The importance of employment as a public interest consideration in merger regulation by

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List of abbreviations

1. “Act” means the Competition Act No. 89 of 1998, as amended;
2. “Commission” means the Competition Commission of South Africa;
3. “CAC” means Competition Appeal Court;
4. “Tribunal” means the Competition Tribunal.
5. “SME’s” means small, medium and micro enterprises

Chapter 1

1. Introduction

1.1 The purpose of Competition Law and Competition Policy

Competition policy can be broadly defined as a governmental policy that promotes or maintains the level of competition in markets, and includes governmental measures that directly affect the behaviour of enterprises and the structure of industry and markets.[1] Competition policy is considerably broader ranging than competition law. [2] It includes both economic policies adopted by the government aimed at enhancing competition in the local and international markets and competition or anti-trust law.[3] It also lays out the parameters of the relationship between the state and economic citizens and between economic citizens themselves, in a manner somewhat akin to the way in which the constitution regulates the relationship between the state and individual citizens and between individual citizens themselves.[4]

Competition policy is a regulatory tool which seeks to address market failures by maintaining or creating the foundations for effective functioning markets.[5] There are various purposes for competition policy. In South African context the primary purpose of competition policy is to "promote and maintain competition," and it is supplemented by six particular sets of goals.[6] The first of these is the efficiency, adaptability, and development of the economy.[7] The second goal, competitive prices and choices for consumers, recognises the foundation of an economics-based policy in concerns about consumer welfare.[8] The other four sets of policy goals represent other public interest issues that have been important to stakeholders in the debate: employment

[1] ASEAN Regional Guidelines on Competition Policy.
[2] The investment analysis society www.iassa.co.za/competitionpolicyinsouthafrica
[3] Neuhoff et al A Practical Guide to the South African Competition Act.
[4] The investment analysis society www.iassa.co.za/competitionpolicyinsouthafrica
[5] Neuhoff *et al* A Practical Guide to the South African Competition Act.
[6] (2003) OECD Peer Review, Competition Law and Policy in South Africa page 17.
[7] *Ibid.*
[8] *Ibid.*

and social and economic welfare opportunities to participate in world markets (and to recognise foreign competition in South Africa), equitable opportunities for SMEs to participate in the economy, and increasing the ownership stakes of historically disadvantaged persons. [9]

Competition in South Africa is regulated in terms of the Competition Act 89 of 1998. The South African Competition Act is written in a manner 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.[10] Competition policy was seen by the drafter of the South African Competition Act as something that should be complementary to efforts to improve employment, support emerging entrepreneurs (particularly those from historically disadvantaged backgrounds) and complement consumer transparency.[11] The Competition Act incorporates features, which reflect the unique challenges facing South Africa's economic development.[12] It permits and, in certain cases, requires consideration of equity issues such as empowerment, employment and impact on small and medium enterprises.[13] Enterprise development is thus an important focus for South Africa's new competition policy and law.[14]

Section 2 of the Competition Act states that the purpose of the Act is to promote and maintain competition in the Republic in order to, *inter alia* promote the efficiency, adaptability and development of the economy and to promote employment and advance the social and economic welfare of South African and to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy. The general purpose of the Act in a nutshell is to promote fair and equitable competition in the country to the benefit of the market, consumers and the economy.

[9] *Ibid.*
[10] James Hodge, Sha'ista Goga, Tshepiso Moahloli- "Public Interest provisions in the South African Competition Act – A critical review" - Competition Policy, Law and Economics Conference 2009.
[11] *Ibid.*
[12] Wenzile Myeni, "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations".
[13] *Ibid.*
[14] *Ibid.*

It is clear that employment has always been one of the major problems in South Africa prior and post-Apartheid. In the black townships, unemployment is much higher than the already high national rate of about 30%, and incomes are far below the national average.[15] This was as result thereof that economic policy in South Africa has been shaped by dependence on extractive industries and isolation from many world markets.[16] The preamble[17] of the Competition Act characterises the problem that the law seeks to address, namely 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. [18]The preamble thus states that "*the economy must be open to greater ownership by a greater number of South Africans*," all of these are concerns about equity and justice. [19] The preamble recognises the problem of inefficiency and waste, but connects these too with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that "*an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans*."[20]

At this stage it is also apposite to point out that the Competition Act has established a tiered hierarchy consisting of the Competition Commission [21], the Competition Tribunal[22] and the Competition Appeal Court[23] to enforce the Act and by implication the public interest objectives pursued by the Act.

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[15] *Ibid*.
[16] (2003) OECD Peer Review, Competition Law and Policy in South Africa page 17.
[17] The law's preamble restates the law's political motivations. They include policies of equity and distribution as well as efficiency, and they clearly incorporate goals and ideals for competition law derived from the early ANC positions and the stakeholder debate – *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*
[21] See s19 regarding the establishment and constitution of the Competition Commission and s21 regarding the Commission's functions.
[22] See s26 regarding the establishment of the Competition Tribunal and s27 regarding the Tribunal's functions.
[23] See s36 regarding the establishment of the Competition Appeal Court and s 37 regarding its functions.

1.2 Role of public interest

The Competition Act specifically provides for consideration of public interest to play a determining role in the context of merger regulation. For purposes of the Act merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm[24]. Mergers are further categorized into small, intermediate and large mergers[25] and the Act also sets notification requirements for intermediate and large mergers.[26] A merger is considered to be large where the greater of the combined annual turnover and/or assets value of both the consolidated acquiring group and the target firm is valued at or above R6.6 billion and the annual turnover or assets value of the target firm is valued at or above 190 million. An intermediate merger occurs where the greater of the combined annual turnover and or assets value of both the consolidated acquiring group and target firm is valued at or above R560 million and the greater of the annual turnover or assets value of the target firm is valued at or above R80 million, but does not meet the large merger threshold. A small merger occurs where the financial values fall below the threshold pertaining to an intermediate merger. In respect of small and intermediate mergers the Competition Commission is the final decision maker but large mergers have to be referred to the Competition Tribunal for a final determination regarding their approval or not.[27] Notably the approval or rejection of a merger by the Competition Authorities occurs in accordance with a merger evaluation process set out in Section 12A of the Competition Act.

The concept of public interest with respect to the consideration of mergers is more fully developed in section 12(A) which, in brief, states that in addition to competition and efficiency considerations it is also necessary to assess whether a merger 'can or

[24] Section 12(1)(a) of the Act.

[25] a small merger" means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a). "an intermediate merger" means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a); and "a large merger" means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1)(a). Section 11(1)(a) state that The Minister, in consultation with the Competition Commission, must determine a lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers.

[26] S13 and 13A.

[27] S14A.

cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).[28] This is to be done whether or not a merger is found to be anticompetitive. It accordingly implies that in merger regulations, the competition authorities are obliged to always take into consideration the public interest to determine if the merger will be justifiable. In terms of section 12A(3) of the Act the effect of the merger on the following public interest aspects need to be determined:

(a) A particular industrial sector or region;
(b) Employment;
(c) The ability of small business or firms controlled or owned by historically disadvantaged persons to become competitive;
(d) The ability of national industries to compete in international market.[29]

The OECD has pointed out that around the globe competition and merger control laws have never developed in a political vacuum but were introduced to contribute to attaining public interest goals such as a competitive market economy or the promotion of scientific and technological advancement for the benefit of the population.[30] A merger review based on principles such as competitive pricing as well as static and dynamic efficiency, including innovation, generally promotes public interest considerations such as employment and equity, because strengthening the financial and market position of businesses can ensure enhanced job security and productivity in the long term.[31] A previous chairperson of the Competition Tribunal, David Lewis stated, also, that he was 'quite comfortable with the requirement that we must balance competition and public interest considerations'.[32] *The Act does not only require the Tribunal to assess public interest, but section 12A (1) (b) of the Act requires that the public interest grounds should be 'substantial'.* [33]

[28] *Ibid.*
[29] Neuhoff *et al* A Practical Guide to the South African Competition Act. Also Section.
[30] (2016) BIAC/OECD "Public Interest considerations in merger control".
[31] *Ibid*.
[32] Willem Boshoff , Daryl Dingley & Janine Dingley the economics of public interest provisions in the South African Competition Policy.
[33] James Hodge, Sha'ista Goga, Tshepiso Moahloli- "Public Interest provisions in the South African Competition Act – A critical review" - Competition Policy, Law and Economics Conference 2009.

