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A CRITICAL APPRAISAL OF SOUTH AFRICA'S POLITICAL APPROACH TO COMPETITION REGULATION

by

PHILIP BOUWER

(Student number: 28258101)

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SUPERVISOR: PROF CM VAN HEERDEN

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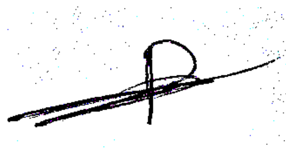
Signature of student: 

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ABSTRACT

Authorities have always been conflicted in their enforcement of competition laws. This is due to the fact that they are often tasked with balancing traditional competition goals such market efficiency and consumer welfare and so-called “political” or “socio-economic” goals which are often alien in their nature to traditional competition law goals. Competition regulation in South Africa is certainly no different and if anything, even more conflicted. The Competition Act 89 of 1998 contains a variety of goals listed in section 2, many of which can be regarded as political in nature. Many of these goals also fall within the ambit of the current regime’s redistributive and affirmative action policies. This poses questions regarding whether these goals can be better achieved through policies designed specifically to achieve such goals, whether competition policy and law is even capable of achieving these goals, and whether trying to achieve these goals through the use of competition policy and law will have an adverse effect on competition regulation as a whole.

In order to answer these questions this thesis will first examine the historical development of the theories of competition regulation that originated mainly in the US as birthplace of modern competition (antitrust) law during the early twentieth century. These theories will be used to extract the primary goals of competition policy as well as other policy goals that have informed the development of competition regulation. The theories will further be examined to determine how they have influenced the historical development of South African competition regulation. South Africa’s unique history requires that the various policy considerations that informed the development of South African competition law be evaluated. In this regard, specific focus will be placed on the policy objectives identified by the ANC led government in the formulation of the Competition Act. The listed goals of the Competition Act will be examined together with the various provisions relating to horizontal restrictive practices, abuse of dominance, and merger regulation Additionally, the manner in which competition authorities have dealt with and adjudicated on these matters will be examined. In particular, the various landmark decisions of the Competition Tribunal and Competition Appeal Court in matters involving allegations of collusion and abuse of dominance together with their decisions in matters of merger regulation, will be examined to establish how they have sought to balance the competing aims of the Competition Act. The numerous interests that came into play during the adjudication of these matters will also be examined to establish whether these interests were of a

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competition nature or whether they were of a political nature. This thesis will further examine the recent changes to the Competition Act contained in the Competition Amendment Act of 2018 with the view of establishing whether these amendments have been formulated with the aim of improving the Act's ability to achieve pure competition goals or whether they are aimed at improving the Act's ability to achieve "political" goals.

Lastly, the convergence between competition regulation and socio-economic development will be examined with the view of determining how competition policy can best contribute to socio-economic upliftment. What is the most appropriate medium through which competition policy can contribute to the achievement of political goals? Various recommendations on how competition policy can best be used to this end without compromising on the achievement of pure competition goals will be discussed. The overall aim will remain to determine whether South Africa's political approach to competition aids in the achievement of effective competition, or whether this political approach hampers the attainment of same.

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Chapter 1 – Introduction

1. Background and Problem Statement

The industrial revolution changed the face of commerce forever. It brought with it a number of new technologies that in turn created many new markets that previously never existed. The, perhaps unintended, consequence that this "Big Bang" of capitalism had, was to create an exclusive and privileged group of individuals and firms that were now bestowed with newfound monopolies in their respective markets.[1] These firms and individuals soon realised that because of this unique position they enjoyed within their markets, they incidentally also obtained the necessary power to manipulate the ordinary functioning of such markets. Lawmakers soon realised that this power would need to be restricted in order to restore and protect the proper functioning of the markets concerned.[2] The belief that subsequently began to emerge was that measures should be enacted to protect smaller competitors from these large and dominant firms.[3] The need for competition regulation was born.

Competition law as we know it today dates back more than 100 years and its genesis can generally be traced to the United States with the enactment of the Sherman Act in 1890.[4] Over the years, the US has served as a melting pot for ideas on antitrust (competition) regulation and has had a substantial influence on, and served as the basis for, the continued development of competition law globally. The goals too of competition law have grown to extend far beyond the mere protection of smaller firms from their larger rivals.

Despite all the developments in competition policy and law, the ultimate goal of competition law however appears to have remained an elusive concept. Is the aim of competition regulation to develop an environment in which a competitive market can flourish? Or is the aim perhaps to protect smaller competitors from large monopolies, or instead protect consumers from the actions of these monopolies? Although there does not appear to be a universally accepted answer to this question, the US decision of

[1] Usher, Berglund, Custis, Laidler & Tyson "The Rise of Monopoly in the United States" (1933) *The American Economic Review* 1, at 1.
[2] See Chamberlin *The Theory of Monopolistic Competition* (1962) at 213.
[3] See Hunt "The Theory of Monopolistic Competition, Marketing's Intellectual History, and the Product Differentiation Versus Market Segmentation Controversy" (2011) *Journal of Makromarketing* 73, at 78.
[4] The Sherman Act of 1890 15 U.S.C. §§ 1-7 was enacted in 1890. It should however be noted that Canada enacted its competition legislation in 1889, thus preceding UD antitrust legislation. However the US has been the centre of developments in competition law ever since.

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Spectrum Sports, Inc. v McQuillan[5] does appear to point to the fact that the protection of competition itself is of paramount importance. In this case the US Supreme Court significantly held that:

"The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[6]

Generally, the main goals that competition law frameworks across the globe pursue today are allocative efficiency and consumer welfare (the so-called traditional competition goals), as discussed in more detail in chapter 2 hereinafter.

In South Africa, being a developing country, competition regulation is still in its infancy. The current competition framework only came into being at the end of the 20th century. Prior to this, effective competition regulation was sorely lacking in the South African market. The discriminatory laws of the Apartheid Government and its policy of deep inward industrialisation following South Africa's exclusion from international markets created significant structural impediments to effective competition in the South African market. [7]

After 1994, the incoming ANC government was presented with a market characterised by deep structural barriers to effective competition. The ANC also inherited a country beset with a great number of social ills that were the direct result of the previous government's policy of racial discrimination. The enactment of effective competition policy was soon identified as a key measure that would assist with redressing the vast majority of these issues.[8] The South African law makers, in comparison to earlier ineffective

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[5] 506 U.S. 447 (1993).

[6] *Spectrum Sports, Inc. v McQuillan* 506 U.S. 447 (1993) at 458.

[7] Also see Hartzenberg "Competition Policy and Practice in South Africa: Promoting Competition for Development" (2006) *Northwestern Journal of International Law & Business* 667, at 667. Also see Organisation for Economic Co-operation and Development (OCED), Directorate for Financial and Economic Affairs – "Competition Policy and Law in South Africa" OECD Global Forum on Competition Peer Review: Paris, 11 February 2003 (available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf) (last accessed 07/08/2016) at 10.

[8] See The African National Congress *Ready to Govern: ANC policy guidelines for a Democratic South Africa adopted at the National Conference 28 – 31 May 1992* (1992) and "Reconstruction and Development Programme" White Paper Notice No. 1954 of 1994, Government Gazette No. 16085 Vol. 353 (1994).

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attempts at competition regulation, now had a distinct advantage in formulating their competition policy as they had at their disposal over a century's worth of development and theory from across the globe on how best to achieve effective competition within a market.

In drafting the South African Competition Act, it became apparent that the construction of the Act would be unique given the history that preceded it and the deep desire and need to address the ills of the past that contributed to the lack of effective competition in the South African market. The Act would thus not have a singular purpose. Instead the Act was designed to not only achieve specific competition related goals but, would also include a host of other "political" and/or "socio-economic" goals that appeared to fall outside the scope of ordinary competition law.[9] These political goals are focussed on addressing some of the socio-economic realities that exist in South Africa as a consequence the racially discriminatory laws of the past, more specifically the exclusion of certain of segments of the population from participating in the market. The Act is clear, in both its preamble and purpose, that the achievement of a greater distribution of wealth and ownership in the South African economy, especially amongst those that the Act classifies as being previously disadvantaged, are core objectives of South Africa's competition policy and legal framework.[10]

The legacy of South Africa's discriminatory history undeniably requires redressing. This is an inescapable reality. To achieve this, government policy needs to be aligned with various redistributive and empowerment objectives or at the very least, it must take these objectives into account in its ordinary application. At first glance, it is then apparent why the various political goals have been included in the Competition Act. However, the problem with the inclusion of these goals in the Act is that it appears to ignore a large volume of international jurisprudence on the conflict between the achievement of political

[9] See the goals of the South African Competition Act contained in the Preamble and section 2 of the Act as well as the various discussion papers on economic reform published by the Department of Trade Industry such as Reconstruction and Development Programme" White Paper Notice No. 1954 of 1994, Government Gazette No. 16085 Vol. 353 (1994), National Treasury "Growth, Employment and Redistribution: A Macroeconomic Strategy document (GEAR)" 1996 available at http://www.treasury.gov.za/publications/other/gear/chapters.pdf (last accessed on 21/10/2019), and The Department of Trade and Industry "The Evolution of Policy in SA: Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development" (1997) available at www.compcom.co.za/aboutus/EvolutionOfPolicyInSA.asp (last accessed on 01/02/2017). These goals and policy documents will be discussed at length throughout this thesis.
[10] See the Preamble and section 2 of the South African Competition Act.

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goals that are socio-economic in their nature, on the one hand, and the achievement of "pure" competition goals, on the other.[11] As pointed out by Reekie, the growing school of thought is that competition policy remains ill-suited to achieving socio-economic orientated goals.[12] The belief appears to be that, if anything, competition law can merely *assist* with the achievement of these goals in a passive manner.[13] The South African legislature however opted to ignore these arguments in the formulation of the Competition Act. Perhaps the belief was that the Act could be constructed in such way as to facilitate the achievement of this dual purpose of pursuing pure competition goals and political goals as a substitute for achieving government's political goals through other policy and legislative instruments. There also appears to be evidence that this notion of being able to use competition policy and law as a driver for the attainment of political goals has on occasion been rejected explicitly by South African competition authorities. Notably, in the matter of *Minister of Economic Development and Others v The Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union v Wal-Mart Stores Inc.*[14] the Competition Appeal Court held that:

"The fact that conditions were imposed by the Tribunal, no matter the criticism, of its reasoning, is reflective of this concern, manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation."[15]

Regardless of the intention behind the specific formulation of the Competition Act, it does appear as though a golden opportunity was missed to construct the Competition Act in compliance with international best practice on the goals that competition law should seek to achieve. The discussions that follow will show that instead an outdated approach to

[11] See Areeda & Hovenkamp *Antitrust Law* (2004), at 100 and Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *New York Law Review* 579, at 586.
[12] See Reekie "The Competition Act, 1998 An Economic Perspective" (1999) *The South African Journal of Economics* 257 – 288, and D.A. Crane "Antitrust and Wealth Inequality" (2016) *Cornell Law Review* 1171, at 1174.
[13] See Organisation for Economic Co-operation and Development (OECD) "Public Interest Considerations in Merger Control", OECD Working Party No.3 on Co-Operation and Enforcement, June 14-15, 2015, DAF/COMP/WP3/(2016) 3 available at https://one.oecd.org/document/DAF/COMP/WP3(2016)3/en/pdf (last accessed on 17/07/2019) at 20.
[14] 110/CAC/Jun11 and 110/CAC/Jun11.
[15] *Minister of Economic Development and Others v The Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union v Wal-Mart Stores Inc.* 110/CAC/Jun11 and 110/CAC/Jun11, at par 154.

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competition regulation regulation was adopted solely in the hope that the Competition Act could be tailored to be capable of achieving this dual purpose.[16]

2. Research statement and objective

This study accordingly aims to establish whether the political objectives of the South African government as expressed through the political goals contained in the Competition Act are compatible with the core goals of competition law namely; consumer welfare and allocative efficiency.[17] This necessitates that two questions be answered: Firstly, is competition policy and law really the appropriate instruments through which these political goals can be achieved? And secondly, how would the inclusion of goals of a political nature affect the Act's ability to achieve effective competition within the South African market? This thesis will therefore seek to establish how these political goals affect the manner in which the Competition Authorities regulate competition and will also attempt to establish whether seeking to achieve these goals through competition policy and law has the potential of leading to situations which may have an adverse effect on competition as a whole.[18]

The objective of this study will thus be to critically assess how the diverse array of goals contained in the Competition Act affect the regulation of effective competition within the South African market. Specifically, how does the inclusion of political goals that are often of a socio-economic nature, affect the achievement of ordinary competition goals such as allocative efficiency and consumer welfare? An attempt will be made to determine if the various decisions of competition authorities since the enactment of the Competition Act have been made with the aim of promoting effective competition or whether they have been made for the furtherance of these political goals. Lastly a conclusion will be drawn on whether competition policy is in fact capable of achieving these goals or whether these goals should sought to be achieved through other policy instruments.

3. Research methodology

[16] The South African legislature appears to have preferred to adopt the Harvard approach to competition regulation despite the fact the fact this approach had fallen out in favour in many other jurisdictions in favour of the Chicago and Post-Chicago approaches to competition regulation.
[17] See the decisions of *Minister of Economic Development v Competition Tribunal* 110/CAC/Jun11, *Anglo American Ltd/Kumba Resources Ltd* 46/LM/Jun02 04/09/2003 and *Nationwide Poles (Pty) Ltd v Sasol (Oil) (Pty) Ltd* 72/CR/Dec03.
[18] See of *Minister of Economic Development v Competition Tribunal* 110/CAC/Jun11.

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The abovementioned research objectives will be sought to be achieved through a critical and comparative doctrinal study comprising of an analysis of relevant policy documents, legislation, case law, books, journal articles and internet sources.

A historical review of the development of competition regulation will be conducted to establish the principles that underlined the development of these various theories of competition regulation. In addition, a historical review of the development of South African competition legislation will also be conducted to establish the particular principles that underlie the development of the Competition Act.

In addition to reviewing policy documents, legislation, books and journal articles, a review of various decisions of the Competition Commission, Competition Tribunal and Competition Appeal Court will be undertaken, specifically those seminal decisions pertaining to the enforcement and interpretation of horizontal restrictive practices, abuse of dominance and merger regulation provisions of the Act that would inform the research questions posed in this study. In the decisions dealing with horizontal restrictive practices, specific attention will be paid to the remedial action imposed in the bread and construction industry cartels with a focus on determining whether these remedies were imposed with the aim of advancing a competitive purpose or whether these remedies were designed with the advancement of political agenda outside the realm of ordinary competition law. In matters dealing with abuse of dominance, various matters will be discussed to determine how the Competition Tribunal and the Competition Appeal Court have interpreted the abuse of dominance provisions of the Act and what these entities have deemed necessary to prove allegations of abuse of dominance. With regard to merger regulation, various large mergers considered and approved by the Tribunal, will be evaluated. These discussions will mainly focus on the public interest component of merger regulation contained in the Act, more specifically the manner in which they have been interpreted during merger proceedings. The ultimate aim will be to isolate the considerations that these authorities have sought to advance through their decisions so that a determination can be made as to the extent that political goals have influenced the regulation of effective competition within these three areas.

Due to the fact that the primary aim of this thesis is specifically to determine how South Africa's political approach to competition regulation has or will have the potential to affect effective competition regulation domestically, an extensive comparative study of other

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countries to determine whether they also seek to achieve political goals through their competition policy and legislation will not be undertaken. The point of departure of this thesis is that South Africa, as a developing country functioning for many years under the yoke of Apartheid, has chosen specifically to include political goals in its competition legislation. That is a *fait accompli*. The question is whether that choice contributes to effective competition in the South African market. It is a question to be answered, not by considering how competition laws in other countries that have incorporated political goals fare, but by focusing particularly on how this choice has played out for competition in South Africa. The study undertaken in this thesis will however engage in comparative research for purposes of interrogating the various theories on what the goals of competition law should be in order to set the scene for the juxtaposing of pure competition goals against political goals insofar as the ability of each to contribute to effective competition is concerned. A comparative study will also be conducted on the manner in which dominance is established in South Africa, the European Union and the United States as well as how each of these jurisdictions define the terms “dominance” and “market power”. This is necessary for purposes of assessing the distorting consequences on competition facilitated by an inappropriate test for dominance and the lack of effective competition that may flow from it.

