties to demonstrate that the alleged failing firm cannot be successfully reorganised under the insolvency/bankruptcy laws.
96 Eg, business rescue provisions under Ch 6 of the Companies Act 71 of 2008.
97 *Schuman Sasol* (fn 25) 66. See EC *Horizontal merger guidelines* para 90.

would inevitably be occupied by the acquiring firm.[98] This shows not only that there are no other purchasers in the market, but also that even if the merger is prohibited, the market conditions would still deteriorate as a result of the exit of the target firm and the acquirer would still assume a dominant position. The merger is thus not the cause of the deterioration in the market conditions and, therefore, its prohibition serves no purpose.[99]

(e) What will happen to the failing firm's assets post-failure?[100]

Allowing the failing firm's productive assets to exit the relevant market constitutes a net competition loss. As such it must be demonstrated that post-failure, the assets will be kept in the relevant market by the acquisition. This is only required if there are no other purchasers who can do the same.

Having considered what can be regarded as the essentials of the failing-firm doctrine, the attention now turns to the approach. Here, the *Iscor/Saldanha Steel*[101] decision is used to illustrate the South African approach to the failing-firm doctrine.

3 1 3 Iscor/Saldanha Steel

The Tribunal's decision follows a proposed acquisition of the shares of Saldanha Steel (Pty) Ltd from one co-owner, the Industrial Development Corporation of South Africa Limited (IDC), by Iscor Limited, the other co-owner.[102] The transaction would have seen Iscor owning all the issued shares in Saldanha. The Tribunal conditionally approved the merger though it admitted that it raised no quantifiable competition concerns.[103] The basis for the approval was the failing-firm doctrine which enabled the merger to clear the first hurdle of the test and the imposition of conditions was done to mitigate the public interest concerns raised therein.

In considering the failing-firm doctrine, including its theoretical basis and criticism of it,[104] the Tribunal went on to set out what can be described here as the South African approach to the doctrine. This approach may be summarised as follows:

(a) Establishing the doctrine does not amount to an absolute defence to an otherwise anti-competitive merger, but rather it is a mere factor that helps to arrive at a conclusion that the merger is unlikely to substantially lessen or prevent competition.[105]

(b) The doctrine is a distinct aspect that must be considered as such and separated from other similar doctrines or defences that may be invoked to justify a merger that raises competition concerns.[106] In particular, the Tribunal set

98 *Ibid*.
99 *Supra* para 66. See also on lack of causality, Baccaro "Failing firm defence and the lack of causality: Doctrine and practice in Europe of two closely related concepts" 2004 *European Competition LR* 11.
100 *Schuman Sasol* (fn 25) para 67.
101 *Iscor Limited/Saldanha Steel* (fn 25).
102 Para 2.
103 Para 6(3).
104 Paras 77–97.
105 Para 101.
106 Paras 98–99.

the record straight that if a merger involving an alleged failing firm is believed to result in any efficiencies or public interest benefits, it is advisable that merging parties rely on those considerations and that they must be kept apart from the failing-firm doctrine.[107] This is intended to avoid clouding the doctrine given that those other considerations are adequately provided for in the Act.[108]

(c) It confirms the *Schuman Sasol*[109] approach to the effect that the doctrine is not cast in stone and that no single criterion can be said to be the exclusive one. The applicable criterion is determined by the facts of each case.[110] The Tribunal expressed the desire to apply and adapt the US and EU criteria.[111]

(d) A flexible approach. The Tribunal expressly stated that it intends to allow for a flexible approach by not adhering to the strict approach employed in other jurisdictions.[112] However, this approach largely is dependent on the degree of competitive effects raised by the merger.[113] A merger which, after the competition analysis, presents serious competition concerns is likely to face a strict application of the doctrine. This is meant to ensure that the doctrine is employed to genuinely failing-firm claims. Hence, the competitive structure of the market is not compromised by allowing anti-competitive mergers to go through the assessment net on the basis of failing-firm claims.

(e) The established principles of merger regulation must not be rewritten but rather adapted to suit the South African situation. Although the approach adopted by the Tribunal showed a departure from that employed in the US and the EU, such a departure is limited to the interpretation of the doctrine as a factor rather than a defence. This is in line with the substantive assessment test which requires the merger even after an exhaustive assessment of the failing-firm doctrine, to be subjected to further scrutiny in terms of the public interest-compatibility test.