The rationale for the emphasis on employment as a public interest consideration is the fact that unemployment plays a significant role in the economy and growth of the economy in the country. Therefore, the Commission must determine whether a proposed merger will increase the level of unemployment in South Africa through lay-offs. Employment in South African has always been a very critical issue and South Africa's high unemployment rate affects the economy in a negative manner. In terms of the South African statistics unemployment report in February 2017, it is stated that the unemployment rate in South Africa averaged 25.37 percent from 2000 until 2016, reaching an all-time high of 31.20 percent in the first quarter of 2003 and a record low of 21.50 percent in the fourth quarter of 2008.[34] During the period of the fourth quarter 2015 and first quarter 2016, unemployment increased by 521 000 persons and employment decreased by 355 000.[35] The number of employed persons decreased in both the formal and informal sectors as well as in private households.[36] It is therefore crucial that employment is taken into consideration in respect of a company or a firm that will form part of a proposed merger. The parties to the merger transaction may accordingly be required by the Commission to disclose how they intend to deal with employees, and where the parties have not carefully considered the consequences of the merger transaction on employment, they are frequently required to project a worst case scenario in order for the Competition Authorities to assess the impact of the merger on employment.[37]

In order to facilitate the consideration of employment as a public interest concern section 13A (2) of the Act addresses the need to notify employees of a proposed merger and state that:

> "*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 merger notice contemplated in subsection (1) to –*
> *(a) any registered trade union that represents a substantial number of its employees; or*

[34] Statistics South Africa - Statistical release 2016 P0211
[35] *Ibid*
[36] *Ibid*
[37] Neuhoff *et al* A Practical Guide to the South African Competition Act.

(b) the employees concerned or representatives of the employees concerned, if there are no such registered trade unions.

However, the Commission has noted that parties to merger proceedings often provide insufficient information relating to public interest considerations – especially in relation to employment and this result in delays and the Commission not being able to make an informed decision.[38]

1.3 Nature and Scope of the dissertation

The Competition Act obliges the Competition Authorities to consider the public interest in preservation of jobs when evaluating merger transactions. It is further important to note that a merger will not be allowed to proceed unconditionally if there are substantial concerns about its impact on the jobs of persons working for the merging firms.

How many jobs must be lost before one has grounds for substantial public interest?[39] The legislature wisely does not seek to answer that for us, nor can we assume that it should be a uniform figure for all mergers - it would depend on the context.[40] Theoretically mergers may have two opposite effects as far as employment policy is concern. [41] First, a merger may cause a decrease in job places, because one company will cease to exist in the market as a result of the merger. [42] Secondly a merger may lead to the creation of jobs in several situations i) where one company acquires another which would have otherwise left the market, for instance, in a failing firm case or ;ii) owners expand the business contributing to employment gains in future. [43] A

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[38] Natasha Odendaal, "Competition authorities should balance public interest, competition considerations in merger decisions", 6 February 2015 accessed at http://www.polity.org.za/print-version/competition-authorities- should-balance-public-interest-competition-considerations-in-merger-decisions-2015-02-06

[39] James Hodge, Sha'ista Goga, Tshepiso Moahloli- "Public Interest provisions in the South African Competition Act – A critical review" - Competition Policy, Law and Economics Conference 2009. Also Competition Tribunal, Case no 08/LM/FEB02, para 240

[40] *Ibid*

[41] Merger Control in Post-Communist Countries: EC Merger Regulation in Small Market Economies- By Jurgita Malinauskaite. Routledge, 01 Nov 2010. Page https://books.google.co.za/books?id=p2zFBQAAQBAJ&dq=merger+control+and+employment&source=gbs_navlinks_s

[42] Ibid

[43] Ibid

merger may cause concern for a regional policy. [44] for instance, a merger may lead to the rationalisation for existing firms with consequential effects on unemployment. [45] Unemployment affects the society negatively.

The main purpose of this dissertation is accordingly to consider the role of unemployment as a public interest consideration in South African merger analysis. Regard will be had to case law to determine exactly how the Competition Authorities have employed this consideration as a "filter" to ensure that mergers do not further contribute arbitrarily to South Africa's already alarming unemployment rate. Guidelines issued by the Competition Authorities on consideration of public interest aspects will also be analysed.

1.4 Chapter Layout

This dissertation will consist of five chapters. The first chapter explains the purpose of competition policy and competition law. It outlines the importance and the role of public interest in merger regulations and explains the types of public interest in South Africa, focusing on employment. Chapter two addresses merger evaluation in full detail as laid out in chapter three of the Act. It explains the different types of merger and the criteria implemented by the commission and/or competition authorities during merger assessment. The chapter focuses on where in the merger analysis process the competition authorities take public interest into account, specifically relating to the issue of employment. The commission issued "guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Act" on the 31 May 2016 and on these guidelines will be considered in this chapter. Chapter Three reviews the cases in which the competition courts considered the role of public interest, in particular employment, as one the factors in merger evaluation. Chapter Four will focus on comparative aspects and how other jurisdictions take into account public interest in merger regulation. Chapter 5 will consist of the conclusions and recommendations.

Chapter 2 - Merger Regulation

[44] Ibid
[45] ibid

2.1 What is a Merger?

Section 12(1)(a) of the Act states that a "merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". The process by which the merger can take place can be either by mutual consent/agreement or through hostile takeover of a firm.[46] The Act further states that merger may be achieved in any manner, including through "purchase or lease of the shares, an interest or assets of the other firm in question; or amalgamation or other combination with the other firm in question.[47]

The definition of "merger" as set out in Section 12(1)(a) applies to any direct or indirect acquisition of control over a business/firm. In order for a merger to take place, there must thereof be an acquisition or establishment of "control" of a firm. Guidance in this regard is provided in Section 12(2) which provides that a person is deemed to control a firm if that person-[48]

(a) Beneficially owns more than one half (50%) of the issued share capital of the firm;

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

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

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);

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

[46] Neuhoff *et al* A Practical Guide to the South African Competition Act. P177

[47] Section 12(1)(b)(i)-(ii)

[48] It may include a firm i.e. company, partnership and a trust.