As regards the selected comparative jurisdictions: The United States was chosen due to the fact that its competition legislation and jurisprudence served as the basis for the development of competition law globally. The European Union, in turn, was selected due to the fact that many markets within the EU share similar structural barriers as those present in South Africa. EU competition regulation has also played a significant role in the development of the Competition Act and the various concepts contained therein.

4. Structure of Thesis

Chapter 1

This chapter provides the roadmap to the thesis. It gives the background to the study and sets out the research statement, research objectives and methodology, the extent of the comparative study that will be undertaken and the selection of comparative jurisdictions, as well as the chapter lay-out.

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Chapter 2

This chapter examines the historical development of theories of competition regulation. Specifically, the chapter examines the development of the neo-classical theories of competition regulation that were developed in the United States during the 20th century. These theories include the Harvard theory, Chicago theory and the Post-Chicago theory of competition regulation. The chapter will also examine the peripheral theory of competition regulation known as the "Austrian School of Competition Regulation." The aim of the chapter will be to extract the underlying principles that have informed the development of the various theories to better understand how competition regulation has evolved over the years. Together with discussing the various theories of competition regulation, the chapter will also briefly look at the development of the "rule of reason" and "*per se*" evidentiary approaches to understand and contextualise how these approaches have influenced the development of competition laws. The chapter will further consider recent developments in the US, more specifically the *California Dental* case, to determine whether the principles developed by the US Supreme Court in this matter can serve as a feasible template for the refinement of the provisions of the South African Competition Act. Lastly, the manner in which allegations of anti-competitive conduct will be assessed, particularly the provisions of the Act dealing with abuse of dominance.

The overall purpose of this chapter is to examine the growing convergence between law and economics in the development of competition policy. The aim will be to determine which goals of competition regulation can be regarded as so-called "pure competition" goals and which other goals can be regarded as socio-economic or political in their nature. The chapter will set the stage for how these two different sets of goals converge with one another during regulatory processes and will aid in determining whether competition regulation is suited to the achievement of the political goals that are socio-economic in nature or whether competition regulation should exclusively be focused on the achievement of "pure competition" goals .

Chapter 3

The purpose of this chapter will be to examine the historical development of competition regulation in South Africa. Specific consideration will be given examining competition regulation prior to the enactment of the Competition Act. The deficiencies of previous

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competition legislation must be isolated so as to properly understand the specific areas of regulation that needed to be addressed through new legislation. Following the dawn of democracy post 1994, the new government brought with it a fresh set of ideals that differed substantially from those of the previous administration. While the days of racial segregation that barred participation in the economy were gone, many of the structural distortions that these policies had created remained entrenched in the South African market. The ANC government was now tasked with undoing much the damage caused by the previous regime as well as uplifting and empowering the disenfranchised majority.[19]

The chapter will therefore examine the considerations identified by the ANC government in its various policy documents and the specific issues that it identified as requiring redress through new competition policy and law. The principles that informed the development of the Competition Act will be extracted and discussed to establish how they influenced the eventual construction of the Act. Specifically, it will be established what political considerations and purposes have been woven into the fabric of the Competition Act and it will be determined which specific goals can be regarded as being purely competition orientated in their construction and what other goals have been included in the Competition Act which can be regarded as alien to traditional competition law. In light of the various deficiencies that have been identified in the previous pieces of legislation, the forms of conduct that the Competition Act seeks to prohibit and the provisions dealing with merger regulation will also be briefly discussed together with the new independent regulatory authorities that have been established in terms of the Competition Act.

Chapter 4

This chapter will examine specific examples of competition authorities dealing with allegations of collusion between competitors. While little attention will be paid to the nature of the various forms of collusion themselves, much focus will be placed on examining the remedial actions that were imposed on the firms involved in collusive conduct. In this regard, two specific instances of collusion will be examined. Firstly, the so called “bread cartel” which involved allegations of price setting in the bread and milling

[19] See African National Congress *Ready to Govern: ANC policy guidelines for a Democratic South Africa adopted at the National Conference 28 – 31 May 1992*.

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industries which would later evolve to include various other food related industries. The second is the construction industry cartel which involved allegations of collusive tendering for 2010 Soccer World Cup stadiums and also later evolved to include the wider construction industry as a whole. In both these cases unique and "innovative" remedies were devised to address the damage caused to both competition as well as consumers. While these remedies were the result of negotiations between the firms involved in such conduct, the Competition Commission and National Government, this Chapter will emphasise that the nature of these remedies have the potential to have far reaching consequences for the industries concerned.

The various remedies and concessions agreed to in each case will consequently be interrogated in this chapter. Specifically, the considerations that informed the formulation of each remedy will be considered to determine whether these considerations were of a traditional competition nature or of a political nature. The aim will be to determine whether or not these remedies advance objectives that fall within the realm of traditional competition law or, whether they advance other objectives falling outside of the scope of traditional competition law and more within the realm of political agenda.

The eventual purpose will be to determine the effect that the various goals contained in the Competition Act have had on influencing evaluations of collusive conduct. It will also be necessary to determine whether the Competition Act has been used, in the context of horizontal restrictive practices, for the furtherance and achievement of effective competition or whether it is being used as a tool for the furtherance of a government agenda. In attempting to answer this question, the recently initiated investigation into collusion between various banks in foreign exchange transactions will be looked at. Although no final determination has been made in this particular matter yet, the nature of the complaint will be assessed to see whether the complaint represents genuine competition concerns capable of enforcement in terms of the Competition Act or, whether the complaint and the Competition Act are being used a means of achieving an objective far outside the realm of competition law. This will be examined against the backdrop of the remedies imposed in the bread and construction industry cartels.

Chapter 5

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In this chapter the abuse of dominance provisions of the Competition Act will be reviewed. The review will commence with a comparative study that considers how the United States, European Union and South Africa define the terms “dominance” and “market power”. The manner in which dominance is established in each of these jurisdictions will subsequently be compared. The purpose will be to determine whether the formalistic approach of establishing dominance adopted in the Competition Act is an appropriate method for determining dominance or whether there are additional factors that should also be considered during such an evaluation.

In addition to a comparative study, this chapter will also examine a number of the decisions of the Competition Tribunal and the Competition Appeal Court. While the formulation of the test for dominance in the Competition Act has the made the process of establishing dominance fairly easy, the requirements necessary for a finding that a firm has breached the provisions of the Competition Act appear to have been left largely unrefined. The examination of these previous decisions will seek to isolate the relevant elements that would need to be present to support an allegation of abuse of dominance.

The decisions of these competition authorities will thereupon be reviewed against the backdrop of the manner in which dominance is established in terms of the Act. The aim will again be to determine to what extent the various other goals contained in the Competition Act have influenced the manner in which complaints of abuse of dominance are assessed. It will be considered whether these provisions have been enacted to ensure effective regulation of abusive conduct or whether they have been enacted in such a manner as to enable evaluations of specific conduct to be steered in a pre-determined direction? Ultimately it must be established whether the inclusion of political goals in the Act assists or hinders effective regulation of dominant firms abusing their position within the market.

Chapter 6

Chapter Six will contain an assessment of the merger regulation provisions of the Competition Act. Brief consideration will be given to the manner in which mergers are defined, how mergers are categorised as either small, intermediate, or large mergers, and the notification process that will be followed for each category of merger. The merger evaluation process will also be discussed as well as the substantive issues forming part

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thereof. In particular the efficiency defence in terms of which an otherwise anti-competitive merger can be rescued due to it providing certain merger specific efficiencies, will be discussed against the backdrop of the large merger involving Trident Steel and Dorbyl.

Much focus will further be dedicated to discussing the public interest component of merger regulation. This is a feature that is unique to the Competition Act but has garnered its fair share criticism. The specific public interest concerns listed in the Act will be discussed together with the Competition Commission's Public Interest Guidelines. A number of merger decisions will also be examined with the view of establishing how the Competition Tribunal has interpreted and developed the Competition Act's public interest provisions applicable. Specific consideration will be given to two significant mergers, namely the merger involving Massmart and the US retail giant Wal-Mart, and the merger involving two global giants, SAB Miller and AB-Inbev. Both of these mergers were significant in that the public interest concerns of the Competition Act were at the forefront of their approval. Both mergers were eventually approved but subject to several conditions being imposed to ensure that certain public interest concerns were properly addressed. The nature of these conditions will be of particular importance in addressing the following two question; firstly, what were the particular concerns that these conditions were designed to address and secondly, were they legitimate concerns that fell within the ambit of the public interest concerns listed in the Competition Act?

The aim of the chapter will be to determine if the inclusion of these specific public interest goals are the result of the various other political objectives contained in the Competition Act and whether these provisions are used for the furtherance of a political agenda outside the scope of competition regulation. Additionally, other questions will also need to be answered. What are the objectives of these provisions? Can the objectives of these provisions be achieved through the use of competition law or would they be better suited to being achieved through other pieces of legislation? Most importantly, the question will be addressed whether these public interest provisions assist or hamper the achievement and maintenance of effective competition or whether they simply advance a political agenda.

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Chapter 7

The 2017 and mainly the 2018 drafts of the Competition Amendment Bill and the subsequent Competition Amendment Act of 2018 will be discussed in this chapter. A number of relevant amendments proposed in the Amendment Bills will be considered as well as whether these proposals were eventually enacted in the Amendment Act and the exact format they took. These include the amendments to the provisions dealing with horizontal restrictive practices, abuse of dominance and price discrimination, merger regulation, as well as the amendments aimed at improving institutional efficiency, and the amendments pertaining to the remedial action that may be imposed in terms of the Competition Act. The purpose of this chapter will thus be to determine if the amendments proposed in the Amendment Bill and those subsequently enacted in the Amendment Act have been designed to address any deficiencies identified in the previous chapters regarding the advancement of the goals of allocative efficiency and consumer welfare, or whether these amendments have actually been designed as a means of advancing a more sinister and political objective through the use of the Competition Act. The question will need to be answered whether the Amendment Act is aimed at moving the purpose of the Competition Act further away from the goal of the achievement and maintenance of effective competition and rather using the Act as a tool through various other policy objectives which are far outside the realm of traditional competition law can be achieved. Consequently, in an attempt to illustrate that the goals of the Competition Act have become even more politicized through the Competition Amendment Act of 2018 and now deviate even further from pure competition goals, the various amendments that will be considered will be wider than merely considering the aspects addressed in Chapters 4 to 6.

Chapter 8

The outcomes of the discussions undertaken in the previous chapters will be addressed in this chapter. The aim will be to determine what effect the inclusion of the political goals contained in the Competition Act have had on effective competition regulation in South Africa, specifically on collusion as a restrictive horizontal practice as well as on the approach to determining dominance and the merger regulation regime. The remedies imposed in matters dealing with collusion will be analysed to determine if they have had a positive effect on promoting competition within the relevant markets, whether they can

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be regarded as effective deterrents against other firms engaging in similar conduct in the future, and whether these remedies have been successful in redressing the damage caused by the collusive conduct. The manner in which abuse of dominance is established will also be discussed to determine if the structural approach adopted by the Act can be regarded as an effective measure of dominance. The Act's focus on prohibiting certain forms of conduct will further be examined to determine if the abuse of dominance provisions and regulation would not be better served through adopting a more effects-based approach.

The exemption provisions of the Act will also briefly be discussed in order to determine whether these provisions have been included with a competitive purpose in mind or whether these provisions have been included solely for the protection of specific competitors for the furtherance of political goals. The mandate of the Competition Commission will also be briefly examined. The aim will be to determine whether the Competition Commission understands the mandate that has been given to it or whether this mandate has too been infected by the political goals of the Competition Act. Together with evaluating the various decisions discussed in this thesis, the merger involving Shell South Africa and Tepco will evaluated with specific reference to the public interest conditions that the Competition Commission sought to have imposed on the merger as well as the Competition Tribunal's rulings thereon. The chapter will further discuss the public interest provisions contained in the merger regulation portion of the Competition Act. The aim will be to determine whether public interest concerns have a legitimate place in merger regulation or whether these concerns should be better served through other policy instruments.

Lastly, this chapter will discuss competition policy and the achievement of socio-economic goals. It will be attempted to make a determination on whether or not specifically including socio-economic goals in the goals of competition law will aid in the achievement of these goals parallel to the achievement of effective competition. The question that will be sought to be answered is whether these socio-economic goals could not be better served by simply focusing competition law strictly on the achievement of pure competition goals.

Chapter 9

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The aim of this chapter will be to a draw a conclusion on the problem statement and research objectives outlined in Chapter One. Following the discussions in all the previous chapters, the question whether political goals belong in competition policy and whether competition policy is even capable of achieving these goals, will be answered.

Lastly, based on the outcomes of the discussions outlined above, potential solutions for identified problems will be proposed with the aim of providing a model that not only will be better suited to the achievement and maintenance of effective competition within the South African market, but through the creation of a more competitive market space, will create the appropriate medium by means of which many social ills that exist in the broader South African context can possibly be addressed.

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Chapter 2 - The Historical Development of Competition Regulation

1. Introduction

Competition regulation is a relatively young field of law with deep roots in the United States. Since the enactment of the Sherman Act[20] in 1890, various theories on the purpose of competition law have developed. The unique nature of competition law, spanning both economics and law, means that these theories were developed and influenced by both economists and jurists. In particular, economics has played a pivotal role in both the development and application of competition law in the US market.

The theories on the purpose of competition regulation that have originated and developed in the US have subsequently also played an important role in the development of competition law worldwide. While many foreign jurisdictions may not specifically acknowledge any particular theory of competition regulation in the formulation of their competition policy, it is often plain to see how a particular competition theory has influenced the development of a specific jurisdiction's competition legislation. South Africa is certainly no different. Accordingly, we have to first isolate what goals competition law seeks to achieve as argued by these theories and then interrogate the historical development of competition regulation, and specifically how the various theories that originated in the US have influenced the development of competition policy and law in the South African landscape especially post liberation in 1994. Each of these theories will therefore be discussed to determine precisely which theory has been most influential in the development of South African competition policy and law.

2. The Ultimate Goal of Competition Law

The various theories for competition regulation that will be discussed below paint a picture of how these theories have influenced the manner in which competition policy is applied and enforced in a particular market. The relevant theory of competition regulation applied in any particular market will directly influence the economic policy and competition law goals of that market. But what is competition policy? In its simplest form, competition policy generally comprises two distinct elements:[21] Firstly, it encompasses the numerous

[20] 1890 15 U.S.C. §§ 1-7.
[21] See Khemani *A Framework for the Design and Implementation of Competition Law and Policy* (1999) at 1 – 3. Also see Association of South East Asia Nations (ASEAN) "Regional Guidelines on Competition Policy (2010)", available at

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policy instruments which set out the various aims that a particular government seeks to achieve from a competition point of view. Secondly, it comprises the specific set of legislative instruments and enforcement bodies aimed at promoting and achieving the stated competition aims of that jurisdiction.

The goals of competition policy are set out in a particular market's competition legislation. By stating these goals in legislative instruments, market participants are empowered with the knowledge of what their jurisdiction's competition policy seeks to achieve and can direct their business activities with certainty knowing what forms of conduct have been prohibited by these instruments.[22] This also provides enforcement bodies with the necessary tools to interpret, develop and apply legislative provisions in accordance with the relevant competition policy's ultimate goals. What competition policy seeks to achieve will however often differ substantially from market to market. This, as pointed out by the United Nations, is because each markets' competition policy will largely be influenced by that particular jurisdiction's specific industrial policy[23] goals as well as the various other unique structural and socio-economic characteristics present in that market.[24] No two markets are the same which often leads to substantial differences in the particular policy goals that each market seeks to achieve. These goals are what influence the formulation and development of competition policy goals. Importantly, Khemani observes that these goals often include so-called "pure competition" goals as well as "public interest or political" goals that are often influenced by larger political motivations and underlying socio-economic circumstances.[25]

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https://www.icao.int/sustainability/Compendium/Documents/ASEAN/ASEANRegionalGudelinesonCompetitionPolicy.pdf (date of last access 06/12/18).