The Tribunal values the significance of promoting and maintaining competition. This is evidenced by its declaration that although it might relax other requirements for meeting the doctrine as may be set and applied in foreign jurisdictions, the less anti-competitive-purchaser requirement was non-negotiable.[114] This means that, for instance, the Tribunal might be willing to accept as failing, a target firm that is likely to exit the relevant market as a result of a management decision not to reinvest in that firm. This approach is also evidenced in the *Pioneer Hi-Bred/Panaar Seed*[115] decision where, though the firm was not a failing firm,[116] the Tribunal took time to consider the significance of an alternative purchaser and concluded that not every name of a purchaser that is thrown into the

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107 Para 110(1).

108 See, generally, s 12A(1)(a)(i) on efficiency justification and 12A(1)(a)(ii) read with subs (3) on substantial public interest benefits.

109 *Supra* fn 25.

110 Para 59.

111 *Iscor/Saldanha Steel* (fn 25) paras 108 and 110(2), (3) and (4).

112 Para 108.

113 Para 110(4).

114 Para 110(6).

115 *Pioneer Hi-Bred/Panaar Seed* (fn 93). See also *CTP Limited and Compact Disc Technologies (A Division of Times Media) (Pty) Ltd v The Competition Commission* IM232Feb16.

116 Para 3.

fray constitutes an alternative purchaser.[117] A party is only regarded as an alternative purchaser if it is able to fit the market profile of the exiting firm.[118] This ensures that the merged entity would be a significant player in the market as far as competition is concerned by being able to put pressure on the incumbents.

Having considered the place of public interest considerations in South African merger regulation and the principles underlying the failing-frim doctrine and its application in South Africa, the discussion next focuses on the implications of the public interests consideration on the interpretation and application of the doctrine.

4 IMPLICATIONS OF PUBLIC INTEREST CONSIDERATIONS ON THE FAILING-FIRM DOCTRINE

Section 12A(1) provides that the competition authorities must first assess the merger to determine its likely effects on competition. This assessment is done by considering, *inter alia*, the failing-firm doctrine.[119] The substantive test thus regards the failing-firm consideration as a mere factor in assessing the first leg of the test. Regardless of whether the merging parties are able to satisfy any criteria that the competition authorities might have settled on, given that the statute does not provide any further guidance to this effect, the merger must still be subjected to further scrutiny.

Section 12A(b) provides for an assessment of the merger after the initial test regardless of the results thereof to determine "whether the merger can or cannot be justified on substantial public interest grounds". In the context of the failing firm this can be interpreted to mean that even if the parties had managed to establish the failing-firm doctrine, the merger must be scrutinised to determine its public interest compatibility. Similarly, even if the parties have failed to establish the doctrine, the merger must still be subjected to further scrutiny. In South Africa, therefore, the failing-firm doctrine is interpreted not as an absolute defence to an anti-competitive merger within the context of the three-pronged substantive test, but rather as a mere factor in determining one of the three legs of the single test. The question is how this influences the doctrine.

The first scenario contemplates subjecting a merger where the merging parties had managed to satisfy the requirements of the failing-firm doctrine to negotiate the first hurdle of the three-pronged assessment test to further scrutiny. What happens to the merger if it fails this further test? Would the authorities give it a reprieve or would they block it regardless of it demonstrating that it is capable of neutralising the competition concerns by clearing the failing-firm hurdle? In any event, an anti-competitive merger seldom clears the first hurdle. This is because consideration of the failing-firm doctrine is not an isolated inquiry but one that is carried out within the context of determining the competitive effects of the merger.[120] There is no initial inquiry to determine whether the merger raises any competition concerns, followed by considering whether the failing-firm doctrine may be established as a defence to justify its approval if found to be anti-competitive.[121] It follows that satisfying the requirements for establishing the

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117 *Ibid*.
118 See fn 93 above.
119 S 12A(2)(g).
120 See *Iscor/Saldanha Steel* (fn 25) para 103.
121 *Ibid* (referring to the practice in other jurisdictions where the doctrine is treated as an absolute defence to an otherwise anti-competitive merger).

failing-firm doctrine does not result in an approval of an anti-competitive merger. This is because a merger is not cleared merely on the basis that it had managed to pass the first hurdle of the three-pronged test, that is, the competition test. It can be argued that a merger that clears the first hurdle of the three-pronged substantive test may best be described as having a neutral effect on competition. The question then is whether that merger that poses no harm to the competitive structure of the market may not be approved on the grounds that it fails the public interest part of the test.