(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or

(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).[49]

The definition of "merger" includes three kinds of mergers namely, horizontal, vertical and conglomerate mergers. A "horizontal merger" is a merger between firms operating at the same level of the supply chain selling substitutable products in the same geographic area.[50] It is thus a merger between direct competitors in a market. [51] A "vertical merger" entails the integration of parties in a vertical relationship, such as a manufacturer and its distributors.[52] A "conglomerate merger" covers all other types of mergers that are neither horizontal nor vertical in nature.[53]

When the factors listed above are present in a proposed merger transaction, then it must be established whether a merger is small, intermediate or large[54] in order to determine whether the merger is notifiable. A merger is categorised according to the threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets of a firm, in the Republic, in general or in relation to specific industries.[55] Section 11(5) states that-

a. a small merger means a merger or proposed merger with a value at or below the lower threshold established in terms of subsection (1)(a)[56] namely, the combined annual turnover or assets (whichever is the greater) of the acquiring firms and target firms in, into or from South Africa is less than R560 million and the annual turnover or assets of the target firm is less than R80 million;

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[49] Section 12(2)(a)-(g)
[50] *Ibid*
[51] *Ibid*
[52] *Ibid*
[53] *Ibid*
[54] Section 11(5)
[55] Section 11(5)
[56] Competition Commission of South Africa- Merger threshold as at 1st April 2009. http://www.compcom.co.za/merger-thresholds/

b. an intermediate merger means a merger or proposed merger with a value between the lower and higher thresholds established in terms of subsection (1)(a)[57], namely, the combined annual turnover or assets(whichever is the greater) of the acquiring firms and target firms in, into or from South Africa is R560 million or more but not does not exceed R6.6 billion and the annual turnover or assets of the target firm is R80 million or more but does not exceed R190 million;

c. Large merger means a merger or proposed merger with a value at or above the higher threshold established in terms of subsection (1) (a)[58], namely, the combined annual turnover or assets (whichever is the greater) of the acquiring firms and target firms in, into or from South Africa is equal to or more than R6.6 billion and the annual turnover or assets of the target firm is equal to or more than R190 million.

Only parties to intermediate and large mergers are required to notify the Commission of such acquisition. Parties in a small merger need not notify the Commission unless if they are specifically required to do so by the Commission[59] or on own initiative elect to notify the Commission. The competition authorities have the sole jurisdiction to investigate and adjudicate all small, intermediate and large mergers. [60]

2.2 Merger assessment functions

Merger evaluation is the most crucial matter addressed in Chapter Three of the Act. Merger analysis is forward-looking, predictive and probabilistic.[61] The evaluation involves speculation and conjecture, but it is a "nettle to be grasped rather than avoided".[62] In this regard section 12A of the Act states that, in evaluating a merger,

[57] *Ibid.*
[58] *Ibid.*
[59] This will be in terms of Section 13(1)(a) and (b) of Act.
[60] Neuhoff *et al* A Practical Guide to the South African Competition Act, P212.
[61] Philip. Sutherland, Katharine. Kemp, Competition law of South Africa : Service issue 12
[62] *Ibid.*

the Commissioner has to first consider whether the merger is likely to substantially prevent or lessen competition. It further states that when determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the factors set out in section 12A(2), and if it appears that the merger is likely to substantially prevent or lessen competition, then the Commission must determine whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain (hereinafter TEP gains) 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. In addition it must also be considered whether the merger can or cannot be justified on substantial public interest grounds by assessing the public interest factors as set out in section 12A(3).

Thus in brief merger evaluation entails the following stages:

- Stage 1: determining, with reference to the factors in section 12A(2), whether the merger is likely to substantially prevent or lessen competition;
- Stage 2: if so, determine whether there are any TEP gains that weigh in favour of allowing the merger;
- Step 3: regardless of the outcome of the aforementioned, determine whether the merger can be justified or not, based on any of the substantial public interest grounds listed in section 12A(3).

During Stage 1 the Competition Commission must assess the strength of competition in the relevant market, and the probability that the firms in the post-merger will behave competitively or co-operatively (thus collusively), taking into account any factor that is relevant to competition in that market.[63] Factors that must be considered by the Commission for the aforesaid purpose include:

a. the actual and potential level of import in the market;
b. the ease of entry into the market, including tariff and regulatory barriers;
c. the level and trend of concentration, and history of collusion, in the market;

[63] Section 12A(2)

d. the degree of countervailing power in the market;[64]
e. the dynamic characteristics of the market, including growth, innovation, and product differentiation;
f. the nature and extent of vertical integration in the market;
g. whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail, and
h. Whether the merger will result to the removal of an effective competitor.[65]

The factors stated above must be assessed in order to determine whether the merger is likely to prevent or lessen competition in a specific relevant market.

The last leg of merger evaluation in accordance with section 12A entails that, when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or Competition Tribunal is obliged to consider the effect that the merger will have on:

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

The Act thus requires that a merger must be assessed with regard to both competition issues as well as public interest grounds.[66] If a merger will substantially prevent or lessen competition based on the factors listed above i.e. have anticompetitive effects, then merger may be justified on either technological, efficiency or pro-competitive grounds, or on public interest consideration/grounds.[67] However, it is to be noted that

[64] There is no single definition of market. In competition matters, a relevant market describes the area of competition that is relevant to issues under investigation. When investigating market, factors such as the product or service, geographical area, functional market must be taken into account.
[65] Subsection (2)(a)-(h)
[66] Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate of Werkman Attorneys- "Putting more thought into the "people" aspect of a deal: Competition Commission Public Interest Guidelines."
[67] Wenzile Myeni- "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"

even a merger that otherwise passes the first two legs of merger evaluation and poses no anticompetitive threat may be prevented if it raises serious public interest concerns.

To summarise, section 12A(1) sets out three separate but interrelated enquiries that the Commission must engage in, namely (i) determine whether the merger is likely to substantially prevent or lessen competition; (ii) if the enquiry reveals a substantial lessening of competition, then determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative competitive effects, and whether there are any substantial public interest considerations that could justify permitting or refusing the merger; (iii) notwithstanding the conclusion of the enquiry in (i) or (ii) above, assess whether the merger can or cannot be justified on substantial public interest grounds as set out in Section 12A(3) of the Act.[68]

Irrespective of the outcome of the evaluation of the competition impact of the merger, a public interest test has to be conducted.[69] Even though a merger may not have an adverse effect on competition, it still has to be reviewed on public interest grounds.[70] The public interest test can also work to resurrect a merger that is otherwise found anti-competitive.[71] This requires a balancing of competition and public interest issues and is dealt with on a case by case basis.[72] This test is therefore mandatory in all merger assessments.[73] It is for this reason that the principle of having explicit public interest goals brings fears that efficiency will be overlooked in favour of equity. However in practice such fears have no basis as authorities take a cautious approach to public interest pleas. Hantke-Domas argues that judicial interpretation of public interest in this context "constitutes a limitation of the legal scope of government's

[68] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016. Page 7
[69] *Ibid*
[70] *Ibid*
[71] *Ibid*
[72] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016. Page 8
[73] *Ibid*

intervention in the economy, and provides the judiciary with a rhetorical base for resolving questions of political economy".[74]

2.3 Where in merger analysis do you take public interest into account?

The inclusion of public interest considerations arose out of South Africa's unique history of apartheid, which led to notable economic inequality, in particular along racial lines, as well as higher concentration of wealth, a small closed economy and limited access to competitive exports, among other characteristics.[75] Public interest provisions in South African competition law have long evoked debate among South African economists and policymakers.[76]

Merger law attempts to prevent the creation of anti-competitive market structures through mergers.[77] The Act has created elaborate notification and adjudication procedures aimed at enabling competition authorities to predict the consequences mergers will have, and then to decide whether they should be allowed to be implemented or not.[78] Section 12A(1)(b) of the Act states that competition authorities evaluating a merger must otherwise determine whether the merger can or cannot be justified on substantial public interest grounds. The Commission has issued guidelines on assessment of Public Interest Provisions in Merger Regulation under the Act in May 2016. 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.[79] The Competition

[74] M Hante-Domas 'The Public Interest Theory of Regulation: Non Existence or Misinterpretation?' (2003) 15(2) European Journal of Law and Economics. Also Willem Boshoff , Daryl Dingley & Janine Dingley the economics of public interest provisions in the South African Competition Policy.
[75] (2016) BIAC/OECD "Public Interest considerations in merger control".
[76] "The economics of public interest provisions in South Africa" Willem Boshoff1, Daryl Dingley2 & Janine Dingley3
[77] Philip. Sutherland, Katharine. Kemp. Competition law of South Africa : Service issue 12.
[78] *Ibid*. also Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings 45/LM/Jun02 and 46/LM/Jun02 of 26/09/2002 par 8.
[79] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016.