[22] United Nations "The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy" United Nations Conference on Trade and Development, (8 – 12 November 2010) TD/RBP/CONF.7/3 available at https://unctad.org/en/Docs/ditcclp20042_en.pdf (last accessed on 21/10/2019) at 7.

[23] Pack & Saggi define "industrial policy" as "any type of selective intervention or Government policy that attempts to alter the structure of production toward sectors that are expected to offer better prospects for economic growth than would occur in the absence of such intervention, i.e., in the market equilibrium". See Pack & Saggi *The case for industrial policy: acritical survey* (2006) available at http://siteresources.worldbank.org/INTRANETTRADE/Resources/InternalTraining/HowardPack_KamalSaggiPaper.pdf (last accessed on 24/10/2019) at 2.

[24] United Nations "The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy" United Nations Conference on Trade and Development, (8 – 12 November 2010) TD/RBP/CONF.7/3 available at https://unctad.org/en/Docs/ditcclp20042_en.pdf (last accessed on 21/10/2019) at 8 - 9.

[25] See Khemani *A Framework for the Design and Implementation of Competition Law and Policy* (1999) at 2.

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While it is obvious that political goals will generally find their foundations in the socio-economic circumstances of the market in question, the "pure competition" goals of competition policy may too, often differ, based on the specific set of circumstances of the market in question. The reason for this simple: as pointed out above, no two markets are the same with each having its own unique set of circumstances which can be regarded as potential impediments to the achievement of a competitive market. A simple comparison between developed nations and developing nations illustrates this point.[26] The OECD points out that developed nations are generally characterised by well-developed markets that are usually subject to a healthy degree of competition between various rival firms. While this characteristic in itself does not render these developed markets immune to anti-competitive conduct, generally less regulatory intervention is required to maintain a competitive space. In developing nations, on the other hand, markets are generally underdeveloped and dominated by a single monopolistic firm or, as is more usually the case, they are dominated by state-owned enterprises that have had their position within their markets entrenched usually through legislative shielding. In these markets, regulatory intervention is often a necessary tool to correct the structural imbalances that exist within the market.[27] Regardless though of whether a market can be regarded as developed or developing, the particular features of a market will still play a defining role in the formulation of the goals underlying that market's competition policy.

2.1. "Pure Competition" Goals

The question of what can regarded as pure competition goals has changed considerably over the last century. Universally, it is accepted that the primary goal of competition policy and law is the attainment and maintenance of effective competition within the market.[28] The question remains though, what can be regarded as "effective competition" and which

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[26] See Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard International Law Review* 579 at 579 – 580.

[27] Organisation for Economic Co-operation and Development (OCED), Directorate for Financial and Economic Affairs – "Competition Policy and Law in South Africa" OECD Global Forum on Competition Peer Review: Paris, 11 February 2003 (available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf) (last accessed 07/08/2016) at 9.

[28] See Khemani, Shyam, Anderson, Robert, Bradford & Pete "A Framework for the Design and Implementation of Competition Law and Policy" (1998) The World Bank, at 1 available at: http://documents.worldbank.org/curated/en/977331468759588195/A-framework-for-the-design-and-implementation-of-competition-law-and-policy (date last accessed 06/12/18) (hereinafter referred to as Khemani *et al*)

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principles underlie it? This question appears to remain debatable. However, as will be discussed later in this chapter, the Harvard theory of regulation points to structuralism being the principal concern of competition regulation. The so-called "structure-conduct-performance" (SCP) paradigm served as the basis for this concern.[29] The basis of the Harvard theory was that the structure of a particular market would determine how firms behave with regards to decisions on pricing and output which, in turn, would determine their performance. In other words, the theory concerned itself with how issues such as efficiency, welfare and profit margins would all be affected by these structural factors.[30] The Harvard theory was accordingly premised on the idea that anti-competitive market structures, in other words monopolies, need to be dismantled in order to attain effective competition.[31] The Harvard theory went on to assume that where a firm had a monopoly in its particular market, it would as a consequence thereof, engage in anti-competitive conduct. This led US authorities to prefer the so-called "principle of plurality" in terms of which markets should be deconcentrated in favour of a larger number of smaller firms.[32] As a result, the Harvard theory became more concerned with the protection of competitors rather than with the protection of competition itself.

The emergence of the Chicago school of thought followed as the Harvard theory's obsession with market structure began to fall out of favour with US authors and courts. This new theory advocated a "consumer welfare standard" in relation to which effective competition could be measured. It followed that only where a firm's conduct could be determined to adversely affect consumer welfare could it be regarded as being anti-competitive. This theory too however was not without its critics, with many pointing towards certain forms of conduct being declared anti-competitive despite the fact that producer welfare or total welfare exceeded any harm to consumer welfare.[33] As

[29] The principle was first developed by Joe S. Bain as a model for industrialization organization and formed the basis of the theories developed by Edward Chamberlain and Joan Robinson. See his work J. S. Bain "The Profit Rate as a Measure of Monopoly Power," (1941) *Quarterly Journal of Economics* 271.
[30] Lee "The Objectives of Competition Law" August 2015, ERIA Discussion Paper Series, ERIA-DP-2015-54, available at https://www.researchgate.net/publication/307634289_The_Objectives_of_Competition_Law (lasted accessed on 21/10/2019) (hereinafter referred to as Lee (2015) at 16.
[31] See the discussions on the Harvard theory at par 3.1.
[32] Khemani *et al* at 3.
[33] See discussions on the Chicago theory at par 3.2.

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discussed below, the post-Chicago theory subsequently followed with its strong emphasis on allocative efficiency.[34]

No one theory of competition regulation has proved universally appropriate in relation to all issues of competition regulation. Instead, over the years, each of these theories have left their own mark on the development of competition policy. What however will be extracted from all of these theories in the discussion below, is the universal acknowledgement that the concept of effective competition entails the achievement and maintenance of a free and competitive process which seeks to achieve economic efficiency as well as some form of welfare standard.[35] A debate has since arisen as to exactly what sort of efficiency and welfare standard should be achieved. On the issue of efficiency, traditionally the question has been whether the efficiencies achieved should be of an allocative or production nature? In particular allocative efficiency refers to a situation where resources are allocated to the production of products which are then distributed to the consumers that will value them the most.[36] Production efficiencies refer to the effective use of resources in the production process with the overall aim of minimising costs and thereby reducing prices charged to consumers.[37]

The question regarding whether allocative or production efficiencies should prevail over the other remains a topic of debate. As pointed out by Williamson, one proposed solution has been to weigh the potential benefits of each efficiency with the negative effects of the other:[38] Thus, for example, where the benefit to consumers outweighs the detriment to producers, it goes without saying that such conduct should be permitted. In the same breath however, where the conduct is of such a nature that it benefits producers, but these benefits far outweigh the negative effects to consumers, such conduct could also be permitted due to its productive efficiencies. This total welfare standard however will always be a question to be determined on the prevailing facts.[39]

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[34] See discussions on the Post-Chicago theory at par 3.3.
[35] See Khemani *et al* at 2, as well as Lee (2015) at 3.
[36] Lee (2015) at 20.
[37] *Ibid*.
[38] See Williamson "Economies as an Antritrust Defense: The Welfare Tradeoffs" (1968) *American Economic Review* 18, at 18 – 19.
[39] Wilson "Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get" (2019) available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf (last accessed on 04/02/2021) at 8 where total welfare is defined as *"the effect of a practice*

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In addition to efficiencies being of an allocative or productive nature, efficiencies may also be dynamic in their nature. Dynamic efficiencies however are a much more difficult concept to measure. Generally speaking, dynamic efficiencies arise as a result of technological progress much in the same way as will be highlighted in the later discussions on the Austrian theory, which is yet another theory that emerged in relation to the goals of competition policy and law.[40] The advancement of technology is generally assumed to bring with it lower prices and a greater degree of efficiency in the production process with these benefits then in turn being passed on to consumers. The question then remains as to whether dynamic efficiencies should be favoured over "static" efficiencies[41] such as allocative and productive efficiency. However, Ghemawat and Costa remark that if dynamic efficiencies are properly analysed, it appears highly unlikely that they could be truly regarded as an efficiency unless at least one of the static efficiencies is also attained. They further observe that the nature of dynamic efficiency also does not lend itself to the advancement of competition in all situations. An example here would be where the advancement of technology is impracticable or incapable of being realistically achieved. Striving to achieve dynamic efficiencies in such a situation would be nothing more than an exercise in futility. Ultimately, they point out that dynamic efficiencies will also need to be assessed on the particular facts of each case.[42]

From a welfare perspective, Bork observes that consumer welfare[43] will underlie all other welfare assessments.[44] Regardless of whether welfare is assessed from a producer or total welfare perspective, consumer welfare will remain an important factor in such evaluations. The argument is further supported by the manner in which allegations of anti-competitive conduct have been evaluated in the US over the years. In the US allegations of anti-competitive conduct have generally been measured against the yardstick of consumer harm. Where conduct can be shown to harm consumer welfare,

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or transaction on the economic welfare of all participants in a market, including both producers and consumers. Put differently, it refers to the aggregate value created, without regard for how gains or losses are distributed".

[40] See discussions on the Austrian theory at par 3.5.

[41] Allocative and production efficiency are referred to as static efficiencies due to their one-off and static nature. See Ghemawat, & Costa, "The organizational tension between static and dynamic efficiency" (1993) *Strategic Management Journal* 59 at 60.

[42] Ibid.

[43] See discussions on the Chicago theory at par 3.2.

[44] See Bork, "Resale Price Maintenance and Consumer Welfare" (1968) *Yale Law Journal* 80.

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such conduct will be regarded as being anti-competitive.[45] If thus follows that effective competition will generally be measured against the standard of consumer welfare. While other welfare factors may be taken into account, Lee points out that evidence would need to be presented that would justify a move away from this consumer welfare standard.[46]

While efficiency and consumer welfare remain core competition goals, they are not the only goals that can be considered as pure competition goals by their nature. As discussed above, the nature of a particular market may necessitate that further goals be included within the aims of competition policy. France and Germany for example have called for innovation to become a core goal of EU competition law.[47] The inclusion of innovation as a core competition goal flows directly from the principles advanced by the Austrian theory as will be discussed below.[48] Nevertheless, efficiency appears to remain key to the pure competition goals, meaning that it will have a limiting effect on what could be regarded as a pure competition goal.

2.2. "Public Interest or Political" Goals

The so-called "public interest" or political goals usually fall far outside the scope of what can be considered "pure" goals of competition policy. These goals find themselves rooted in the socio-economic climate that may exist in a particular market and are strongly influenced by the political aspirations of governments. Public interest or political goals will therefore be subjective and in many cases unique to a particular market. The United Nations point out that these goals can also in many instances be in a state of flux. Changing national priorities or changes in government may result in a change in the priorities which are sought to be achieved through competition law and industrial policy.[49]

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[45] *Ibid.*
[46] Lee (2015) at 18.
[47] Following the European Commission's refusal of the Alstom-Siemens merger, the French and German Governments published a joint manifesto being "Franco-German Manifesto for a European Industrial Policy fit for the 21st Century" available at https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043_-_a_franco-german_manifesto_for_a_european_industrial_policy_fit_for_the_21st_century.pdf (last accessed on 24/10/2019) which called for a reform to the EU's industrial strategy and with it a reform for the EU's competition rules. Chief amongst these recommendations for reform was the prioritising of heavy investment in innovation and adopting a regulatory framework that would support this goal.
[48] See discussions on the Austrian theory at par 3.5.
[49] United Nations "The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy" United Nations Conference on Trade and Development, (8 – 12 November 2010) TD/RBP/CONF.7/3 available at https://unctad.org/en/Docs/ditcclp20042_en.pdf (last accessed on 21/10/2019) at 7.

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Public interest or political goals have found their way into the competition policy of numerous countries also as a consequence of potential shortfalls that may arise from a regulatory approach that focuses solely on the attainment of efficiency. Creamer argues that a regulatory approach that is focused solely on the attainment of efficiency fails to take into account the historical spread of power within the market.[50] According to Creamer such an approach would automatically assume that the current allocative spread of resources was optimally efficient and that it would be unnecessary and undesirable for the state to interfere in the allocation and distribution of resources. While this may be true in developed markets, Creamer, as well as Fox, are of the view that the same cannot be assumed for developing markets.[51] State intervention in markets is often necessary to correct imbalances and Creamer submits that these political goals offer authorities the necessary tool with which to intervene.[52]

It is to be noted that, while these political goals will often differ from jurisdiction to jurisdiction, they are generally developmental in their nature. The promotion of employment appears to be a universally accepted goal of competition policy albeit it a public interest or political goal.[53] Oddly though, this goal can often be regarded as being diametrically opposed to the pure competition goal of efficiency. An efficient enterprise will always seek to employ as few people as possible to minimise costs and maximise profit. Other goals of a public interest or political nature that are commonly included in competition policy include the protection of local industries, the promotion of small businesses, economic development, and promoting a more equitable spread of income within the market.[54] As will be discussed in greater detail in Chapter Three, South Africa has adopted a very similar approach in the development of its competition law through its inclusion of various public interest or political goals in the main objectives of the Competition Act. South Africa competition law is however also unique in the sense that it

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[50] See Creamer "The Political Economy of Competition Law", prepared for Trade and Industries Policy Strategies (TIPS) Forum 1998, 20 - 22 September, available at https://www.tips.org.za/research archive/item/download/25_54fff9ecb68ebaefb2f7c0b858639d42 (last accessed on 21/10/2019) (hereinafter referred to as Creamer (1998) at 22.

[51] Creamer (1998) at 22. Also see Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard International Law Review* 579 at 581.

[52] Creamer (1998) at 23.

[53] See section 2 of the Competition Act and see the EU directive on cross-border merger regulation Directive EU 2017/1132.

[54] Organisation for Economic Co-operation and Development (OECD), Global Forum on Competition "The Objectives of Competition Law and Policy" CCNM//GF/COMP(2003)3 (available at http://www.oecd.org/daf/competition/2486329.pdf) (last accessed on 15/0/2017) at 9 – 10.

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places the racially transformative objectives of government as a core aim of South African competition law.[55]

3. The development of the theories of competition regulation

3.1. The Harvard Theory

Kovacic and Shapiro indicate that the rationale for competition regulation first arose during the late 19th century as a direct consequence of the industrial revolution. The building of vast railway networks and the invention of many new technologies made cheap and efficient inter-state and global trade a possibility which in turn gave rise to the formation of large vertically integrated monopoly corporations.[56] Chief amongst these corporations were the new large trusts that began to form in the US, such as the Standard Oil Trust, Lorillard, Carnegie Steel Company and Pennsylvania Railroad Company together with various other railroad companies of the time. These entities were perceived as being so large and dominant within their respective markets that they were regarded as immune from the corrective effects of ordinary market forces as well as competition from competitors.[57] Kovacic and Shapiro remark that competition policy and the anti-trust law that followed from it was therefore seen in the US as means by which public confidence in markets could be restored through a process of state intervention designed to exert control over the market power enjoyed by monopoly firms and to constrain them from functioning in the market with impunity.[58] The introduction of the formal regulation of competition in markets has given rise to the question regarding what extent of state interference is required in the market to adequately regulate competition and what forms of conduct need to be prohibited and/ or regulated through various forms of government intervention.

The Harvard theory of competition regulation was one of the first theories in the field and played a significant role in the early development of antitrust law and its enforcement in

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[55] See the later discussions in Chapter 2 and Chapter 8, more specifically section 2 of the Competition Act.
[56] Kovacic & Shapiro "Antitrust Policy: A Century of Economic and Legal Thinking" (2000) *Journal of Economic Perspectives* 43, at 44.
[57] See Greenspan *Antitrust,* based on a paper given at the Antitrust Seminar of the National Association of Business Economists, Cleveland, September 25, 1961. Published by Nathaniel Branden Institute, New York, 1962 available at http://keever.us/greenspanantitrust.html (last accessed on 24/10/2019). Included in Ayn Rand's *Capitalism, the Unknown Ideal* (1967) at 64.
[58] Kovacic & Shapiro "Antitrust Policy: A Century of Economic and Legal Thinking" (2000) *Journal of Economic Perspectives* 43, at 44.