First, one must answer the question as to when a merger can be said to have failed the public interest test, and then, what happens to such a merger? A merger is deemed to fail the public interest test if it raises public interest concerns. By public interest concerns is meant that the merger is likely to have an effect on any of the specified grounds in section 12A(3). Bearing in mind that a merger that passes the competition leg of the three-pronged substantive test is one that is competition neutral, it becomes difficult to envisage the competition authorities not approving it simply because it raises public interest concerns.

In *Industrial Development Corporation/Anglo-American*[122] the Tribunal noted that the public interest test has a "Janus-faced quality" in that it can either work to prohibit a merger raising no competition concerns, or result in the approval of an anti-competitive merger.[123] This quality is shown by subjecting a merger where the merging parties had managed to satisfy the requirements of the failing-firm doctrine to negotiate the first hurdle of the three-pronged assessment to further scrutiny. The answer as to whether the competition authorities can block a competition-neutral merger can be positive and negative. In principle, the competition authorities are able to a competition-neutral merger for failing the public interest test as there is nothing in the Act to suggest otherwise. However, practice has shown that the competition authorities have never blocked a merger that raises no competition concerns primarily on public interest grounds.[124] However, this does not mean that the merger is simply allowed in its current form. The competition authorities have made use of a number of remedies at their disposal to impose conditions on the merger and then conditionally approve it.[125] In this context, these conditions specifically address the public interest concerns raised by the merger.[126] The inclusion of public interests considerations in merger review does not in practice result in a successful failing-firm claim being declared incompatible with the public interest and blocked. It can be found incompatible, but that does not mean it will be blocked.

The second scenario contemplates the possibility of a merger involving a failing firm being approved on public interest grounds. In other words, could the public interest leg help to save a merger involving a failing firm where the parties might have failed to meet the requirements for the failing-firm doctrine? The failing-firm doctrine is considered when determining the first part of the test.

122 *Supra* fn 20.
123 Para 22.
124 Lewis (fn 2) 360; Moodaliyar "Competition policy in the SADC: A South African perspective" in Drexl *e tal* (eds) *Competition policy and regional integration in developing countries* (2012) 69.
125 Ss 13(5) and 14(1)(b)(ii).
126 *Tiger Brands* (fn 67); *Duan et Cie AG/Kolosus Holdings* Ltd 10/LM/Mar03; *DB Investments SA v De Beers Consolidated Miners Ltd* [2001–2002] CPLR 172 CCT.

This implies that should the parties seek to rely on the doctrine to clear the first hurdle of the three-pronged test and fail, the Act still requires the competition authorities to consider whether or not the merger may be justified on public interest grounds. The merger involving a "failed-failing-firm argument" thus still is subjected to public interest scrutiny. A merger that involves a failed-failing-firm doctrine may be regarded as anti-competitive as the doctrine is employed to assess the likely anti-competitive effects of a merger. However, an exception to this would be where the parties have wrongly invoked the doctrine where the situation does not clearly exhibit a classic case of a failing firm. In other words, the fact that a failing-firm claim failed does not mean that the merger is anti-competitive, but it rather is a matter of the wrong option being chosen. It is assumed, pursuant to this argument, that the hypothetical scenario portrays a situation where the facts *prima facie* exhibit a failing firm, but that the merging parties failed to meet the preferred criteria and that the merger simply was anti-competitive from the start. This is because, as stated earlier, the South African authorities have applied the doctrine in a flexible manner that may be described as generous. They have stated that they may employ a stricter approach only in instances where the merger is likely to affect competition to a great degree.[127] It is then clear that the reason why the doctrine might have failed in the first place is that the proposed merger is anti-competitive. The question is whether subjecting the said merger to a further scrutiny affords it a second chance.