Commissioner, Tembinkosi Bonakele ("Bonakele"), believes one important reason that so many mergers and acquisitions fail is because the merging parties have not put enough thought into the "people" aspect of the deal.[80]

With respect to the public interest enquiry itself, there are two lines that must be taken into consideration.[81] In the first line of enquiry, following from a negative competition finding, the Commission must determine whether there are any substantial positive public interest grounds that could justify the approval of the anti-competitive merger.[82] This means that the Commission could approve an anti-competitive merger if there are substantial merger specific positive public interest grounds that justify the approval of the merger.[83] This requires a balancing of competition and public interest issues and is dealt with on a case by case basis.[84] In the second line of enquiry, following from a positive competition finding, the Commission is required to consider whether the merger raises any substantial negative public interest effects.[85] In this case, the Commission may prohibit a merger if it is established that the merger raises substantial negative public interest effects, or impose conditions to remedy the substantial negative public interest effect arising from a merger even if the merger has a positive competition effect.[86]

The Commission, in general, will adopt the steps when analysing each of public interest provisions in Section 12A (3)(a)-(c) and will determine the likely effect of the merger on the listed public interest grounds and determine whether such effect, if any, is merger specific.[87] A merger specific public interest effect is essentially an effect that

[80] Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate of Werkman Attorneys- "Putting more thought into the "people" aspect of a deal: Competition Commission Public Interest Guidelines."
[81] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016. Page 3.
[82] *Ibid*. page 11-12.
[83] *Ibid*
[84] *Ibid*
[85] Ibid. page 12.
[86] *Ibid*. This again requires a balancing of competition and public interest issues and is dealt with on a case by case basis.
[87] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016. Page 3.

is causally related to, or results / arises from, the merger.[88] In the first line of enquiry referred to above, the Commission must consider any likely positive effects to justify the approval of the merger or determine whether a likely negative effect in the second line of enquiry referred to above can be justified which may result in the approval of the merger, with or without conditions. [89] The Commission must furthermore consider possible remedies to address any substantial negative public interest effect.[90] In applying this approach, where an effect is found to be non-merger specific, the enquiry into that effect will stop at that stage.[91]

In the first line of the public interest enquiry following from a negative competition finding, the Commission will consider what the effects on the public interest are.[92] If there are positive public interest effects, the Commission will assess whether the claimed positive effects are merger specific and substantial such that the claimed positive effects could justify the approval of the anti-competitive merger.[93] In such an instance, the merging parties will be given the opportunity to substantiate any substantial positive effects on public interest.[94]In the second line of enquiry following from a positive competition finding, the Commission will determine what the public interest effects are.[95] Following from a positive competition finding and if the public interest effects are negative, the Commission will proceed to determine whether these effects are merger specific and substantial. If such effects are merger specific and substantial, the merging parties will be given an opportunity to provide arguments and information to justify any substantial negative public interest effects and ultimately this may lead to the approval of the merger.[96] Where the arguments do not justify the negative public interest effects and approval of the merger, the Commission may

[88] *Ibid.* The commission will further determine whether such effect, if any, is substantial.
[89] *Ibid*
[90] *Ibid*
[91] *Ibid*. Likewise, where an effect is found to be merger specific but not substantial, the enquiry into that effect will stop at that stage.
[92] *Ibid*
[93] *Ibid*
[94] *Ibid*
[95] *Ibid*. If the public interest effects are positive, then the enquiry will stop. The Commission is likely to approve such a merger without conditions.
[96] *Ibid*.

consider imposing remedies or prohibiting the merger depending on the substantiality of the public interest effects.[97]

To date, it should be noted that no mergers have been prohibited on a public interest basis in South Africa.[98] There has however been mergers that were otherwise not anti-competitive but were subjected to public interest specific conditions, as discussed in more detail in the next chapter. In addition, there is view that the Commission's decision making process is faster when there are large public interest issues to consider which results in the merging parties being able to conclude deals more swiftly.[99]

Section 12A(1)(a)(ii) and section 12A(1)(b) both use the phrase "can or cannot be justified". [100]This may create the impression that the merger may be condemned only if it would also be against public interest and that it cannot be approved unless it can be positively justified on public interest grounds, irrespective of whether the merger is pro-competitive or anti-competitive.[101] However, the Tribunal has correctly rejected this interpretation. It has proposed that the words "can or cannot" were included for other purposes and that this interpretation would ignore the scheme of the Act which, in the first instance, is concerned with competition.[102] The Appeal Court has stated that this difficulty can be resolved simply by reference to the requirement that only substantial public interests can be taken into account.[103] However, this does not appear to entail a clear answer to the interpretative difficulty posed by section 12A.[104]

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[97] *Ibid*.

[98] Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate of Werkman Attorneys- "Putting more thought into the "people" aspect of a deal: Competition Commission Public Interest Guidelines."

[99] Natasha Odendaal, "Competition authorities should balance public interest, competition considerations in merger decisions", 6 February 2015 accessed at http://www.polity.org.za/print-version/competition-authorities- should-balance-public-interest-competition-considerations-in-merger-decisions-2015-02-06

[100] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12

[101] *Ibid*. In Harmony Gold Mining Co/Gold Fields Ltd 93/LM/Nov04 par 46 the Tribunal argued that this wording perhaps still made sense where s 12A(1)(a)(ii) applied but not where s 12A(1)(b) applied.

[102] *ibid*

[103] *ibid*

[104] *ibid*

2.4 Employment as a public interest consideration in merger regulation

Employment has been one of the main public interest considerations that the competition authorities have focussed on in its assessment of the impact of certain mergers over the years.[105] The effect of a merger on employment has been treated with greater deference than the other public interest factors.[106] When evaluating the effect of the merger on employment Competition authorities will keep in mind that other regulatory regimes provide more direct protection for employees.[107] They will not be prepared to interfere with regard to wages, collective bargaining and working conditions.[108] To ensure that the effect of a merger on employment is properly analysed by the Competition Authorities before approving such merger, input from affected employee groups and trade unions are considered.[109] The Act specifically requires that trade unions and/or employee representatives of affected employees be notified of any proposed mergers that are notifiable to the Competition Authorities.[110] A unique aspect of the South African merger control regime is that it actively promotes participation of unions in merger proceedings.[111] In an intermediate or large merger, the primary acquiring and primary target firms must each provide a merger notification to:

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

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[105] Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate of Werkman Attorneys- "Putting more thought into the "people" aspect of a deal: Competition Commission Public Interest Guidelines."
[106] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[107] Wenzile Myeni- "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" page 29.
[108] Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd 08?LM/Feb02 19/03/2003 pars 232-238.
[109] Wenzile Myeni- "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" page 29.
[110] *Ibid*. Section 13A of the Act. Of importance is the practical reality that a merger cannot be registered with the Commission until proof is provided to the Commission that service has been affected on trade unions or employees, where applicable. .Unions participates in about 20% of the merger proceedings, and about 20% of the unions that are notified decide to participate. (Competition Commission, 2001) These interested unions may also pursue appeals if they are dissatisfied with the outcome.
[111] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12