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the US for nearly four decades starting in the early 1930's.[59] This theory was first developed by the economist Edward Chamberlin as a departure from the then accepted concept of "pure competition"[60] and as a measure through which he attempted to establish a universally applicable method for evaluating the American economy as a whole.[61] According to Chamberlin's theory of "monopolistic competition"[62], a firm that has a monopoly in a particular market will always attempt to charge a higher price for its product while at the same time restricting the production volume of such product.[63] Chamberlin's theory therefore focused on the structure of monopolies within a particular market and how the conduct of such firms would affect competition in the relevant market.

Hunt points out that the theory of monopolistic competition, or "imperfect competition" as it later became known, was based on four assumptions:[64] The first assumption was that there must exist product differentiation in the particular market. Such differentiation would arise as a direct consequence of the varying preferences of the consumers in that market. The second assumption was that because heterogeneous demand is itself not sufficient to create product differentiation, both heterogeneous demand and supply would need to be present to give rise to product differentiation. The third assumption was that an equilibrium determined through an analysis of the demand curves of the firm in question would form the basis of economic analysis. The fourth assumption was that monopolistic competition would always need to be evaluated against the backdrop of perfect competition.

Hunt remarks that it is however ironic that Harvard scholars would evaluate competition against the backdrop of "perfect competition" especially in light of the fact that most

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[59] Hunt "The Theory of Monopolistic Competition, Marketing's Intellectual History, and the Product Differentiation Versus Market Segmentation Controversy" (2011) *Journal of Makromarketing* 73, at 74, (hereinafter referred to as Hunt (2011).

[60] Pure or perfect competition is a theoretical market structure in which the following criteria are met: all firms sell an identical product (the product is a "commodity" or "homogeneous"), all firms are price takers (they cannot influence the market price of their product), market share has no influence on price, buyers have complete or "perfect" information – in the past, present and future – about the product being sold and the prices charged by each firm, resources such a labour are perfectly mobile, and firms can enter or exit the market without cost. See Bork *The Antitrust Paradox* (1993).

[61] See Chamberlin *The Theory of Monopolistic Competition* (1962) at 213.

[62] Robinson "The Economics of Imperfect Competition" (1934) *Journal of the Royal Statistical Society* 671. Robinson developed the theory of "imperfect competition" which has widely been regarded as essentially the same theory as Chamberlin's monopolistic competition theory although Chamberlin has largely been regarded as the father of the theory.

[63] Chamberlin *The Theory of Monopolistic Competition* (1962) at 60.

[64] See Hunt (2011) at 75 - 76.

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scholars were in agreement that the concept of "perfect competition" was unattainable and an impractical concept to apply in real word markets.[65] This then led Harvard scholars to the development of the theory of "workable competition"[66] in the hope of creating a basis from which to evaluate real world markets.[67]

Through workable competition, it was accepted that, because perfect competition can never exist in real world markets, an attempt must be made to find the most realistic and applicable form of competition for a particular market. This would be done by taking into account all the relevant circumstances that exist in such market with specific emphasis on the structure of the market concerned.[68] The universal acceptance that the utopian idea of perfect competition was both unattainable and impracticable to find application in real world situations thus necessitated the development of a yardstick against which allegations of anti-competitive conduct could be measured.[69] Although not perfect, workable competition sought to achieve the most realistic benchmark possible.

It is evident that the Harvard theory is deeply rooted in the theory of structuralism first expanded upon in 1897 by Augustin Cournot.[70] Structuralism[71] refers to the relevant factors that exist in a particular market which seek to influence and determine the conduct of firms that operate in such market.[72] Piraino observes that the Harvard theory is most concerned with the structural factor of market concentration. In markets that are very concentrated, that is markets that have been saturated by a very small group of firms, the proponents of the Harvard theory have premised their arguments on the assumption that

[65] Hunt (2011) at 76, also see J. M. Clark "Towards a Concept of Workable Competition" (1940) *American Economics Review* 240, at 241 (hereinafter referred to as Clark (1940)).
[66] See Clark (1940) at 241.
[67] See Clark (1940) at 241 and Sutherland and Kemp *Competition Law of South Africa* (2013), Service Issue 24, at 1-29,(hereinafter referred to as "Sutherland and Kemp").
[68] See Clark (1940) at 242 and Sutherland and Kemp at 1-29.
[69] See Clark (1940) at 241 – 243, Chamberlin 1962 at 60, and Piraino Jr "Reconciling the Harvard and Chicago: A New Antitrust Approach for the 21st Century" (2007) *Indiana Law Journal* 346, at 349 (hereinafter referred to as Piraino (2007)).
[70] See Cournot *Researches into the Mathematical Principles of the Theory of Wealth* (1897) (Translated by Nathaniel T. Bacon) Macmilliam Publishers, wherein Cournot puts forward the theory that where a firm holds a monopoly over its competitors in a particular market, that firm will always be able to produce the relevant product at a lower marginal cost and enjoy a higher level of profits over its small competitors by virtue of its monopoly.
[71] Also referred to as the concept of "industrial organization".
[72] Sutherland and Kemp at 1-27.

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such firms would be more likely to engage in some form of anti-competitive conduct by virtue of their dominant position within such market.[73]

What further becomes clear is that the Harvard theory does not seek to avoid preventing over concentration within a particular market but, rather aims to curtail the market power of firms that may possess large market shares.[74] The theory therefore assumes that a small number of firms saturating any particular market, by virtue of their large market shares,[75] would possess sufficient market power to enable them to engage in various forms of anti-competitive conduct.[76] The aim of competition law, as far as the Harvard theory is concerned, is then to constrain the power of those firms that possess significant market power and thereby seek to protect individual competitors from exploitation by such firms.[77] It is argued that the very nature of the structural factors that exist within a particular market and that lead to a situation of over-concentration, creates a market that is not self-correcting in its nature. Such a market then necessitates the need for substantial government intervention to attempt to constrain the effect that these structural factors[78] have on smaller competitors.[79]Sutherland and Kemp thus indicate that the Harvard theory therefore not only seeks to achieve certain economic goals, but also seeks to achieve certain political goals defined by the policy makers in relation to any given market.[80] Through this approach to competition regulation, the relevant enforcement authorities are not only tasked with achieving the economic goal of allocative efficiency, which it is submitted, should remain the ultimate goal, but also seeks to

[73] Piraino (2007) at 350.
[74] See the statement from Senator George Hoar of Massachusetts, one of the original authors of the Sherman Act, where he stated that "*a person who merely by superior skill and intelligence...got the whole business because nobody could do it as well as he could was not a monopolist..(but was if) it involved something like the use of means which made it impossible for other persons to engage in fair competition."* Congress, United States; Finch, James Arthur (26 March 2018). "Bills and Debates in Congress Relating to Trusts: Fiftieth Congress to Fifty-seventh Congress, First Session, Inclusive". U.S. Government Printing Office.
[75] See section 7 of the Competition Act.
[76] Piraino (2007) at 349.
[77] Sutherland and Kemp at 1-29. Also see Piraino (2007) at 349.
[78] These structural impediments can take various forms which may be caused by a variety of factors. For example, industries that require substantial capital investments will also be limited to a small group firms by virtue of the high barriers of entry faced by new participants these factors create. From a South African perspective, various markets are heavily concentrated as a direct consequence of the racial segregation and exclusionary effect of the apartheid era policies. See Background Note on Competition Amendment Bill, 2017 (1 December 2017) (hereinafter referred to as the "Background Note"), published in Government Gazette No. 14294 of 1 December 2017 at Table 1.
[79] Hunt (2011) at 78.
[80] Sutherland and Kemp at 1-31.

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achieve various other political goals such as the promotion of employment and the achievement of an equitable distribution of wealth.[81]

The Harvard theory has however over the years come under severe attack. Chief amongst these criticisms is the argument regarding the incompatibility of attempting to achieve both pure competition goals and political goals of a socio-economic nature through competition policy.[82] As will be discussed in more detail later in this thesis, various opinions have been voiced to the effect that competition law is *not* the appropriate framework within which to attempt to achieve political goals that seek to address certain socio-economic problems that exist in society. The argument in this regard is that the aim of competition law should remain exclusively economic which, if viewed through the prism of the aim of allocative efficiency, brings the irreconcilable nature of economic "pure" competition goals and political goals into glaring focus. The Harvard theory has also been criticised for being too concerned with market structure and therefore creating an environment of over-regulation of competition in a particular market.[83] Turner in particular, argues that the Harvard theory's obsession with market structure and market shares diverted the focus of competition regulation away from preventing anti-competitive conduct and turned its attention to preventing market concentration.[84] This gave way to the assumption that the conduct of firms with large market shares, which on the face of it appeared to be anti-competitive in nature, were *automatically* deemed anti-competitive regardless of any pro-competitive advantages their conduct may create in the market concerned.[85] This meant that the relevant regulatory authorities would evaluate the conduct of such large firms in a vacuum without taking surrounding circumstances into account - most importantly, they ignored the *effect* such conduct had on consumer welfare. This approach resulted in essentially deterring firms with large market shares

[81] Sutherland and Kemp at 1-29.
[82] Sutherland and Kemp 1-33.
[83] Piraino (2007) at 352.
[84] See Turner "The Definition of an Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" (1962) *Harvard Law Review* 633, at 655 wherein he argues that the American legislature should pass the necessary legislation which would empower the Courts to dismantle large firms with large market shares while ignoring the benefits that such firms where able to achieve through the economies of scale which ultimately benefitted consumers by reducing prices.
[85] See for example the case of *United States v Aluminum Co. of America(Alcoa)* 148 F.2d 214 (1945) wherein the Court made a ruling against Alcoa for engaging in aggressive competition despite the fact that Alcoa's conduct had the effect of reducing prices for consumers without degrading the quality of the product provided, also see the argument raised by Munyai *A Critical review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* LLD Thesis, University of South Africa (2016) at 90 – 95.

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from engaging in any aggressive forms of competitive conduct with their competitors for fear that such conduct could lead to sanctions due to their perceived anti-competitiveness while neglecting any benefit their conduct would have for consumers.[86] An additional criticism of the Harvard theory relates to the fact that many of its defining features, especially the concept of workable competition, were not reconcilable with the economic theory of profit maximization.[87] Thus, despite the Harvard theory's attempts to use economic theory in antitrust law, the theory appears to remain at war with the basic fundamentals of economics.

The aforesaid criticisms against the Harvard theory do not however mean that the theory is without benefits. According to Piraino, the defining benefit of the Harvard theory is the fact that it provides regulatory authorities with a degree of certainty when evaluating whether a firm's conduct can be deemed anti-competitive.[88] This certainty is established by the relevant legislature and/or regulatory bodies specifically labelling certain forms of conduct as inherently anti-competitive (per se anti-competitive).[89] This approach also lessens the burden of proof on regulatory authorities who can focus their investigations on establishing the existence of only the essential elements of the prohibited conduct in question. While the competition authorities need only prove that the firm in question committed the conduct complained of, the accused firm will in turn be saddled with the substantial burden of proving that its conduct is in fact *not* anti-competitive. The certainty that this theory therefore creates has the added proactive benefit of empowering firms with the knowledge of knowing in advance exactly what conduct is viewed as anti-competitive and it thus deters market participants from engaging in such conduct in the future.[90]

3.2. The Chicago Theory

[86] See Piraino (2007) at 358.
[87] Posner "The Chicago School of Antitrust Analysis" (1979) *University of Pennsylvania law Review* 925 at 926, hereinafter referred to as "Posner (1979)". Profit Maximization refers to the process undertaken by companies in terms of which they attempt to determine the best output and price levels in order to maximize their resulting profit.
[88] See Piraino (2007) at 360.
[89] See for example the prohibited conduct of charging excessive prices to the detriment of consumers and refusing competitors access to an essential facility where it is economically feasible to do so, the so called *"per se"* offences as contained in sections 8(a) and 8(b) of the Competition Act.
[90] Piraino (2007) at 348 – 350. Also see Brown *Legal Certainty and Competition Law: Can they be reconciled?* LLD Thesis, Stellenbosch University (2018) at 216 – 217.

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During the 1960's, a new school of thought began to emerge which sought to disagree with the notion of industrial structuralism as advocated by the Harvard School and instead proposed the idea that the legislative intent behind the Sherman Act was not to protect individual competitors in the market at the expense of large monopolies but rather the promotion of concept of consumer welfare.[91] Rather than using industrial structuralism as the starting point for antitrust analysis, this new theory, which became known as the Chicago Theory of Antitrust Regulation, advocated using price theory as the starting point for determining whether or not a firm could be held liable for anti-competitive conduct.[92] Price theory is the microeconomic principle that involves the analysis of the market forces of supply and demand in determining the appropriate price for a good or service. [93]

One of the leading advocates of the Chicago theory was Robert Bork,[94] who argued that the sole purpose of antitrust regulation was the promotion of efficiency which would ensure the achievement of the ultimate goal of consumer welfare.[95] Bork defined consumer welfare as the "maximisation of wealth", or put differently, "consumer want satisfaction".[96] The relevant regulatory authorities would thus be tasked with determining what type of conduct had the effect of increasing efficiency and which specific conduct would have the effect of decreasing consumer welfare through the reduction of output. It would thus *not automatically* deem any conduct by large firms anti-competitive as would be the case under the Harvard theory.[97] Bork formulated his theory through an extensive evaluation of statements made by several senators and congressmen in the US congress when enacting the Sherman Act as well as various decisions of the US courts when tasked with adjudicating on questions of anti-competitive conduct.[98] He concluded that it

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[91] See Director & Levi "Law and the Future: Trade Regulation", (1956) *University of Chicago Law Review* 281, at 290, Bork "Legislative Intent and the Policy of the Sherman Act" (1966) *The Journal of Law and Economics* 7, at 8 (hereinafter referred to as Bork (1966)), and Stigler, *The Organization of Industry* (1983).
[92] See Posner (1979) at 927.
[93] See Weyl "Price Theory" (2014) *Journal of Economic Literature, Forthcoming* 1 at 1.
[94] It is important to note that Aaron Director is largely regarded as the father of the Chicago Theory however, many of his arguments were presented orally and were not developed as a specific philosophy of competition law. Director's arguments were rather developed into studies of specific issues within competition law. These ideas have since been expanded upon and developed further by Bork and many other writers such as Bowman, McGee and Telser. See Priest "The Abiding Influence of the Antitrust Paradox: An Essay in Honor of Robert H. Bork" (2008) *Yale Law School Legal Scholarship Repository* 455 at 456 – 457.
[95] Bork (1966) at 8. Also see Piraino (2007) at 351.
[96] Bork (1966) at 7.
[97] Bork (1966) at 37.
[98] See for example the decision of United States v Aluminum Co. of America (Alcoa) 148 F.2d 214 (1945) where at 428 where Judge Hand stated; "We have been speaking only of the economic reasons which forbid monopoly; but there are others, based upon the belief that great industrial consolidations are

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was clearly the intention of the legislature in passing the Sherman Act into law, that the predominant goal of antitrust law was the achievement of consumer welfare and that any other goals which were conflict with this goal, should give way to it.[99]

In light of this new suggested goal of competition policy, Chicago jurists held the view that several practices which were deemed automatically anti-competitive in terms of the Harvard theory, could in actual fact now be seen to have a positive effect on competition.[100] An example of such conduct was the practice of predatory pricing which simply put entails setting prices below costs to drive competitors out of a market.[101] According to the Chicago theory, setting price below cost to drive out competitors would not benefit a dominant firm due to the fact that when such dominant firm later raises prices to recoup its losses, new entrants to the market will be attracted. This will have the effect of ultimately driving prices down further and eventually placing the dominant firm in a position where it can no longer compete.[102] Such prohibited conduct would only have anti-competitive consequences in the exceptional circumstances where the intended target of such conduct does not have the necessary capital resources to survive a price war.[103]

As pointed out by Piraino, the argument was further that the regulation of competition to a large extent should not fall to regulatory authorities and the courts given that they generally made poor decisions when evaluating conduct of an economic nature.[104] Instead, except for the exceptional circumstances where clear evidence exists that warrants regulatory intervention to prevent conduct which may have anti-competitive consequences, Chicago theorists argued that regulation should be left to the ordinary market forces of supply and demand.[105] This argument was based solely on the belief that markets are self-correcting and would better redress any imbalances caused by anti-

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inherently undesirable, regardless of their economic results". What is important to note from this decision is that despite accepting the notion that monopolies could have positive economic effects, the Court still ruled that the conduct of Alcoa was anti-competitive despite the fact that it would of have the effect of allowing Alcoa to supply a quality product at a lower price.