The possibility of a reprieve was acknowledged in *Industrial Development Corporation/Anglo-American*. This is true in principle as the legislature could not have intended to condemn an already-condemned transaction. In other words, a merger that might have failed to clear the competition test can still be afforded a second chance. Is this so only in principle or is it a reality? There is no doubt that the first leg of the test where the failing-firm doctrine is utilised does not constitute the exclusive criteria for merger review. This means that even if the merger failed to clear that leg because the failing-firm doctrine was not established, the Act enjoins the reviewing authorities to consider that same merger on, *inter alia*, public interests grounds. The question is: can the merger be approved on public interests grounds alone having been found to be anti-competitive as evidenced by its failure to clear the competition leg of the test? As much as this is possible in principle, there are several factors that make it practically impossible for an anti-competitive merger to be approved on purely public interest grounds.

Firstly, there is no such precedent in South African merger regulation.[128] This shows that the authorities have never approved an anti-competitive merger and will probably not do so. Secondly, the competition authorities have reiterated that although they are statutorily obliged to consider the likely impact of any given merger on substantial public interests, such a mandate must not be construed as placing the latter at the heart of merger assessment.[129] The primary mandate of the competition authorities is to ensure the protection of the competition process.[130] The authorities have shown a commitment to jealously guard the

127 See *Iscor/Saldanha Steel* (fn 25) para 110(4).
128 See fn 124 above.
129 *Wal-Mart Stores Inc/Massmart Holdings Limited* 73/LM/Nov10 para 32 where it was stated that the "Tribunal's job is not to make the world a better place, but only to prevent it from becoming worse as a result of a specific transaction".
130 See *Natal Association of Pharmaceutical Wholesalers v GlaxoWellcome (Pty) Ltd* CT 68/112/Jun00 para 64.

competition process. This is evidenced by its dismissing of attempts to weaken it through "wild" interpretations of the public interest concept[131] and attempts to hijack the concept to protect individual interests that are not aimed at protecting the competition process,[132] as well as the fact that the competition authority has maintained its independence from any form of influence, including political pressure.[133]

The most important feature of the South African approach is its ability to promote flexibility in mergers involving failing firms. This is particularly important given that the doctrine had gained a reputation as being notoriously difficult to establish as the criteria for doing that are strict and narrow.[134] This has been admitted also by regulatory authorities in the US.[135] However, the rationale for such a narrow approach and resultant strict application is that once the criteria are met, an anti-competitive merger is approved. However, it is argued that where the doctrine does not result in the approval of an otherwise anti-competitive merger, there is no need for a strict and narrow approach. This is what the South African authorities have shown. The three-pronged substantive assessment test offers a buffer against the approval of an anti-competitive merger in that the substantive test, though consisting of three legs, is a single test in which the failing-firm consideration is utilised only as a component of deciding one aspect thereof.[136] However, regardless of this positive influence, that is, a flexible approach to the doctrine,[137] the reality is that public interest considerations have caused controversy in the South African merger regulatory system mainly when they were subjected to 'wild' interpretations and relied upon to try and protect vested interests disguised as public interests.[138] This has led to questions as to whether they need to be removed from merger regulation.

Does South Africa need public interest provisions in its merger regulation statute? An exhaustive discussion of this aspect is beyond the scope of this

131 *See Standard Bank Investment Corporation Ltd v Competition Commission; Liberty Life Associations of Africa Ltd v Competition Commission* 2000 2 SA 797 (SCA) (*Nedcor/Stanbic)*.

132 See *Glaxo Wellcome pl./Smithklineplc v The Competition Commission* 58/AM/May01.

133 This was exhibited by the recent *Wal-Mart/Massmart merger* (*supra* fn 129) and upon appeal *South African Commercial Catering and Allied Workers Union (SACCAWU), The Minister of Economic Development, The Minister of Trade and Industry and The Minister of Agriculture and Fisheries v The Competition Commission, The Competition Tribunal of South Africa, Wal-Mart Stores Inc and Massmart Holdings Limited* 110/CAC/Jul 11 and 111/CAC/Jul 11 in which several government ministers vigorously opposed the merger but the competition authorities stood their ground and conditionally approved the merger because it raised no serious competition concerns.

134 See fn 27 above.

135 Valentine (fn 27): The standards of the defence "are strict . . . [and] rarely all satisfied, and, as a result, the defense is seldom invoked. In fact, the Supreme Court has not upheld its application since its 1930 *International Shoe* decision;" Scheffman *et al* "20 years of merger guidelines enforcement at the FTC: An economic perspective" (2002) 51, available at http://1.usa.gov/1JGr539 (accessed on 12 April 2012) (the FTC has successfully challenged a number of mergers where a failing-firm defence was alleged); Friedman "Untangling the failing company doctrine" 1986 *Texas LR* 1375 1376: "[The failing-firm defence] has often been ignored or scorned, and [is] rarely invoked with success in litigation."