The involvement of employee organisations may thus materially affect the implementation of a proposed merger.[112] Not only do employees (or their unions) have the right to be notified, they also have the right to participate in merger proceedings.[113] In Unilever Plc v Commission,[114] the Tribunal held that "the purpose of these provisions is to ensure that employees' representatives are provided with the necessary information to enable them to make representations to the competition authorities, if they so wish".[115] In the case of Unilever PLC /Competition Commission/ CEPPWAWU[116] the public interest concern was the number of potential job losses in South Africa, which already has a high unemployment rate.[117] The Tribunal held that a valid assessment of the effect of the merger on employment could not be conducted on the information made available by the parties.[118] Hence, the Tribunal imposed as a condition for the approval of the merger an obligation on the merging parties to consult the trade unions regarding job losses, as a pre-condition to approving the merger.[119]

To be considered as a public interest consideration issue, job losses must be merger specific, substantial and must not be categorized under any other public interest grounds.[120] The Guidelines set out that the Commission will follow a general approach in assessing the likely employment effects of a merger on employment.[121] However, in instances where there is a dispute around merger specific job losses, this will be evaluated in detail on a case by case basis.[122] As a general approach, when assessing the likely impact of a merger on employment, the Commission will perform the following analysis:

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[112] *Ibid*.
[113] ibid
[114] Unilever Plc v Competition Commission 55/LM/Sep01 par 40
[115] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[116] [2001-2002] CPLR 336 (CT)
[117] The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations
[118] *Ibid*
[119] *ibid*
[120] Wenzile Myeni "Public Policy Considerations in Competition Enforcement: Merger Control in South Africa" Azza A. Raslan. UCL Faculty of Law: Research Paper Series: 3/2016
[121] Ahmore Burger-Smidt, Director and Kriska-Leila Goolabjith, Associate of Werkman Attorneys- "Putting more thought into the "people" aspect of a deal: Competition Commission Public Interest Guidelines."
[122] *Ibid*.

- Step 1: determine the likely effect of the merger on employment;
- Step 2: determine whether any identified effect on employment is specific to the proposed merger;
- Step 3: determine whether the likely effect on employment is substantial;
- Step 4: in the first line of enquiry referred to above, allow the merging parties an opportunity to 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 referred to above, can be justified which may lead to the approval of the merger, with or without conditions; and
- Step 5: consider possible remedies to address any likely substantial negative effect on employment.[123]

What is important to note is that this public interest concern also empowers competition authorities to protect levels of employment through conditions.[124] In determining the effect on employment, the Commission's primary consideration will be the direct effect on employment within the merging parties. [125]

Retrenchment is a matter dealt with under the Labour Act.[126] Competition authorities will not be prepared to interfere with regard to wages, collective bargaining and working conditions. [127] What concern the merger review process are merger-specific retrenchments.[128] Merger-specific retrenchment is conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new employer.[129] On the face of it, it is difficult to distinguish

[123] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 issued by the Competition Commission of South Africa. Final draft dated the 31 May 2016. Page 15.
[124] Wenzile Myeni- "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" page 29.
[125] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998. Issued 31 May 2016 Final.
[126] "The economics of public interest provisions in South Africa" Willem Boshoff1, Daryl Dingley2 & Janine Dingley3
[127] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[128] "The economics of public interest provisions in South Africa" Willem Boshoff1, Daryl Dingley2 & Janine Dingley3
[129] *ibid*

protection of employment levels from interference in other aspects of employment.[130] Yet it has been accepted that, because of the powerful link between direct employment loss and a restructuring initiative like a merger, it is undoubtedly in this area that the legislature intended a role for the competition authorities. [131] The merging parties must declare all contemplated retrenchments whether these are in their view due to the merger or operational reasons.[132]

Competition authorities divide the work force into three main categories: unskilled, semiskilled and skilled employees.[133] They give more weight to the retrenchment of unskilled employees.[134] The presumption is that skilled and semi-skilled employees are skilled professionals who do not require retraining and should be able to find alternative work opportunities.[135]

Whilst the Act offers no threshold number for when job losses become substantial, the proper approach is to start by having regard to the number of jobs that will be lost post-merger.[136] The Commission will consider whether the merger impacts on the level of employment post-merger due to, inter alia, job creation or loss of job opportunities, duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, plants and facilities.[137]

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[130] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[131] *Ibid*. Daun et Cie AG/Kolosus Holdings Ltd 10/LM/Mar03 par 126.
[132] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998. Issued 31 May 2016 Final. And also Para 109-110 of BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd (case:18713)
[133] "The economics of public interest provisions in South Africa" Willem Boshoff1, Daryl Dingley2 & Janine Dingley3
[134] *Ibid*
[135] *Ibid*
[136] *ibid*
[137] Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998. Issued 31 May 2016 Final

Chapter 3- Cases where employment played a role in merger evaluation

3.1 The Metropolitan Holdings Limited and Momentum Group Limited[138]

This case is a landmark case as it establishes the principle of connecting job losses and efficiencies.[139] On 14 October 2010 the Tribunal announced the approval of the merger between Metropolitan Holdings Limited ("Metropolitan") and Momentum Group Limited ("Momentum") subject to conditions.[140] The Tribunal held that there were no competition concerns arising in any of the potential relevant markets affected by the proposed merger. There was only one public interest concern being the effect the merger would have on employment. [141] The Tribunal, without prompting from government but at the insistence of labour, declared that it was willing to extensively address the regulation of labour on the basis of it being in the public interest to do so. [142] The Tribunal held that where there is substantial employment loss the evidentiary burden shifts to the merging parties to justify the loss.[143] In doing so, the Tribunal identified the following elements which must be taken into consideration[144]:

- Whether a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reasons for the job reduction and the number for jobs proposed to be shed are rationally connected; and
- 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.

In this case, the merging parties initially proposed to limit the number of merger related job losses to 1000 in the first three years following the implementation of the merger.[145]

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[138] Case 41/LM/Jul10
[139] https://www.africanlii.org/sites/default/files/the_rise_of_public_interest.docx
[140] http://www.comptrib.co.za/cases/large-merger/retrieve_case/1225
[141] *Ibid*
[142] Willem Boshoff, Daryl Dingley & Janine Dingley "The Economics of Public Interest Provisions in South African Competition Policy"
[143] http://www.comptrib.co.za/cases/large-merger/retrieve_case/1225
[144] *ibid*
[145] Willem Boshoff, Daryl Dingley & Janine Dingley "The Economics of Public Interest Provisions in South African Competition Policy"

The merging parties also offered to provide support, including core skills training to affected unskilled and semi-skilled employees, outplacement support and counselling, and to use their best endeavours to redeploy affected employees within the merged entity.[146] The Tribunal in the *Metropolitan/Momentum* case decided that the merger parties will have a very specific evidentiary burden once it have shown that employment loss is of a considerable magnitude and that short term (sic) prospects of re-employment for a substantial portion of the affected class are limited.[147] The Tribunal emphasised that even if the merging parties make a good efficiency argument for job losses, this efficiency gain must, if the job losses are substantial, be justified on a ground that is also of the public interest nature in order to countervail the public interest in preserving jobs.[148]

Thus, once the mechanism as developed in *Metropolitan Holdings Ltd/Momentum Group Ltd* has kicked in, the merging parties must then satisfy two criteria.[149] First, they must show that a rational process has been followed to arrive at the determination of the number of jobs to be lost and that "the reason for the job reduction and the number of jobs proposed to be shed are rationally connected".[150] Secondly, the public interest in preventing employment loss must be balanced by "an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act".[151]