[99] Bork (1966) at 38.

[100] See Bork (1966) at 39 and Piraino (2007) at 362.

[101] See Posner (1979) at 927.

[102] See Posner (1979) at 927.

[103] See Posner (1979) at 928.

[104] Piraino (2007) at pg. 350.

[105] Hovenkamp "Post-Chicago Antitrust: A Review and Critique" (2001) *Columbia Business Law Review* 257, at 266 (hereinafter referred to as Hovenkamp (2011)).

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competitive conduct than any form of regulatory intervention.[106] Bork accordingly argued that any activity which has the effect of increasing consumer welfare by reducing the price of a particular good or service should be encouraged while any conduct which reduces consumer welfare by increasing the price of the good or service will accordingly require redress.[107] However, the theory does not end there. Together with the achievement of consumer welfare, the Chicago theory argues that competition authorities should seek to achieve allocative efficiency in the distribution of resources. This would appear to entail that conduct which can be shown to have a greater benefit for all those who benefit from it than the total loss suffered by all those who lose from it, should be encouraged even in circumstances where some consumers ultimately lose.[108] This then requires balancing producer benefit against consumer harm.[109] The question of when consumer welfare should give way to allocative efficiency will thus remain dependent on the facts of each particular case. Despite this potential paradox at the heart of the theory itself, Kobayashi and Muris remark that the Chicago theory has certainly left a lasting legacy on antitrust analysis through its heavy reliance on both theoretical and empirical economics in order to determine testable hypotheses aimed at achieving its efficiency goals.[110]

In terms of the Chicago theory, antitrust regulation should be limited to the prohibition of three types of conduct only: Firstly, horizontal agreements that are aimed at the suppression of competition while providing little to no efficiency gains. Secondly, predatory pricing practices undertaken for the sole aim of excluding a competitor from the market. Thirdly, horizontal mergers which seek to give the merging firms extremely large market shares.[111] In this context it is important to bear in mind that Bork viewed market shares as an important constraint on market power.[112] For this reason, Bork argued that a firm should not be permitted to possess more than a forty percent share of the market and that at least three large competitors should exist in the market at all times.[113]

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[106] Piraino (2007) at 350.
[107] See Bork (1966) at 27.
[108] See Bork (1966) at 8. His argument remains that any conduct which seeks to increase the efficiency of producers will have the ultimate effect of benefiting consumers. Also see Hovenkamp "Antitrust Policy After Chicago" (1985) *Michigan Law Review* 257, at 264 (hereinafter referred to as Hovenkamp (1985)).
[109] Bork acknowledges the difficulty in weighing the competing interests herein against one another and acknowledges the difficulty posed through a direct comparison of the competing factors at play.
[110] BKobayashi & Muris "Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century" (2012) *Antitrust Law Journal* 147*,* at 150 (hereinafter referred to as Kobayashi & Muris (2012).
[111] Shores "Antitrust Decisions and Legislative Intent" 2001 *Missouri Law Review* 725 at 740.
[112] See Shores "Antitrust Decisions and Legislative Intent" at 41.
[113] See Bork (1966) at 47.

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Therefore, where a horizontal merger results in the merged entity eventually possessing a very large market share, Bork argued that it should be presumed that such a merger may result in a situation where the merged entity can increase its efficiency and thereby reduce prices but without the countervailing power[114] of competitors to prevent it from overcharging consumers.[115]

The basis of the theory by the Chicago School that the legislative intent of the Sherman Act was consumer welfare has not been without its detractors. Various academics have argued that history rather seems to point to such legislative intent being the prevention of the transfer of wealth from consumers to large corporations[116] and the protection of small business.[117] The Chicago theory is thus also not without its deficiencies. Paradoxically, the Chicago theory's biggest failing is the Harvard theory's greatest strength. While the Harvard theory offers firms and regulatory bodies certainty on the types of conduct that are deemed anti-competitive and which should be avoided and ultimately be prohibited, the Chicago theory lacks certainty as it places a burden on all parties concerned to establish on a case-by-case basis whether any particular conduct has anti-competitive consequences.[118] The Chicago theory has also been criticised for placing too much faith in the market's ability to correct imbalances created by anti-competitive conduct.[119] Fox and Sullivan point out that in the Chicago theory, too much emphasis is placed on economics at the expense of law and especially the regulatory responsibility of the law.[120] Sutherland and Kemp however remark that it will always remain the responsibility of the law to redress imbalances that cannot be corrected by ordinary market forces due to the imperfect nature of markets.[121]

Like the Harvard theory, the Chicago theory therefore also appears to be at war with itself in some respects. Although the stated goal of competition law should be the achievement

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[114] "Countervailing Power" is a theory of political modification of markets. Countervailing powers refer to those powers which constrain the powers of large firms which are able to manipulate the prices set for goods and services through free bargaining. See Galbraith *American Capitalism* (1952) at 28.
[115] See Bork (1966) at 40.
[116] See Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Economic Efficiency Interpretation Challenged" (1982) *Hastings Law Journal* 65, at 68.
[117] Hovenkamp "Antitrust's Protected Classes" (1989) *Michigan Law Review* 4, at 24.
[118] Piraino (2007) at 351. Also see Brown *Legal Certainty and Competition Law: Can they be reconciled?* LLD Thesis, University of South Africa (2016) at 290.
[119] Sutherland and Kemp at 1-47.
[120] See Fox & Sullivan "Antitrust – Retrospective and Prospective: Where Are We Coming From? Where Are We Going?" (1987) *New York University Law Review* 936, at 947.
[121] Sutherland and Kemp at 1-48.

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of consumer welfare, Sutherland and Kemp observe that the Chicago theory seems to still favour conduct which may result in efficiency gains from a production point of view but which will ultimately reduce consumer welfare on the basis that overall efficiency would be enhanced.[122] This clearly highlights the contradiction within the theory.

Despite the aforesaid criticism, the Chicago theory found wide acceptance in the US courts between the late 1960's and the early 1980's.[123] As alluded to in the introduction of this Chapter, the Chicago theory has largely contributed to the concept of structuralism, that underpinned the Harvard theory, falling out of favour. As such, it is submitted that the Chicago theory appears to have been instrumental in shifting the focus of competition regulation away from the protection of individual competitors in favour of the protection of the competitive process as a whole.

3.3. The Post-Chicago Theory

The lasting effect that the Chicago theory has had on antitrust thinking has been that the focus of competition regulation should be aimed at the achievement of allocative efficiency in the market and the promotion of overall consumer welfare.[124] As pointed out above, despite the wide spread acceptance of the Chicago theory, several scholars however believed the theory to be overly simplistic and placing far too much faith in the ability of imperfect markets to effectively address imbalances that may arise in such markets.[125]

Piraino remarks that all markets inevitably have some degree of structural imperfection, whether it be high barriers to entry, highly concentrated industries, or a lack of transparency between competitors. These imperfections are what enable firms to possess market power and ultimately solidify their dominant positions within the particular market. This not only renders such dominant firms almost immune to the corrective

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[122] Sutherland and Kemp at 1-47.
[123] See the decisions of *United States v Arnold, Schwin & Co.* 388 U.S. 365 (1967), *Continental T.V. Inc. v GTE Sylvania Inc.* 433 U.S. 36 (1977), *Reiter v Sonotone Corp.* 442 U.S. 330 (1979), *NCAA v Board of Regents of University of Oklahoma* 468 U.S. 85 (1984). Also see the more recent decision of *Leegin Creative Leather Products Inc. PSKS Inc.* 551 U.S. 877 (2007) at 905 where the court that *"to protect small retail establishments that might otherwise be driven from the market place by large-volume discounters was foreign to the Sherman Act. Divorced from competition and consumer welfare to save inefficient small retailers from their inability to compete. The purpose of antitrust laws, by contrast, is the protection of competition, not competitors."*. Although this is a more recent decision, it is important to bear in mind that the Chicago Theory has largely fallen out of favour with both the courts and academics.
[124] Sutherland and Kemp at 1-48.
[125] See Hovenkamp (2011) at 267, Piraino (2007) at 358, and Kobayashi & Muris (2012) at 148.

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powers of ordinary market forces, but also allows these firms some degree of manipulation of the market.[126] The Post-Chicago theory takes this into account and is premised on the understanding that markets are far more complex than initially believed, with the constant advancement of technology leading to new markets constantly being formed.[127] This has also led to the realisation that anti-competitive conduct cannot be limited to a closed list of predetermined forms of conduct. Rather, like also advocated by the Chicago School, a determination on whether a specific practice is anti-competitive in nature will inevitably be a question of fact to be determined on a case-by-case basis.[128]

Post-Chicago scholars have however accepted the shortcomings of the Chicago theory and have conceded the need for government and regulatory intervention in antitrust regulation in certain circumstances.[129] In order to determine whether or not conduct can be deemed to be anti-competitive, Post-Chicago analysis has adopted much more sophisticated models of economic analysis, such as game theory[130], with the aim of producing possible outcomes never properly considered by the proponents of the traditional Chicago theory.[131] Sutherland and Kemp observe that the aim behind the adoption of this new sophisticated economic theory was to provide enforcement authorities with new empirical data and models to accurately measure the benefits and effects of alleged anti-competitive conduct.[132]

The Post-Chicago theory has however been criticised for placing too much reliance on economic theories that have the ability of producing evidence that supports the theory, but which do not produce evidence strong enough to exclude other explanations.[133] Above all else, as pointed out by Hovenkamp, this highlights the often-irreconcilable nature of economics and law in antitrust adjudication. It accordingly requires that the

[126] Piraino (2007) at 348 – 351.
[127] See Hovenkamp (2011) at 267.
[128] See Hovenkamp (2011) at 269.
[129] See Kobayashi & Muris (2012) at 150.
[130] See Turocy & Stengel "Game Theory" CDAM Research Report LSE-CDAM-2001-09, available at http://www.cdam.lse.ac.uk/Reports/Files/cdam-2001-09.pdf (last accessed on 21/10/2019), where game theory was first developed by Princeton professor John Von Neumann and is defined as "the formal study of mathematical models of conflict and cooperation within a competitive situation". The theory attempts, through mathematics, to predict the actions of market participants should take to achieve the best result for themselves. In this way, the outcome of each participant will directly be influenced by the decision or strategies of all other participants.
[131] Kobayashi & Muris (2012) at 251.
[132] Sutherland and Kemp at 1-49.
[133] See Hovenkamp (2011) at 271

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evidence produced is not only consistent with the perceived anti-competitive effects of the alleged conduct but also reasonably excludes any other less detrimental consequence of the alleged conduct.[134] The lasting legacy of the Post-Chicago theory is to agree with the goal of consumer welfare in competition regulation but also to concede that interference by regulatory authorities in markets may sometimes be inevitable but such intervention should only be a means of last resort in circumstances where the anti-competitive effects of such conduct will continue unabated without the necessary intervention.[135]

3.4. The Development of "*per se*" and "rule of reason" approaches

3.4.1. The Rule of Reason Approach

While the various theories of competition regulation that originated in the US have been discussed above, the task of applying these theories in practice has largely been left to the American courts. The problem facing the US courts was that these theories remained largely abstract with little indication of how they should be applied to real world situations. The varying nature of the contrasting theories certainly did not simplify this task. This necessitated the development of specific evidentiary theories that would assist authorities in the evaluation of allegations of anti-competitive conduct. Such evidentiary theories would in particular assist the courts in determining which forms of conduct would require substantial analysis to determine their anti-competitive effects and which forms of conduct could be deemed so reprehensible that the courts could limit their enquiry simply to the establishment of the conduct in question.[136]

The "rule of reason" approach was consequently developed by US courts in an attempt to determine what type of conduct should be prohibited in terms of section 1 of the Sherman Act.[137] In terms of this rule, the potential pro-competitive effects of any conduct

[134] See Hovenkamp (2011) at 272, also see the decision of *Matsushita Elect. Indus. Co. v Zenith Radio Corp.* 475 U.S. 574 (1986) where the US Supreme Court highlighted the important of unambiguous evidence of anti-competitive in summary judgment proceedings in antitrust matters.
[135] See Hovenkamp (1985) at 231.
[136] See *White Motor Co. v United States* 372 U.S. 253 (1963).
[137] Section 1 of the Sherman Act provides that *"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal"*. Also see Piraino "Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis" (1991) Southern California Law Review 685), also see the decisions of *White Motor Co. v United States* 372 U.S. 253 (1963), *United States v Penn-Olin Chemical Co.* 378 U.S. 158 (1964) and *United States v First Nat'l Bank & Trust Co. og Llexington* 376 U.S. 665 (1964).

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will be carefully analysed and only where such conduct can be shown to have a negative effect on efficiency, will it be determined to be illegal.[138] The courts will accordingly consider various factors in determining whether the alleged conduct is in fact anti-competitive, such as the particular circumstances relevant to the particular market, the prevailing conditions that existed in the market before and after the alleged conduct, the intention behind the alleged conduct and the alleged anti-competitive effects of such conduct.[139] It is clear to see how this rule was favoured by the proponents of the Chicago theory especially given the fact that all relevant factors need to be weighed against each other to make a determination of anti-competitiveness. Piraino however points out that the problem with such an approach is that the enforcement bodies are forced to engage in often prolonged and complicated investigations to determine the effects that the particular conduct will have on effective competition. In an attempt to simplify this analysis, many commentators have suggested that the analysis should first focus on the establishment of market power and where the firm in question can be shown to lack market power, to accept that its conduct can never be judged as anti-competitive.[140] It is however submitted that marking conduct as anti-competitive merely because it meets certain predetermined factors that may be indicative of an abuse, is not necessarily itself proof of anti-competitive conduct. The possession of market power, as will be discussed later in this thesis, is an essential element for any firm to exert some sort of influence over the market.

3.4.2. The "*Per se*" Approach

The development of the "per se" rule followed directly from the uncertainty and inconsistency that resulted from the application of the rule of reason approach.[141] In terms of the per se rule, certain defined anti-competitive practices will automatically be deemed to have an anti-competitive effect and once the offending conduct has been established, the offending firm will not be provided an opportunity to prove that the effect of the particular conduct is *not* anti-competitive. This means that the offending firm will not be

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[138] Piraino "Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures"(1991) *Minnesota Law Review* 1, at 14 (hereinafter referred to Piraino (1991).
[139] See the test developed by Justice Brandeis in the matter of *Chicago Bd. Of Trade* 246 U.S. (1918). Also see the decision of *Continental T.V. v GTE Sylvania* 433 U.S. 36 (1977).
[140] Piraino (1991) at 14.
[141] See Piraino (1991) at 15. and Arthur "A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts (2000) *Antitrust Law Journal* 337, at 337.