136 Fn 119 above.

137 Fn 112 above.

138 See fn 131 above.

article. However, the fact that these provisions effect the failing-firm doctrine makes it necessary to emphasise a number of issues. One of the criticisms against the provision is levelled particularly against the intervention proceedings on public interest grounds;[139] and the requirement of serving notice of the merger on other parties besides the competition authorities.[140] In the context of the failing-firm doctrine these provisions have the potential to prolong the process to such an extent that by the time the merger is determined, the alleged failing firm might already have failed and the merger decision would not achieve its intended purpose: to rescue a failing firm. This is an unfortunate reality, however, the question is whether this situation should be addressed by removing the relevant provisions. The answer is a sounding "no". This is because the inclusion of public interest provisions must be understood as a reflection of matters that impact on South African society at large and the authorities cannot ignore them. Even if they are removed from the competition statute, they are likely to appear elsewhere. This is because the concerns that are intended to be addressed by public interest considerations such as employment, greater spread of economic participation and industrial policy, are of broader national interest and, as such, need to be considered by competition policy or in other forums. It follows then that if these public interest concerns are removed from competition legislation and concentrated in other legislation, merging parties will be required to notify the competition authorities for purposes of competition assessment and then any other such authorities for purposes of assessing compliance with statutes. This multiple filing is not only expensive but is time-consuming, especially given that time is of the essence, especially in failing-firm cases where delays in determining the fate of a notified merger might result in the failure of the target firm and its subsequent exit from the market. This means that even if the merger is to be approved post failure and exit, the merger might have failed to achieve its goal of 'rescuing' a failing firm.

It is submitted that retaining the public interest provisions is not only a policy matter but also a logical one. However, to counter the unfortunate situation of prolonging the proceedings it is suggested that consideration be given to allow the Competition Commission to provisionally approve a merger once it is establishes that it will not raise competition concerns. This must not be taken to mean that there will be a separate assessment, but will be merely a provisional determination based on the evidence provided. Either way, as noted above, the public interest considerations upon which the interventions in question are founded do not provide a basis for prohibiting a merger.

5 CONCLUSION

The inclusion of public interest considerations as part of the substantive assessment test in merger review undoubtedly has a telling influence on the interpretation and application of the failing-firm doctrine. The most notable and significant influence is that the doctrine is interpreted as a mere factor in assessing one of the three legs of the substantive test, that is, the significant lessening of competition and regardless of the outcome of that test, the merger still has to be subjected to a public interest scrutiny. The South African approach thus contrasts sharply

139 S18(1).
140 S13A(2)(a) (on organised labour) and (b) (employees or representatives.)

with other jurisdictions where the doctrine is an absolute defence to an otherwise anti-competitive merger. Nevertheless, this distinct South African approach promotes flexibility as the competition authorities are under no pressure to apply a narrow and strict approach so as to protect a competitive market structure that may be harmed by allowing an anti-competitive merger. The three-pronged substantive assessment test provides a sufficient buffer against the approval of an anti-competitive merger and the South African approach proves this.

The public interest leg of the test in principle may result in the approval of a failed-failing-firm argument and the blocking of a successful one. However, this is not possible in practice as failure to establish the doctrine only means that the merger is grossly anti-competitive, while the public interest leg is not meant to cure anti-competitive mergers. Similarly, a merger that raises no competition concerns may never be blocked because it failed the public interest leg of the test. There are enough safeguards to ensure that public interest concerns are taken into consideration rather than impeding otherwise beneficial mergers. It can thus be said that public interest provisions have a largely positive influence on the South African approach to the failing-firm doctrine. This approach helps protect the competition process and allows for the approval of benevolent mergers.

The possibility that public interest provisions can prolong the review process has necessitated suggestions for the removal of these provisions from the competition statute. However, this will never be a solution given the importance of the policy objectives underlying these provisions. They are likely to reappear in some other statute with similar consequences. The only realistic solution lies in possibly altering the merger provisions, themselves, to allow for exemptions of mergers involving failing firms from interventions that might prolong the process, or to empower the Commission to issue preliminary approvals of mergers that raise no serious competition concerns.