The Competition Tribunal approved the merger subject to the restriction that, with the exception of senior managers, no retrenchments should occur as a result of the merger for a period of two years from the effective date of the transaction.[152] Moreover, it held that redundancy concerns cannot be addressed through "soft" initiatives such as re-skilling and redeployment as these conditions are, in its experience, largely ineffective.[153]

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[146] ibid
[147] ibid
[148] http://www.comptrib.co.za/cases/large-merger/retrieve_case/1225
[149] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[150] Ibid. page 10-135
[151] ibid
[152] Willem Boshoff, Daryl Dingley & Janine Dingley "The Economics of Public Interest Provisions in South African Competition Policy" page 6
[153] ibid

3.2 Walmart Inc/Massmart Holdings Ltd [154]

On the 27th September 2010 Massmart announced Walmart's intention to acquire a controlling interest in Massmart. On the 2nd of February 2011, the Commission finalised its investigation of the proposed merger between Walmart and Massmart. [155] it found that the merger was not likely to lead to a substantial prevention or lessening of competition. [156]The merging parties had initially argued for unconditional approval of the merger, a position initially supported by the Competition Commission. [157]in considering the public interest issues arising from the merger, the Commission looked at (i) pre-merger retrenchments at Massmart; (ii) the effect of the merger on suppliers;(iii) the effect of the merger on employment generally;(iv) the effect of the merger on the future terms of employment of Massmart employees and (v) the right to association and acceptance of unionized labour. [158] upon considering the transaction the Commission recommended to the Tribunal that the merger be approved unconditionally. [159]

Opposed to this view were three government departments, Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries, who had proposed that the merger be approved, but subject to conditions to protect the public interest.[160] The Ministers intervention arose from a concern regarding Wal-Mart's global procurement network and the extent to which its logistical capabilities might affect imports into South Africa. [161] The Minister submitted that the merger would result in a move in procurement away from local producers towards foreign low cost producers situated in Asia.[162] This would in turn result in employment losses, closure of small and medium

[154] 73/LM/Dec10 29/06/2011 par 59 and especially pars 67–70
[155] Walmart Inc/Massmart Holdings Ltd 73/LM/Dec10 29/06/2011 par 59 and especially pars pars 22
[156] Ibid
[157] http://www.comptrib.co.za/cases/large-merger/retrieve_case/1269
[158] Walmart Inc/Massmart Holdings Ltd 73/LM/Dec10 29/06/2011 par 59 and especially pars pars 22
[159] ibid
[160] ibid
[161]Willem Boshoff, Daryl Dingley & Janine Dingley "The Economics of Public Interest Provisions in South African Competition Policy" page 7
[162] ibid

sized businesses and a stifling of the development of domestic industries.[163] In particular, the CAC stated that:

> *'[T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular'*

There have been several disagreements between the Union and Wal-Mart, as Wal-Mart will not allow its workers to unionize.[164] Several battles have been fought in court and in the U.S. Congress over Wal-Mart's questionable labour practices.[165] Wal-Mart's policy has been one of delay and "terror" in the words of one union representative who has accused the company of old-fashioned union-busting tactics.[166] The CAC stated the Walmart's attitude to collective bargaining was a central issue in the proceedings. Given Walmart's reputation of antipathy towards organised labour and Massmart's divisional approach to labour negotiations, labour unions sought additional conditions that would introduce centralised bargaining and a closed shop.[167]

The Tribunal was satisfied with the imposition of a condition compelling the merged entity to honour existing labour agreements and acknowledge existing labour unions as such. [168]These arguments existed pre-merger and therefore would not be affected by merger.[169] The unions had proposed that the merger be approved subject to a wide

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[163] ibid
[164] Wal-Mart: Staying on Top of the Fortune 500 A Case Study on Wal-Mart Stores Inc. This case study was produced for the Corporate Strategy and Public Affairs Lecture, The Graduate School of Political Management, George Washington University. April 2002, Washington DC.
[165] Wal-Mart: Staying on Top of the Fortune 500 A Case Study on Wal-Mart Stores Inc. This case study was produced for the Corporate Strategy and Public Affairs Lecture, The Graduate School of Political Management, George Washington University. April 2002, Washington DC.
[166] Ibid
[167] https://www.africanlii.org/sites/default/files/the_rise_of_public_interest.docx
[168] https://www.africanlii.org/sites/default/files/the_rise_of_public_interest.docx
[169] Ibid

range of public interest conditions, but that if this was not possible, that the merger should be prohibited. [170]

The Tribunal found that evidence of retrenchments would be proof that the interests of employees as a public interest concern were sufficiently raised by parties opposing the merger.[171] But, the Tribunal held that where employees had been dismissed before the merger occurred, the causal link between the merger and retrenchments first had to be shown.[172] Nevertheless, the Appeal Court believed that proof of retrenchment sufficed in these circumstances and that the time of retrenchment cannot be conclusive.[173] Sutherland and Kemp are of the opinion that the aforesaid seems unconvincing. The opposers to the merger should have to prove all the basic elements that would allow reliance on a public interest concern, before an evidentiary burden for the merging parties can arise.[174] The time of retrenchment could be relevant for this purpose.[175]

With respect to the maintenance of employment, the Tribunal had ordered that the merged entity must when employment opportunities become available, give preference to the 503 employees retrenched in June 2010.[176] However, the CAC ordered that these employees must be reinstated as it found that the retrenchment of these workers was sufficiently related to the merger.[177] Other employment related conditions imposed by the CAC included a monitorium on retrenchments based on the merged entity's operational requirements for a period of two years; and the merged entity must honour existing labour agreements and current practice of bargaining with SACCAWU (the largest representative union).[178]

In Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd merger, the unions argued that the number of job losses was 1,414 (including all voluntary

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[170] https://www.africanlii.org/sites/default/files/the_rise_of_public_interest.docx
[171] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12
[172] *ibid*
[173] *ibid*
[174] *ibid*
[175] *ibid*
[176] Willem Boshoff, Daryl Dingley & Janine Dingley "The Economics of Public Interest Provisions in South African Competition Policy" page 7
[177] *Ibid*
[178] *ibid*

retirements and retrenchments) which accounted for 24% of the work force. [179]The parties argued that it was less than 164, which accounted for a 3% loss of the work force however, if job losses where included both forced and voluntary job losses the percentage becomes 24%.[180] Although finding that the latter percentage is indeed a significant number of job losses, the Tribunal emphasized that what matters is the substantial effect on employment, i.e., which depends on the context where despite the high retrenchment percentage, it was mitigated by a privately negotiated retrenchment packages.[181]

Chapter 4 – Comparative forum

[179] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016
[180] Ibid
[181] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016. Distillers and Stellenbosch merger supra note 26.