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able to raise any defences to escape liability for such conduct.[142] This approach offers a clear advantage to the competition authorities when compared to the rule of reason approach because it dispenses with the need to engage in prolonged investigations to determine whether the alleged conduct has an effect on competition and particularly whether it has an anti-competitive effect. The per se approach however does not offer a miracle cure to the difficulties that beset antitrust analysis. Piraino remarks that the possibility exists that certain conduct which is deemed to be anti-competitive in terms of this approach may in actual fact be proved to have pro-competitive effects but, the firm in question is prevented from advancing any evidence that may justify its conduct.[143] Given the certainty afforded by this approach, the per se approach has been heavily favoured by the proponents of the interventionist Harvard theory.[144]

3.5. A Further Development: The Austrian Theory

Shortly after Chamberlain and Robertson[145] developed their monopolistic competition models for competition regulation that formed the original basis of the Harvard theory, a separate radical school of thought started to develop within economic circles. This radical theory, largely formulated on the writings of Ludwig von Mises and Fredrick Hayek[146], rejected the notion of monopolistic competition that was central to the so called "neo-classical theories" that included the Harvard, Chicago and Post-Chicago theories and instead saw competition being driven not by consumers or producers, but through the profit-seeking speculation of entrepreneurs.[147] This theory has since been further developed by Kirzner and has become known as the "Austrian theory of the purpose of competition regulation".[148]

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[142] Piraino (1991) at 14 - 15. Also see Black *Conceptual Foundations of Antitrust* (2005) at 63.
[143] Piraino (1991) at 16.
[144] See Piraino (2007) at 349.
[145] See Chapter 2 at paragraph 2.1.
[146] See Von Mises *Human Action, New Haven* (1949) (hereinafter referred to as von Mises (1949)), also see Hayek "Economics and Knowledge" (1937) *Economica* 33; Hayek *The Pure Theory of Capital* (1941); Hayek "The Use of Knowledge in Society" (1945) *American Economic Review* 519; F.A Hayek *Individualism and Economic Order* (1948), Hayek "Economic Thought VI: The Austrian School" (1968) *International Encyclopedia of the Social Sciences* 458; Hayek *Competition as a Discovery Procedure New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978) at 179 – 190.
[147] Von Mises (1949) at 325 - 326.
[148] See Kirzner *Competition and Entrepreneurship* (1973), Kirzner *The Perils of Regulation: A Market-Process Approach in Discovery and the Capitalist Process* (1985) at 119 – 149, Kirzner *Discovery, Capitalism, and Distributive Justice,* (1989), Kirzner *The Meaning of Market Process: Essays in the Development of Modern Austrian Economics,* (1992), Kirzner *Classics in Austrian Economics: A Sampling*

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The Austrian theory is firmly rooted in the belief that competition is a dynamic process with the concept of entrepreneurial discovery being the driving force behind the market.[149] The theory is accordingly underlined by three separate concepts:[150] Firstly, the role of the entrepreneur. Von Mises defines the entrepreneur as the "acting man in regard to the changes occurring in the data of the market."[151] It is argued that it is the entrepreneur that functions as the decision maker within the economy and it is through the decisions of entrepreneurs that changes are made to pricing and production of a particular good or service. Secondly, the role of discovery. On a reading of the various texts of von Mises and Kirzner, the process of discovery is akin to that of learning. They submit that through discovery, entrepreneurs learn from the mistakes previously made in a particular market as well as discover where the potential lies to create new markets or penetrate existing markets. The actions of entrepreneurs are then largely influenced by the data that they extract through this process. In this way, entrepreneurs ensure that available resources are allocated to the purposes that will prove the most productive. The final concept underlying the Austrian theory is that of "rivalrous competition". In terms of this concept, the competitive process is driven by the incentive for entrepreneurs to make a profit.[152] The theory posits that by ensuring entrepreneurial freedom, entrepreneurs will always seek to enter markets where they see a potential to make a profit. This in turn will drive the dynamic competitive process as entrepreneurs will always seek to outdo their rivals and win the preference of customers with the ultimate aim of increasing their profits.[153]

Von Mises and Hayek indicated that where the Austrian theory differs from the neo-classical economic theories for competition regulation, is that it rejects the concept of a "competitive equilibrium resulting as a consequence of mutual anticipations and executed decisions".[154] Instead, the theory is premised on the idea that bad decisions by entrepreneurs are what create imbalances in the market. These imbalances are then corrected by the actions of entrepreneurs following the process of entrepreneurial discovery and thereby learning from these mistakes.[155] The market is therefore seen as

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in the History of a Tradition, (1994), also see Kirzner *The Driving Force of the Market Essays in Austrian Economics* (2000) (hereinafter referred to as Kirzner (2000)).
[149] Kirzner (2000) at 11 and 14.
[150] Kirzner (2000) at 15.
[151] Von Mises (1949) at 255.
[152] Kirzner (2000) at 20 – 21.
[153] Kirzner (2000) at 21.
[154] See von Mises (1949) at 256 and Hayek (1937) at 33–54.
[155] Kirzner (2000) at 226 – 227.

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self-correcting in its nature. Driven by the process of innovation and through ensuring free entry into the market, no one firm could ever be deemed to possess a monopoly (at least from a competitive point of view) unless that firm had sole ownership of an essential input. Innovation will render old products obsolete. This then leaves firms with no option but to constantly strive to innovate to either ensure their position within the market or to win a greater share of the market.[156] Only where a firm can limit a competitors' access to an essential facility[157] could such a firm be placed in a position to derive greater profits without entrepreneurial discovery.[158]

While the concept of entrepreneurial discovery may certainly seem attractive to some, especially those supporters of the Nihilist theory of competition regulation (that advocates a complete dismantling of competition regulation and leaving competition solely up to the corrective powers of the ordinary market forces)[159] the Austrian theory is also not without its problems. Kirzner observes that at its heart, the Austrian theory will only find application in a truly free market utopia that is free from any sort of market distortion or state interference.[160] Unfortunately, the reality is that all markets have some degree of structural imperfection which lead to competition imbalances. In some cases, these imbalances may be the result of structural barriers to entry in the market. These barriers may take the forms of extremely high setup costs or regulatory protections designed to protect certain industries or market participants. While the Austrian theory emphasises the need for free entry and entrepreneurial freedom, Kirzner points out that the theory does not provide much detail on how these attributes alone could overcome structural issues of such a nature.[161] The theory further places a large amount of faith in an individual's alertness to potential opportunities and the actions taken on such realisations.[162] According to Kirzner, this may allow imbalances to persist in markets until

[156] Lee "The Objectives of Competition Law" August 2015, ERIA Discussion Paper Series, ERIA-DP-2015-54, available at https://www.researchgate.net/publication/307634289_The_Objectives_of_Competition_Law (lasted accessed on 21/10/2019) (hereinafter referred to as Lee (2015))at 30.
[157] An essential facility for competition purposes refers to a facility or infrastructure which is necessary for reaching consumers and/or enabling competitors to carry out their business. See Organisation for Economic Co-operation and Development (OECD) "The Essential Facilities Concept" OECD Policy Round Table (1996) available at http://www.oecd.org/competition/abuse/1920021.pdf (last accessed on 21/10/2019) at 7 - 8.
[158] Kirzner (2000) at 228.
[159] See Creamer (1998) at 10.
[160] Kirzner (2000) at 228.
[161] Kirzner (2000) at 228.
[162] Kirzner (2000) at 229.

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such time as an entrepreneur acts on discoveries that are made. He points out that the theory also assumes that entrepreneurs will not act in a selfish or materialistic manner, but rather in a manner that advances their own goals.[163] While practically speaking this may be one and the same thing, it also places far too much faith in basic human nature. If entrepreneurs truly existed in the marketplace free from selfish materialistic desires, the need for competition regulation would in all likelihood not exist.

These deficiencies in the Austrian theory have resulted in it largely being regarded as a peripheral theory rather than a primary theory of competition regulation, unlike the neoclassical theories of competition regulation as discussed above which served as a basis for the development of various competition regulatory frameworks. However, the emphasis that the Austrian theory places on innovation has had a substantial influence in the formulation of some jurisdiction's competition law goals, such as Kenya[164],and the ability of innovation to aid in achieving effective competition certainly seems quite evident.

4. A New Approach to Antitrust Regulation

A new approach to antitrust regulation has since been proposed by Thomas Piraino Jr. which seeks to do away with the "per se*"*[165] and "rule of reason"[166] approaches altogether. His approach rather seeks to evaluate various forms of conduct against the relevant presumptions of illegality attached to such conduct and thereby limit the enquiry specifically to establishing the anti-competitive effects of such conduct.[167] He states that such an approach requires a marriage of both the interventionist Harvard theory and the efficiency-based Chicago theory, which will enable the regulatory authorities to dispense with evaluating conduct in terms of a singular objective and rather to evaluate conduct in terms of its competitive purpose and economic effect.[168] According to Piraino, this would

[163] Kirzner (2000) at 235.
[164] See Competition Act Chapter 12 of 2010, laws of Kenya.
[165] Conduct that is so clearly anti-competitive in its nature that it can be deemed illegal at face value without any further enquiries into its anti-competitive effects. See Piraino (1991) at 19.
[166] Conduct whose anti-competitive effects are not clear cut and therefore require a detailed analysis on its effects on a particular market. See Piraino (1991) at 690.
[167] Piraino (2007) at 347. Also see Piraino"A Proposed Antitrust Approach to Collaborations Among Competitors" (2001) *Iowa Law Review* 1137, Piraino "Making Sense of the Rule of Reason: A New Standard for section 1 of the Sherman Act" (1994) *Vanderbilt Law Review* 175, and,Piraino (1991) at 28.
[168] See Piraino (1991) at 28.

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enable regulatory bodies to arrive at one singular objective in evaluating conduct namely, to determine the "substantive economic effects" of such conduct.[169]

This new approach propounded by Piraino found acceptance with the US Supreme Court in the matter of the *California Dental Association v FTC*[170] which involved a challenge against certain advertising restrictions imposed on dentists by the California Dental Association that precluded them from advertising their prices as "low". The court *a quo* held that in terms of the "quick look" approach, the conduct was deemed anti-competitive because it made it more difficult for consumers to find a lower price and for dentists to compete on the basis of price.[171] The "quick look" approach referred to conduct where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets.[172] The Supreme Court however disagreed that the "quick look" approach was appropriate because it was not *"intuitively obvious that the advertising restrictions were likely to have an anti-competitive effect"*[173] and the court was of the view that they may even promote competition by eliminating false discount advertising.[174] The Supreme Court accordingly held that instead of relying on a "rule of reason" approach and instead of dividing antitrust analysis into various distinct categories, antitrust analysis should be "viewed on a continuum" which would allow the courts to adopt an enquiry that would "meet for the case".[175] Therefore, in matters of antitrust regulation, "*the degree of proof required should vary with the circumstances*".[176]

Piraino points out that this approach accordingly requires that all competitive conduct be evaluated on a sliding scale.[177] However, the Supreme Court failed to take the opportunity in the *California Dental* case to lay down a method for evaluating conduct against such sliding scale. Piraino has since proposed that conduct first be categorised according to its likely effect on consumers as either presumptively illegal or legal or, as conduct

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[169] See Piraino (1991) at 31.
[170] 526 U.S. 756 (1999) (hereinafter referred to as *California Dental).*
[171] *California Dental Association v FTC*, 128 F.3d 720 (9th Cir. 1997) at 727.
[172] See *California Dental Association*, 526 U.S. at 770.
[173] *California Dental Association v FTC*, 526 U.S. 756 (1999) at 779 – 781.
[174] *California Dental* at 771 – 772.
[175] *California Dental* at 781.
[176] *California Dental* at 780.
[177] Piraino (2007) at 378.

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requiring a prioritized market analysis.[178] This way, where the anti-competitive effects of the conduct in question are clear, the relevant authorities can rely on presumptions of illegality championed by the Harvard theory. Where the effects of such conduct are less clear, a detailed economic analysis as favoured by the Chicago and Post-Chicago theories can be entered into.[179] Piraino however indicates that the reliance on presumptions should not be construed as a decisive indication of illegality but, rather as a tool for simplifying the relevant regulatory authority's analysis by disposing of the need to engage in complicated economic analysis and to shift the burden of proof away from the regulator and onto the firm in question.[180] This then allows the firm in question the opportunity to prove that its intention was never to achieve the anti-competitive effects complained of.[181]

This however should also not be viewed as a blanket endorsement to engage in complicated economic analysis where the effect of the particular conduct is less clear. Rather, Piraino points out that the regulators should limit their assessments to establishing factors which may lend themselves to conduct being declared as anti-competitive in nature.[182] According to him, the most important of these factors should be the establishment of market power. Where regulatory authorities are able to prove that a particular firm's market power exceeds a predetermined threshold, the regulatory authorities need not continue its investigation by considering other economic factors.[183] The onus will then be shifted onto the firm in question to prove that its conduct was in fact not anti-competitive.[184]

5. The Relationship between Pure Competition and Political Goals in the Regulation of Competition

[178] Piraino (2007) at 379.
[179] *Ibid*.
[180] Piraino (2007) at 379 – 381.
[181] The U.S. courts have long held that a party's intention is an important discerning factor in antitrust analysis. See the decisions of *Poller v CBS* 368 U.S. 464 (1962) where the court pointed out that motive and intent play leading roles; *Broadcast Music Inc. v CBS* 441 U.S. 1 (1979) where the court held that a defendant's purposes for a particular competitive behaviour tends to show its effect; and *Electronics Corp. v Sharp Electronics Corp.* 485 U.S. 717 (1988) where in a dissenting judgment, Justice Stevens pointed out that "in antitrust, as in many other areas of the law, motivation matters and factfinders are able to distinguish bad from good faith.
[182] Piraino (2007) at 367.
[183] Piraino (2007) at 368.
[184] Piraino (2007) at 368.

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The Asia Pacific Corporation in their 1999 Study on Competition Laws for Developing Countries observe that competition purists would advocate a system of competition regulation free from infection by non-competition political goals.[185] They point out that the problem with this belief is that it places competition regulation in a vacuum isolating it from broader policy objectives. It has long been accepted that even the most effective competition legislation cannot in itself ensure the total effective functioning of markets.[186] Instead, competition policy is only one piece of a greater policy puzzle consisting of a variety of different policy pieces, each with its own specific set of outcomes, and all aimed at achieving the same fundamental goals for the market. The goals which are sought to be achieved in any particular market will usually be stated in that market's larger industrial policy. This industrial policy will then in turn lay the blueprint on which these goals are sought to be achieved. It therefore becomes imperative that there is sufficient alignment between the goals of competition law and industrial policy of a particular market.

Hovenkamp cautions that the important consideration to keep in mind is that competition law is very limited in its scope.[187] Care should consequently be taken to avoid including all goals of a nation's industrial policy in its competition legislation. The potential problem that this may present, according to Hovenkamp, is that many of these goals may fall outside the scope of what can be considered as "pure" competition goals which may then lead regulators to *make decisions advancing these specific set of goals at the expense of the promotion of effective competition*.[188] As observed also by Crampton and Facey, this reinforces the need for policy instruments such as legislation to be properly aligned with one another, while also highlighting the importance of limiting the scope of each policy instrument to the specific purpose for which it has been intended to achieve.[189]

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[185] Asia-Pacific Economic Cooperation "Study on Competition Laws for Developing Economies, 1999" APEC Committee on Trade and Investment (CTI) 1999 https://www.apec.org/Publications/1999/12/Study-on-Competition-Laws-for-Developing-Economies-1999 (last accessed on 24/10/2019) at 10.
[186] Asia-Pacific Economic Cooperation "Study on Competition Laws for Developing Economies, 1999" APEC Committee on Trade and Investment (CTI) 1999 https://www.apec.org/Publications/1999/12/Study-on-Competition-Laws-for-Developing-Economies-1999 (last accessed on 24/10/2019) at 10.
[187] See Hovenkamp (2001) at 269.
[188] See Hovenkamp (2001) at 269, as well as Areeda & Hovenkamp *Antitrust Law* (2004) at 100.
[189] See Crampton & Facey, "Revisiting regulation and deregulation through the lens of competition policy", (2002) *World Competition* 25 at 30. See also Organisation for Economic Co-Operation & Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency" (2003) available at: http://www.oecd.org/dataoecd/58/55/2485613.pdf: (last accessed 09/09/2018) at 4.

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This position further reinforces the fact that politics will inevitably, in some way or form, influence the development of competition policy. As pointed out by Khemani *et al*, many of the values that underpin these political goals are often incapable of being measured in purely economic terms.[190] These values are expressions of the underlying desires of society as a whole. The inevitable conflict that may arise between efficiency and political goals presents the potential problem of how regulatory decisions may affect these goals and how these effects should be measured against one another. If the task were left to the executive arm of government, for example, they would likely adopt an approach that furthers the specific set of goals that they have deemed to be their primary objective. But as argued by Lewis, by placing the mandate of measuring these conflicting goals with one another with an independent regulatory body that has been tasked solely with the advancement of competition within the market, the potential is certainly greater that the most appropriate decisions may be made.[191] Take for example a situation involving a merger between two large firms. The nature of the merger presents the new merged entity with several efficiencies throughout their business processes which will ultimately result in substantial cost savings for the merged entity.