4.1 Introduction

The South African Competition Act draws heavily from developed countries' experience and practice in Competition law. [182] The Competition Act incorporates familiar elements that are found in the antitrust laws and concepts of many other jurisdictions. [183] The Act in section 1(3) determines that "any person interpreting or ap plying this Act may consider appropriate foreign and international law". [184] The law even encourages international comparisons. [185] Precedent in jurisdictions such as Canada, Australia and Europe have influence the South African Competition Law's content, application and interpretation. [186] The Competition Act's rules about South African merger standards are similar to those of Canada. [187] Some of the key phrases of Chapter 3 of the South African Competition Act which deals with mergers were clearly derived from the Canadian statute, but there are also significant differences. [188] The political history as it is seen in most developing countries will always influence a competition policy. [189] The Act thus recognizes the encouragement of competition as a means of achieving more fundamental goals: efficiency, expansion of world markets, protection of the opportunity for small business to compete, and protection of competitive prices and product choices.[190]

Three statutes from the mid-sixteenth century deserve special mention because they were generally relevant to the development of competition law and show the state of precursors to anti-monopoly legislation in the two countries that have had the strongest influence on South African law, namely England and the Netherlands.[191]

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[182] Neuhoff et al A Practical Guide to the South African Competition Act, page 12.
[183] 2003) OECD Peer Review, Competition Law and Policy in South Africa page 9.
[184] *ibid*
[185] 2003) OECD Peer Review, Competition Law and Policy in South Africa page 9
[186] Neuhoff et al A Practical Guide to the South African Competition Act, page 12.
[187] 2003) OECD Peer Review, Competition Law and Policy in South Africa page 9.
[188] Philip. Sutherland, Katharine. Kemp Competition law of South Africa: Service issue 12. Paragraph
[189] *Ibid.*
[190] Ibid. Also Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobcci "The law of Economics in Canadian Competition Policy" University of Toronto Press Incorporated 2002 at p39
[191] Philip. Sutherland, Katharine. Kemp Competition law of South Africa: Service issue 12. Paragraph 2.2

In South Africa, competition was regulated since 1979 by the Maintenance and Promotion of Competition Act 96 of 1979. [192] The 1979 Act allowed the adjudication of Competition matters by the then Competition Board, which was appointed by the Minister of Trade and Industry and which could investigate matters at its own initiative.[193] The 1979 Act contained no explicit prohibition, and while certain practices such as resale price maintanace, collision on price, trading terms and market division, as well as bid rigging, were subsequently declared outright illegal, there was no compulsory enforcement action or merger control. [194]

4.2 Merger in Europe

There are two levels of merger control in Europe.[195] The first is the European Union merger control for certain transactions with a 'community dimension', which fall within the jurisdiction of the European Commission under the EU Merger Regulation, Council Regulation No. 139/2004. [196] The second is national merger control for those transactions which do not meet the European Union Merger Regulation criteria, but nevertheless qualify for investigation under the national laws of Member States.[197] European competition law is the competition law in use within the European Union.[198] It promotes the maintenance of competition within the European Single Market by regulating anti-competitive conduct by companies to ensure that they do not create cartels and monopolies that would damage the interests of society.[199] The EU merger regulation provides a mechanism for the control of mergers and acquisition at the

[192] WENZILE MYENI. "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations.
[193] WENZILE MYENI. "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations.
[194] Ibid
[195] Merger Control – A Public Affairs. Bronwyn Leigh Simpson. 15 September 2013
[196] Ibid
[197] ibid
[198] https://en.wikipedia.org/wiki/European_Union_competition_law.
[199] https://en.wikipedia.org/wiki/European_Union_competition_law.

European level. [200] It was revised and replaced by the current version of merger regulation which came into force on the 1st of May 2004.[201]

From the sheer size of its field of operation but also from a comparative perspective, the European competition law system is second only to the one created in the United States. [202]For a South African it is significant not only because it governs Competition in the ever-growing European Union but also because it has had a profound influence on many of the provisions of the South African Competition Act.[203] Global Merger and Acquisition activity in Europe has been driven largely by acquirers from the US and China.[204] Competition law in Europe, like its American counterpart, was shaped by dramatic events.[205]

Companies with turnover above certain thresholds (starting at EUR 2.5 billion of combined aggregate worldwide turnover) which do business in the EU and wish to merge must ask the European Commission for approval - irrespective of where their headquarters are.[206] European Union (EU) competition law also grants the Directorate General for Competition at the European Commission the right to seek information from the merger parties, third parties and interview any natural or legal person who consents, in order to collect information in relation to an investigation.[207] Third parties are identified as those having a 'sufficient interest' in the Commission's procedure, such as customers, suppliers, competitors, members of the administration or

[200] Slaughter and May "the EU merger regulation"- an overview of the European merger control rules. June 2016. The merger regulation lays down the conditions under which the European commission or the National Competition Authorities (NCAs) have jurisdiction over concentrations. Generally concentrations with an EU dimension fall to be investigated by the commission, whereas those without an EU dimension fall to be investigated by the NCAs in accordance with their domestic merger control rules.
[201] Ibid. also council reg.(EC) 139/2004(OJ2004 L24/1,29.1.2004).
[202] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12. Paragraph 2.2
[203] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12. Paragraph 2.2
[204] Mergers & Acquisitions in Europe and Latin America 2016. Baker McKenzie.
[205] Philip. Sutherland, Katharine. Kemp Competition law of South Africa : Service issue 12. Paragraph 2.2
[206] Mergers with foreign companies. http://europa.eu/youreurope/business/start-grow/mergers-acquisitions/index_en.htm. Updated 13/06/2017
[207] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016 Centre for Law, Economics and Society (CLES)

management organs of the undertakings concerned or recognized workers' representatives of those undertakings. [208] The 2004 Best Practices state that: [209]

> "Third parties do not have a right to be heard in the absence of an explicit invitation by the Commission and are expected to comment only on the competition implications of the merger, rather than on broader issues, such as the protection of employment, environment, and so on."

The EU's General Court has the power to review the legality of all Commission decisions, including decisions under the Merger Regulation. [210]An appeal can be brought not only by the merging parties, but also by third parties "directly and individually concerned" by the decision.[211] Although the EU definition of third parties is broader than that of the United State, it is still narrower than that of South Africa.[212] In the case of Gencor Ltd v Commission the EU Court of First Instance wrote merger control is there "...to avoid the establishment of market structures which may create or strengthen a dominant position and not need to control directly possible abuses of dominant positions." [213]

4.3 Public interest in merger control in Europe

The EU Merger Working Group (EUMWG) considered that the role of public interest considerations in the context of merger control proceedings was a current and relevant issue, both regard to the EUMWG's work streams and in the context of wider concerns around potentially protectionist tendencies resurfacing in the aftermath of the financial

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[208] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016 Centre for Law, Economics and Society (CLES). Also COUNCIL REGULATION (EC) NO 139/2004 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (THE EC MERGER REGULATION). Available at http://eurlex. europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF Last viewed January 15, 2016.

[209] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016 Centre for Law, Economics and Society (CLES). Also Also EUROPEAN COMMISSION Competition DG COMPETITION Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (2010). Available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf last viewed January 15, 2016

[210] ibid

[211] ibid

[212] Ibid

[213] (1999) T-102/96, [1999] ECR II-753.
https://en.wikipedia.org/wiki/European_Union_competition_law#Mergers_and_acquisitions

crisis.[214] It therefore decided to conduct a review of public interest regimes in Member States to better understand and compare the individual Member States' regimes. [215] In the European Union Article 21 (4) of the Merger Regulation ('EUMR') allows the EU Member States to take appropriate measures to protect legitimate (non-competition) public interests, including public security, plurality of media and prudential rules. [216] Usually competition law requires competition authorities to balance the public interest criteria against the envisaged competition harm (e.g. Germany, Italy and Portugal).[217]

In a recent national merger case, the German Minister for Economic Affairs and Energy decided to grant a ministerial authorisation with conditions for a merger in the German food retail sector. [218] The merger had been prohibited by the Bundeskartellamt.[219] The ministerial authorisation was based on the public interest considerations to safeguard jobs and protect workers' rights (collective agreements and operational co-determination). [220] In line with Article 42 (1) of the German competition Act, the Federal Minister of Economics and Labour may authorise in exceptional cases a concentration prohibited by the German competition authority ('Bundeskartellamt') if the restraint of competition is outweighed by advantages to the economy as a whole resulting from the concentration, or if the concentration is justified by an overriding public interest. [221]

Differences in institutional arrangements exist across Member States as to which authority or government body may apply public interest considerations to merger control. [222] In the majority of cases there are designated ministries (for example the

[214] Public Interest Regimes in the European Union – differences and similarities in approach
Final Report of the EU Merger Working Group 10 March 2016.
[215] Public Interest Regimes in the European Union – differences and similarities in approach Final Report of the EU Merger Working Group 10 March 2016.
[216] PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL-- Background Paper by the Secretariat -- 14-15 June 2016.
[217] Ibid.
[218] Public Interest Regimes in the European Union – differences and similarities in approach Final Report of the EU Merger Working Group 10 March 2016.
[219] Ibid
[220] Public Interest Regimes in the European Union – differences and similarities in approach Final Report of the EU Merger Working Group 10 March 2016.
[221] PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL-- Background Paper by the Secretariat -- 14-15 June 2016.
[222] Public Interest Regimes in the European Union – differences and similarities in approach Final Report of the EU Merger Working Group 10 March 2016.

Minister of Energy, Commerce, Industry and Tourism (CY), In ES Minister of Economy and Competitiveness can do the same after the Spanish NCA Decision. Minister of Economic Affairs (NL), Minister of Economic Affairs and Energy (GER) or Secretary of State (UK) or the cabinet of ministers) who are able to make an intervention or to grant an authorisation on public interest grounds. Some jurisdictions emphasised that although ministerial intervention remains a theoretical option, this has never occurred in practice. [223] Poland is the only jurisdiction where the application of a public interest test is the sole responsibility of the competition authority and no ministerial intervention is required. [224]

Many OECD Members have clauses permitting the state to intervene in merger control on various public policy grounds, such as [225]:

- industrial development, protecting employment, promoting the competiveness of the undertakings in international competition in France;
- benefits to the economy as a whole or an overriding public interest in Germany;
- relevant general interests of national economy, within the context of European integration in Italy;
- general interest reasons in the Netherlands;
- questions of principle or interest of major significance to society in Norway;
- the benefits to fundamental strategic interest of the national economy in Portugal;
- national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of environment, promotion of technical research and development and the maintenance of the sector regulation objectives in Spain;
- Exceptional public interests, such as national security, media plurality, or the stability of the financial system in the United Kingdom. [226]

[223] Ibid
[224] Ibid
[225] PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL-- Background Paper by the Secretariat -- 14-15 June 2016.
[226] PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL-- Background Paper by the Secretariat -- 14-15 June 2016.

The factors on which the state's intervention can be based vary significantly, including considerations that go from general ('overriding public interest', 'economic policies of the government', 'interest of major significance to society', 'benefits to fundamental strategic interests', 'industrial development', 'international competitiveness',) to more sector specific (e.g. 'media plurality', 'stability of the financial system', 'employment', 'national security', 'protection of public health', 'protection of the environment', 'promotion of technical research').[227] The Secretariat's research suggests that the way public interest considerations are set forth in the law has practical consequences and that, in order to protect legal certainty, public interest considerations should be clearly spelt out in law or soft law. [228] As it is difficult to balance competition and public interest criteria guidance would help authorities to interpret and apply public interest considerations in an objective, transparent and predictable manner.[229]

5. Conclusion and recommendations

Mergers have had, and will continue to have, significant impacts on economic activity, corporate strategy and industry structure, as well as on the effectiveness of

[227] ibid
[228] ibid
[229] ibid

government policies.[230] Mergers can affect the operation of an economy, the structure of its industry and the level of industry concentration, as well as international competitiveness, employment and skill requirements, and can shape government policy concerns. [231]

Employment considerations are of vital importance under the South African competition enforcement. The relation between competition and employment has been a contentious one. The general belief is that more competition leads to job losses and import substitution.[232] In that sense, it is important to note that the South African model has opted to address only the negative short-term impact on employment of unskilled labour without engaging with the broader employment policy concerns.[233] The choice between static and dynamic analysis essentially split interest provision in South African competition policy into parts (i) protection of jobs (static) and other public interest provisions (dynamic or static).[234] A focus on dynamism may well undermine the use of the job protection defence.[235] The initial attitude of the South African competition authorities toward public interest considerations in merger control was summed up by the Chairperson of the Competition Tribunal at the time, David Lewis, when he stated[236] :

> "I readily concede that public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this

[230] Mergers and Acquisitions in Australia: Reasons and Timing Socrates Karagiannidis.
[231] Mergers and Acquisitions in Australia: Reasons and Timing Socrates Karagiannidis.
[232] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016: Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL London, WC1H 0EG. Recent research has shown that competition may have positive long-term effects on employment on the macro level "the final impact on employment from increased competition is more job creation, possibly associated with higher real wages (as prices are reduced)." Negative impact on employment may however be expected in the short-term (up to three years). See OECD, DOES COMPETITION KILL OR CREATE JOBS? BACKGROUND NOTE BY THE SECRETARIAT, GLOBAL FORUM ON COMPETITION TO DAF/COMP/GF (2015) 9 p. 4. Available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2015)9&doc Language=En. Last viewed January 10, 2016.
[233] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016: Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL London.
[234] Public Policy Considerations in Competition Enforcement: Merger Control in South Africa Azza A. Raslan February 2016: Centre for Law, Economics and Society (CLES) Faculty of Laws, UCL London.
[235] Ibid.
[236] BALANCING PUBLIC INTEREST MERGER CONSIDERATIONS BEFORE SUB-SAHARAN AFRICAN COMPETITION JURISDICTIONS WITH THE QUEST FOR MULTI-JURISDICTIONAL MERGER CONTROL CERTAINTY-John Oxenham vol. 9.211 page 216.

> are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries…"

South Africa is an example of a developing country, which has specific public interest goals incorporated in its competition legislation. [237] This model of competition policy envisages Competition Authorities engaging in the balancing of various interests, namely those of workers and consumers when adjudicating competition matters. [238]

When looking at the South African Competition Act, a more contentious conflict arises between the fundamental goals of maximizing efficiency and achieving the most competitive prices for consumers. [239] This conflict is most apparent in merger cases, where an acquisition may involve both significant gains in efficiency in the form of cost savings and an increase in prices because of a lessening of competition.[240] In most cases the South African Competition Authorities resolved such potential conflict in favour of efficiency. [241] The most frequent public interest clauses are socio-economic or socio-political considerations, such as 'employment', 'international competitiveness', 'exports' and 'promoting stability.

The results of the low cost goods at Walmart ultimately come at a high social and economic price: lost jobs, lower wages, and a growing wage deficit." [242] The witness testimony even throws in warnings against the possibility of obesity and more impoverished workers (as a result of working at Wal-Mart) which it documents from

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[237] WENZILE MYENI. "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations".
[238] WENZILE MYENI. "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations".
[239] WENZILE MYENI. "The role of public interest in merger evaluations and how efficiency-driven principles are reconciled with public interest considerations.
[240] Ibid. also Michael Trebilcock, Ralph A Winter, Paul Collins and Edward M. Iacobcci "The law of Economics in Canadian Competition Policy" University of Toronto Press Incorporated 2002 p40.
[241] Ibid.
[242] South Africa: Inside The Wal-Mart-Massmart Merger.
www.africaprebrief.com/media/APBwalmartmassmart.05102011.pdf

case studies of Wal-Mart workers in the United States (the most economically developed country in the world). [243]In conclusion it asserts that Massmart‟s becoming a “foreign‟ entity (as a result of Wal-Mart‟s 51% ownership) “will reduce levels of black economic empowerment and the likelihood of empowerment procurement within the retail sector.”[244]

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[243] Ibid
[244] Ibid