The problem that the merger presents is that there will be substantial job losses as a consequence of merger related redundancies and a streamlining of the two businesses of the merging entities. If the evaluation of this merger were left to government, especially in a situation where employment is at the forefront of industrial policy objectives, there is a high likelihood that the merger would be prevented from proceeding unless concessions were made to avoid these job losses. An independent competition regulatory authority should on the other hand, at least in theory, approach the situation quite differently. This independent institution would be required to establish how the efficiencies derived from the merger will benefit consumer welfare and weigh these potential benefits up against the effect that the merger will have on employment. If for the example the efficiencies merely boosted producer surplus and thereby increased the merged entities profits without benefitting consumers, authorities would be hard pressed to allow the merger to proceed. If, however the efficiencies resulting from the merger resulted in a substantial

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[190] Khemani, *et al* at 1. Also see W. F. Baxter, "Responding to the reaction: the draftsman's view" (1983) *California. Law Review* 618 at 621.

[191] See Lewis "The Role of Public Interest in Merger Evaluation" International Competition Network, Merger Working Group Naples, 28-29 September 2002 (available at https://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf, last accessed 15/09/2018) at 3.

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reduction in the prices that consumers would pay and thereby increased consumer welfare, it would then need to be measured against the potential for job losses to determine if these benefits outweigh the negative effects on employment. It is submitted that the unique mandate and expertise possessed by such an independent regulatory institution places it in the best possible position to not only advance the objectives of competition law, but also those of the larger industrial policy framework as a whole.

Thus, Gal remarks that,while some oppose the idea of political goals finding their way into competition law, as will be seen from later discussions, it appears that some political influence on the goals of competition policy remains inevitable.[192] However, because these two different goals will often be at cross purposes with one another, the fundamental task remains to ensure that these goals are properly weighed up against one another to ensure that the promotion and maintenance of effective competition is properly achieved. Khemani *et al* observe that there will undoubtedly be some degree of compromise needed between these goals.[193] It is therefore essential that a proper and robust approach to regulation is undertaken. Authorities will do well to ensure that the achievement of effective competition does not fall by the wayside in favour of achieving other political goals which would normally fall outside of the scope of ordinary competition.

Competition law plays an extremely important role within the larger industrial policy framework and the achievement of its policy objectives. But, as pointed out above, its role is limited. As acknowledged by Khemani *et al*, competition law's purpose should ideally and primarily remain the achievement of effective competition, that is the achievement of "pure" competition goals, within the market, with other goals of a more political nature being nothing more than secondary.[194] As will be illustrated in this thesis, the problem with the inclusion of political goals in competition policy and law is that it appears to create a belief that competition policy and law can be used as a tool to address the deficiencies in other policy instruments and that it can be used as a tool through which the objectives of these policies can be achieved.

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[192] See Gal, "Reality bites (or bits): the political economy of antitrust enforcement", in: Hawk *International Antitrust Law and Policy* (2001) at 605.
[193] See Khemani, *et al* at 8.
[194] Khemani *et al* at 4.

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6. Conclusion

Competition regulation has certainly sparked the interest of legal and economic scholars alike. The unique role that competition fulfils within markets has highlighted the often-strained relationship that exists between law and economics. While some legal academics have advocated greater regulatory intervention in markets to ensure effective competition, economists prefer a hands-off approach, believing in the corrective nature of the ordinary market forces. If anything, the development of the neo-classical theories of competition regulation discussed in this chapter have stressed the point that effective competition regulation is dependent on the disciplines of both the law and economics. How these two principles are balanced against one another remains the ultimate question. Authorities therefore should seek to ensure that competition policy properly takes the relevant principles of law and economics into account in order to ensure that effective competition regulation is attained.

The development of the Chicago and Post-Chicago theories demonstrates a decisive move away from a formalistic conduct-based approach to competition regulation in favour of a more effects-based approach centred on economics. The idea being that the attainment of effective competition is dependent on the prohibition of only those forms of conduct which have the overall effect of adversely affecting competition within the market. The Austrian theory of competition regulation however differs quite substantially from the neoclassical theories of regulation with its emphasis on the role of the entrepreneur within the market and the promotion of innovation. While this theory has failed to find widespread acceptance within competition circles, the goal of innovation has nevertheless found some acceptance as a fundamental goal of competition policy.

These theories of competition regulation have also played a substantial role in the development of the ultimate aims of competition law. The goals of competition law can broadly be broken down into the traditional pure competition efficiency goals and the socio-economic political non-efficiency goals. Pure competition efficiency goals are largely economic in nature and capable of very easily being quantified and measured. Political goals however, are often incapable of being measured in purely economic terms. Herein lies the problem faced by competition jurists and regulators alike. What weight should be afforded to pure competition efficiency goals as opposed to political goals? Should political goals generally give way in favour of pure competition goals and do these

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goals even belong in competition regulation in the first place? While it seems inevitable that political goals will infuse the foundations of competition law in some way or form, the question of how these often-competing goals are to be reconciled with one another remains a central theme of this thesis.

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CHAPTER 3 – THE HISTORICAL DEVELOPMENT OF COMPETITION LAW AND REGULATION IN SOUTH AFRICA

1. Pre-1998 Competition Regulation

1.1. The Regulation of Monopolistic Conditions Act 25 of 1955

Prior to 1955, competition remained largely unregulated in the South African market. Unlike many other British colonies, South Africa did not adopt any legislation specifically for the task of competition regulation.[195] This left the "regulation" of competition mainly to the then Board of Trade and Industries (BTI),[196] the predecessor to the Department of Trade and Industry and subsequent Department of Trade, Industry and Competition. This Board, without being bestowed with the necessary enforcement powers that are usually given to independent regulatory bodies, found its function limited to providing advice on issues involving competition.[197] In an attempt to plug the gap left by the lack of any form of comprehensive legislation aimed at the regulation of competition in the South African market, the Regulation of Monopolistic Conditions Act was subsequently enacted in 1955 and the BTI was tasked with administering the 1955 Act.[198]

The Regulation of Monopolistic Conditions Act entrusted the BTI with the responsibility of investigating certain anti-competitive or "monopolistic" market conditions, recommending remedies and negotiating and supervising compliance with the Act.[199] The Regulation of Monopolistic Conditions Act however had several flaws. Despite the Act opposing conduct of an anti-competitive nature, it failed to prohibit any particular forms

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[195] Török "Competition Policy reform in South Africa: Towards the mainstream CP model for 'transition' economies in the Third World" (2005-05-28) *University of Veszprém and Hungarian Academy of Sciences* (available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.138.5528&rep=rep1&type=pdf) (last accessed on 28/04/2016) (hereinafter referred to as Török (2005) at 7.

[196] The BTI was established by the Board of Trade and Industries Act 28 of 1923 to advise on trusts, monopolies and restraint of trades that undermine the "general interest" by restricting output or raising prices. The BTI was then reconstituted by the Board of Trade Industries Act 19 of 1944 but its role remained largely consultative on competition issues.

[197] Török (2005) at 7

[198] Smit "The Rationale for Competition Policy: A South African Perspective", presented at ESSA conference 7-9 September 2005 (available at https://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf) (last accessed on 17/07/2019) (hereinafter referred to as Smit (2005) at 10

[199] See section 3 of The Regulation of Monopolistic Conditions Act which would empower the Board to investigate conditions which the Minister of trade and commerce deemed monopolistic. Section 3(3) empowered the board under certain circumstances to negotiate and conclude settlement agreements but these had to be given effect by the Minister. Section 6 limited the power of the board to simply providing the Minister with an opinion that certain market structures were monopolistic but the ultimate authority to take corrective action rested with the Minister, see section 6(5). Also see Smit (2005) at 11.

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of conduct as per se anti-competitive.[200] A further flaw was that the BTI was not empowered to investigate any particular instances of anti-competitive conduct with its functions rather being limited to specific mandates given to it by the Minister of Trade and Industry. This meant that the Minister had a wide discretion regarding the types of investigations that could be undertaken by the BTI as well as the sanctions that it could impose. The remedial action powers available to the BTI were also largely ineffective due to the fact that no real mechanisms were provided to redress the effects of conduct found to be anti-competitive.[201] The BTI was further not afforded the necessary independence to adequately regulate competition within the South African market free from political interference.[202]

1.2. The Maintenance and Promotion of Competition Act 96 of 1979

During the early 1970's, the Mouton Commission of Inquiry was appointed with the aim of reviewing the Regulation of Monopolistic Conditions Act and to provide recommendations on how competition could be better regulated in South Africa.[203] One of the recommendations of the Mouton Commission was the complete overhaul of the relevant regulatory institutions in line with the tripartite system adopted by the British Fair Trade Commission.[204] Such a structure would require the establishment of three separate state institutions each tasked with its own individual responsibility. The first institution

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[200] See 3 of the Regulation of Monopolistic Conditions Act which references "suspected monopolistic conditions". Other than this vague statement, no specific forms of anti-competitive conduct are expressly prohibited. Also see Smit (2005) at 10.

[201] It terms of section 3(2) of the Regulation of Monopolistic Conditions Act, if the board was of the opinion as a result of its investigation that a monopolistic condition exists and that this not in the public interest, it shall recommend to the Minister that action be taken in terms of section 6. Aside from this remedy, the BTI was not empowered with any other form of remedial action. It is also important to note that during the 24 years the Act was in existence, only 18 investigations were ever ordered by the Minister with none ever resulting in any effective corrective action ever being ordered or taken, See Török (2005) at 8.

[202] In terms of section 3 and 6, the powers of the BTI were subject to the discretion of the Minister. Also see Smit, at 10.

[203] See the Mouton Commission report titled the "Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act, 1955" Government Printer, South Africa RP64/1977 (hereinafter referred to as "the Mouton Commission Report").

[204] British competition regulation falls within the jurisdictions of the Department for Business, Innovation and Skills with its investigative arm previously resting in the Office of Fair Trading and Competition Commission which in 2004 were merged into a single entity known as the Competition and Markets Authority. Also see Organisation for Economic Co-operation and Development (OCED), Directorate for Financial and Economic Affairs "Competition Policy and Law in South Africa" OECD Global Forum on Competition Peer Review: Paris, 11 February 2003 (available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf)(last accessed 07/08/2016) at 13 (hereinafter referred to as "Competition Law and Policy in SA (OECD)"). Also see Török (2005) at 8.

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would be that of the relevant ministry tasked with tabling competition policy in Parliament and being responsible for the financing of the other two institutions. The second institution would be responsible for the investigation and enforcement of the various market participants' conduct within the market and finally, an independent tribunal would be established for the purpose of making binding rulings on issues of competition.[205]

The recommendations of the Mouton Commission resulted in the promulgation of the Maintenance and Promotion of Competition Act of 1979. Although this Act dealt with several issues which were omitted from the framework of the Regulation of Monopolistic Conditions Act,[206] Török points out that the Maintenance and Promotion of Competition Act still failed to provide for any per se prohibited forms of conduct.[207] Instead the Act established the benchmark of 'public interest' for making determinations of harm by alleged anti-competitive conduct.[208] As observed by Smit, the Act's fatal flaw in this regard was that it failed to define what the term 'public interest' would entail which left the criterion to be largely subject to, and dependent on, individual interest and interpretations.[209] The Act did however establish the Competition Board which was an independent administrative body[210] entrusted with the function of supervising restrictive practices and monitoring mergers and acquisitions,[211] with the members of the board being appointed by the Minister of Trade of Industry.[212] The functions of this board included undertaking investigations, subject to the direction of the Minister, that it regarded necessary, with regards to competition policy and new trends and developments;[213] the investigation of monopoly situations that were deemed against the public interest:[214] issuing of policy guidelines with regards to restrictive practices and monopoly situations;[215] and it further could perform any other function assigned to it by the Act.[216] The Competition Board however still lacked the necessary authority to take

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[205] See the Mouton Commission Report at par 206 & 209. Also see Competition Law and Policy in SA (OECD) at 13.
[206] For example, merger control was given a separate chapter within the act and the act sought to define certain monopoly situations.
[207] Török (2005) at 10.
[208] Török (2005) at 9.
[209] See section 6(1)(b) of the Maintenance and Promotion of Competition Act. Also see Smit (2005) at 9.
[210] See section 3(1) of the Maintenance and Promotion of Competition Act.
[211] This was the first instance of mergers and acquisitions being regulated in South African law.
[212] See section 3(2) of the Maintenance and Promotion of Competition Act. Also see Smit (2005) at 11.
[213] See section 6(1)(a) of the Maintenance and Promotion of Competition Act.
[214] See section 6(1)(b) of the Maintenance and Promotion of Competition Act.
[215] See section 6(1)(c-d) of the Maintenance and Promotion of Competition Act.
[216] Section 6(4) of the Maintenance and Promotion of Competition Act.

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effective remedial action due to the fact that the Board merely made representations to the Minister on the type of action to be taken but, the authority to implement these remedies ultimately remained vested in the Minister.[217]

As indicated by Smit, an attempt was made to remedy several of the weaknesses of the Maintenance and Promotion of Competition Act when, after an investigation undertaken by the Competition Board the Act was subsequently amended in 1986 to prohibit certain forms of conduct per se.[218] These prohibitions included resale price maintenance[219], horizontal price fixing, horizontal collusion between firms to divide markets and lastly, horizontal collusion between firms in tender rigging.[220] The Act also empowered the Competition Board to control the composition of company boards, examine financial and agricultural cooperatives, consider the deregulation and privatisation of state owned enterprises, and to act against existing monopolies and oligopolies.[221] Smit points out that despite these new amendments, South African competition policy and law remained ineffective for three reasons:[222] Firstly, it did not establish an adequate benchmark for determining whether certain firms of conduct or structures[223] could be viewed as anti-competitive. Secondly, the relevant enforcement institutions lacked the necessary independence to adequately carry out their mandate as they remained an integrated part of the executive. Lastly, this lack of institutional independence enabled the executive to use competition policy as a tool for protecting the interests of the white minority and politically elite.[224]

2. Post 1998 Competition Regulation and the Constitutional Democracy

[217] See section 6(2)(a) of the Maintenance and Promotion of Competition Act. C. Also see Smit (2005) at pg. 11. It is important to note that the Board undertook about 75 such investigations with none ever being having any real implications on such firms' structures or behavior. Also see the remedies contained in section 14(1), which lacked the necessary powers to redress the anti-competitive effects of such conduct.
[218] See Regulation 2 of GN 801 of 2 May 1986 as well as Amendment Acts 12 of 1985, 96 of 1987 and 88 of 1990. Smit (2005) at pg. 10 – 11.
[219] Resale Price Maintenance exists where a supplier specifies the maximum or minimum price at which the product must be resold to the public. See Organisation for Economic Co-operation and Development (OECD) – Glossary of Statistical Terms available at https://stats.oecd.org/glossary/detail.asp?ID=3298 (last accessed on 22/10/2019).
[220] See Regulation 2(d) and 6 of GN 801 of 2 May 1986.
[221] See Regulation 2 GN 801 of 2 May 1986. Also see Smit (2005) at 12.
[222] Török (2005) at 10.
[223] The concept of "monopoly situation" which was specifically concerned with certain market structures and conduct.
[224] Smit (2005) at 12.

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2.1. Structural Factors unpinning the need for anti-trust reform

The nature of the South African economy, in both the pre- and post-1994 eras, has been characterised by high levels of concentration of ownership vested in the minority white population. The apartheid policies of the pre-1994 government, which dominated South African policymaking for about 40 years, excluded the majority non-white sector of the population from most segments of the economy.[225] The effects of these policies also led to the imposition of international sanctions against South Africa which resulted in the South African economy being cut-off from most international markets. This necessitated the need for deep inward industrialisation in order to supply the South African market with many key goods it had been cut off from.[226] The nature of some of these industries required substantial capital outlays far beyond the means of ordinary individuals and the private-sector which mainly left the task of establishing these industries to the state.[227] The state-owned Industrial Development Corporation[228] also played a significant role in the development of various other industries during the 1950's to 1960's.[229] These factors subsequently lead to a situation where the large majority of market capitalisation was controlled by the state and a small group of influential families.[230]

The structure of the South African economy has also been extensively influenced by the country's unique position of being extraordinarily endowed with vast deposits of a variety of different natural resources.[231] This resulted in the economy being mostly concentrated in large scale mining operations and heavy manufacturing industries[232] which were largely dependent on and intended to supplement these large-scale mining operations.

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[225] See Sutherland and Kemp at 3-39 and 3-40 as well as Fox "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard International Law Review* 579, at 583 (hereinafter referred to as Fox (2000)).
[226] See Competition Law and Policy in SA (OECD) at 8.
[227] See for example electricity generation which lead to the establishment of Eskom, telecommunications which lead to the establishment of Telkom, freight transport which lead to the establishment of various enterprises such as Transnet, Spoornet and South African Airways to name a few, and finally steel which lead to the establishment of Iscor.
[228] The IDC is a state owned enterprise that was established by the Industrial Development Act 22 of 1940. In terms of section 3 of the Act, it purpose was was to facilitate, promote, guide and assist the financing of new industries or the expansion of industries to assist with the industrial development of the Union.
[229] Török (2005) at 15.
[230] See Török,(2005) at 15 – 16 where such firms are discussed in detail and include the Anglo-American Group, Liberty Group, Rembrandt Group and the De Beers Group (which was later listed in London).
[231] South Africa has been a world leader in the production of a number resources including gold, platinum, diamonds, coal, uranium and thorium.
[232] These included machinery, chemicals, mineral beneficiation and various inputs used in the mining sector.

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However, since democratisation in 1994, South Africa has been welcomed back into the international markets. This has since seen the continual decrease of the importance of mining and manufacturing as major job creators as well as in their respective contributions towards GDP.[233] As observed by Török, the decline of these industries has been a direct result of declining mineral resource reserves as well as these incumbent industries now being subject to competition occasioned by the importation of new internationally competitive products.[234]

2.2. Policy factors underpinning the need for anti-trust reform

With the fall of the apartheid government and the coming into power of the ANC led government, competition policy reform took centre stage.[235] Although the ANC had traditionally adopted deep socialist policies for economic reform,[236] these views had softened as seen in their 1992 *Policy Guidelines for a Democratic South Africa*[237] which called for the adoption of "*anti-monopoly, anti-trust and mergers policies in accordance with international norms and practices, to curb monopolies, continued domination of the economy by a minority within the white minority and promote greater efficiency in the private sector*".[238] The aims of the aforesaid policy guidelines can be summarised as follows:[239]

a. to break the over-concentration of economic power enjoyed by a small group of dominant firms;

b. to correct the structural imbalances and economic injustices created by the apartheid government policies;

c. to better incorporate the interests of small firms and consumers in the market;

[233] Török (2005) at 14.
[234] Török (2005) at 14.
[235] See Sutherland and Kemp at 3-40 and Competition Law and Policy in SA (OECD) at 13.
[236] The ANC traditionally strongly supported the idea of nationalisation of large industries and banking structures.
[237] See The African National Congress *Ready to Govern: ANC policy guidelines for a Democratic South Africa adopted at the National Conference 28 – 31 May 1992* (1992).
[238] See The African National Congress *Ready to Govern: ANC policy guidelines for a Democratic South Africa adopted at the National Conference 28 – 31 May 1992* (1992) at 2.
[239] See Competition Law and Policy in SA (OECD) at 14 – 15.

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d. to enhance the overall efficiency of the market to promote the international competitiveness of South African firms;

e. to establish an independent regulatory agency to effectively police competition policy; and

f. to develop a flexible policy framework which would incorporate existing policies and future means of market regulation.

In 1994, the ANC government released its *Reconstruction and Development Programme (RDP)* White Paper[240] which set out the goal to enact "*strict anti-trust legislation to create a more competitive and dynamic business environment*". The aims of such legislation would be to:

"systematically discourage the system of pyramids where it leads to over-concentration of economic power and interlocking directorships; to abolish numerous anti-competitive practices such as market domination and abuse, and to prevent the exploitation of consumers. Existing government institutions and regulations concerned with competition policy will be reviewed in accordance with the new anti-trust policy. The Government will establish a commission to review the structure of control and competition in the economy, and develop efficient and democratic solutions. To that end, it will consider changes in regulation in addition to anti-trust measures.

Objectives of this policy are to remove or reduce the distorting effects of excessive economic concentration, collusive practices, and the abuse of economic power by enterprises in a dominant position. In addition, the policy will ensure that participation of efficient small and medium-sized enterprises in the economy is not jeopardised by anti-competitive structures and conduct.

The Government will also seek to increase the competitive nature of domestic markets and to influence the behaviour of the lead participants in highly concentrated markets in a socially desirable manner which does not prejudice the interests of workers. The Government will identify practices that restrict entry of efficient and competitive new

[240] Notice No. 1954 of 1994, Government Gazette No. 16085 Vol. 353 (1994).

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businesses into certain industries. The Competition Board will be restructured and strengthened."[241]

This new competition policy further sought to review the existing institutions responsible for competition regulation and to establish a new independent commission as a regulatory body tasked with resolving disputes and making binding decisions on the firms concerned. These goals were then repeated in the National Treasury's policy document titled *Growth, Employment and Redistribution: A Macroeconomic Strategy document (GEAR)* 1996.[242]

3. The Competition Act - A New Dawn of Competition Regulation

Following the policy goals set out in the RDP and GEAR, the then Department of Trade and Industry embarked on a three year inquiry with the aim of developing a new policy framework for competition regulation.[243] The result of this inquiry was the DTI's *Proposed Guidelines for Competition Policy* which were published in 1997.[244] It was clear that the intention behind these proposed guidelines was to develop a policy framework that aligned the goals of competition law with the industrial policy goal of economic development.[245] These guidelines were a further indication that the DTI viewed competition law as a means of empowering the disenfranchised majority and providing them with equal access to and opportunity in the South African market as a whole. The inquiry also determined that the Maintenance and Promotion of Competition Act and its subsequent amendment[246] were ineffective due to the said Act's failure to deal with several issues[247] as well as not empowering competition regulatory authorities with the

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[241] "Reconstruction and Development Programme" White Paper Notice No. 1954 of 1994, Government Gazette No. 16085 Vol. 353 (1994) Par 3.8.1 – 3.8.3.

[242] Department of Finance *Macro-economic strategy, Growth, Employment and Redistribution* (1996). It is important to note that the goals of competition policy put forward in this document included *"encouraging competition among firms, protecting consumers and downstream firms from restrictive practices, and to open up new opportunities for investment".* These goals differ from those expounded in RDP, the significance of which will be expanded upon in later chapters.

[243] See http://www.compcom.co.za/about/ and Competition Law and Policy in SA (OECD) at 16.

[244] The Department of Trade and Industry "The Evolution of Policy in SA: Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development" (1997) available at www.compcom.co.za/aboutus/EvolutionOfPolicyInSA.asp (last accessed on 01/02/2017).

[245] See Competition Law and Policy in SA (OECD) at 16.

[246] See Amendment Acts 12 of 1985, 96 of 1987 and 88 of 1990.

[247] The act failed to deal with vertical restrictive practices, merger notifications and control as well over concentrations of owners. See previous discussions at par 1.2.

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necessary independence and enforcement functions to adequately regulate the competition environment.[248]

The DTI's guidelines stressed the importance of economic development and the role that competition policy should play in achieving that objective. Notably the DTI viewed competition law and economic development as mutually complimentary policies and not as competing policies. However, the guidelines sought to position competition law as the appropriate medium through which to achieve objectives such as consistency between trade and economic policy, the restructuring of state assets, and the empowering of entrepreneurs.[249] These goals however clearly fall outside of the realm of traditional competition law but appear to have been included as a medium through which to achieve a state agenda. It is interesting to note that the DTI was *aware* of the fact that efficiency and public interest goals were often contradictory to one another rather than complimentary in their nature due to the fact that they often seek to achieve opposing goals.[250] The DTI's solution to this problem was to ensure that competition law was "properly aligned" with industrial policy.[251] How it was envisaged that this alignment was to be achieved however remained unclear.

This new policy document was debated in the *National Economic Development and Labour Council (NEDLAC)*[252] in an attempt to reach consensus on the core principles of the framework prior to it being introduced to Parliament. The aforesaid process was then followed by a further 14-week public consultation process which finally culminated the Competition Act 89 of 1998 ("the Act") being passed into law in September of 1998 and coming into operation on 1 September 1999.[253]

3.1. Policy Goals of the Competition Act

From the outset, the preamble of the Competition Act makes it clear that the Act seeks to achieve several other goals which seem to go far beyond the goals that pure

[248] See "A Framework for Competition, Completeness and Development" at par 2.1.40; 8.2.5; 8.3.2 – 8.3.4; and 10.2.1.4 – 10.2.1.6 and Competition Law and Policy in SA (OECD) at 16.
[249] Competition Law and Policy in SA (OECD) at 8.
[250] "A Framework for Competition, Completeness and Development*"* at 1.
[251] See "A Framework for Competition, Completeness and Development" at par 1.2.3; 1.4; 2.2.7; 2.4.4; 7.1; and 8.1.
[252] NEDLAC was set up in 1994 as vehicle for building consensus between Government, business and labour and various policy issues.
[253] GN 19412 of 30 October 1998.

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competition law would normally seek to achieve.[254] The preamble specifically recognises that the discriminatory laws of the apartheid Government *"resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive practices and unjust restrictions on full and free participation in the economy by all South Africans."* The preamble goes further to state that the economy must be open to a greater spread of ownership by a greater number of South Africans and that credible competition law and effective structures to administer competition law are necessary for the efficient functioning of the economy. It is also stated that an efficient competitive economic environment which balances the interests of all stakeholders in the economy and focuses on development, will benefit all South Africans.

The preamble, in particular, further states that the Competition Act was enacted to provide for the establishment of a Competition Commission that would be responsible for the investigation, control and evaluation of restrictive practices, abuse of dominant positions, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; as well as for the establishment of a Competition Appeal Court; and for related matters. It captures that the people of South Africa recognise[255]:

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

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

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

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

In order to –

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

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[254] Pure competition law, which seems to be more aligned with the Chicago and Post-Chicago Theories, seeks to achieve the economic goal of efficiency above all others.
[255] Own emphasis on the aims contained in the preamble.

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Achieve a more effective and efficient economy in South Africa;

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

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

Restrain particular trade practices which undermine a competitive economy;

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

Establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic."

In addition to the goals set out in the preamble, section 2 of the Act provides that:

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

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

The primary goal of the Competition Act thus appears to be the achievement of economic efficiency and consumer welfare but as appears from section 2, the Act goes further by setting out certain socio-economic political interest goals which it also seeks to achieve.[256] The preamble of the Act is clear in its political motivations of seeking to undo the injustices of the past caused as a direct result of the apartheid era policies which

[256] See Competition Law and Policy in SA (OECD) at 6.

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excluded non-whites from participating the greater economy.[257] This has also lead to the Act formally incorporating empowerment policies such as *Black Economic Empowerment (BEE)*[258] as a core policy of South African competition law.[259] The question however remains what place these goals have in competition policy and furthermore, how these goals will be measured against "pure" competition goals especially in inevitable circumstances where the pure competition goals and the political goals cannot be achieved at the same time.

3.2. Prohibited Conducted

In an attempt to redress the issues outlined in the Mouton Commission Report, the Competition Act sought to prohibit various forms of conduct that could be deemed either *"per se"* anti-competitive or, anti-competitive through the "rule of reason" approach. As discussed previously, per se offences are those offences which are deemed to have the most anti-competitive effects and have no justifiable features while through the rule of reason approach, certain forms of conduct can only be deemed an anti-competitive only once such conduct has been proved to have anti-competitive effects.[260] It follows, as pointed out in Chapter Two, that per se conduct will not require in depth inquiries into the establishment of various other underlying factors and the weighing up of competing interests to make a determination on its anti-competitive effects - once it is established that the prohibited conduct has occurred the inquiry ends there and no defence is then available to exonerate the firm concerned.[261]

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[257] See Competition Law and Policy in SA (OECD) at 6.

[258] The Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended) defines "broad-based black economic empowerment" as *"the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to-*
(a) increasing the number of black people that manage, own and control enterprises and productive assets; Broad-Based Black Economic Empowerment Act 13
(b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
(c) human resource and skills development;
(d) achieving equitable representation in all occupational categories and levels in the workforce;
(e) preferential procurement from enterprises that are owned or managed by black people; and
(f) investment in enterprises that are owned or managed by black people."

[259] See the DTI's Proposed Guidelines for Competition Policy (1997) which called for using competition policy as means for allowing greater ownership participation of black people in the economy.

[260]Sutherland and Kemp at 5-38. Also see the previous discussions in Chapter 2 at par 3.4.1.

[261] Chapter 2 at paragraph 3.4.2. The problem that however exists is that the line between per se and rule of reason conduct can often become blurred. This has led to US courts adopting the flexible continuum approach first laid down in the *California Dental Association* case as discussed in more detail Chapter 1.

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The Competition Act accordingly seeks to prohibit various forms of conduct under the banners of horizontal restrictive practices, vertical restrictive practices and the abuse of a firm's dominant position within its particular market. The relevant provisions below will be discussed in the format prior to the amendments thereto occasioned by the Competition Amendment Act.

3.2.1. Horizontal Restrictive Practices

Section 4(1) of the Act prohibits horizontal restrictive practices where it entails an agreement[262] between, or concerted practice[263] by, firms, or a decision by an association of firms in a horizontal relationship.[264] In terms of section 4(2), an agreement to engage in a horizontal restrictive practice will be deemed to exist between a group of firms where any one of those firms owns a significant interest in the other, or they have at least one director and/or shareholder in common and any combination of those firms engage in that restrictive practice.

The Act defines a "horizontal relationship" in section 1 as a relationship between competitors. A horizontal restrictive practice therefore exists where firms that are in direct competition with one another agree to not compete with each other but instead to cooperate and thereby effectively render themselves a monopoly.[265] Although the Act

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Also see the matter of *American Natural Soda Ash Corporation v Competition Commission* 49/CR/Apr00 19 & on appeal *American Natural Soda Ash Corporation v Competition Commission* 12/CAC/Dec00 [2003] 2 CPLR 221 (CAC) where the Tribunal expressed concern on whether such a flexible approach could find operation in South Africa. Also see Sutherland and Kemp at 5-39.

[262] Section 1 defines an agreement as "a contract arrangement or understanding, whether or not legally enforceable. Sutherland and Kemp remark that for the purposes of the Act, is an extremely wide definition that that will include any form of agreement even if it cannot be described as a contract arrangement or understanding. See Sutherland and Kemp at 5 -15.

[263] Section 1 of the Act defines a concerted practice as "co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but which does not amount to any agreement".

[264] Section 4(1) provides at the time provided as follows:

"4(1) An agreement between. or concerted practice by, firms, or a decision by an association of firms, is prohibited if—

(a) it is between parties in a horizontal relationship and it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice. or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

(b) it involves any of the following restrictive horizontal practices:

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories. or specific types of goods or services; or

(iii) collusive tendering."

[265] Sutherland and Kemp at 5-4.

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provides no formal definition of the concept "competitors", the Commission has held that "firms be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitute goods or services".[266] In particular section 4(1)(b) is against cartels and expressly prohibits the following forms of horizontal conduct: the direct or indirect fixing of purchase or selling prices or any other trading condition, market division through the allocation of customers, suppliers, territories or specific types of goods and services or through collusive tendering.[267] Although this conduct can be viewed as per se anti-competitive, the Act also introduces a "catch-all" rule of reason provision in section 4(1)(a) by prohibiting any restrictive practice which has the effect of substantially preventing, or lessening, competition in the market, unless a party can prove that any technological, efficiency or other pro-competitive gain resulting from such practice outweighs its negative effect.[268] In its simplest terms, the intention of the legislature in this regard is to use the Act to prohibit competitors from working together to give themselves a degree of joint dominance which would enable them to charge consumers higher prices while maximising their own profits.

3.2.2. Vertical Restrictive Practices

In terms of section 1 of the Competition Act the concept "vertical relationship" refers to the relationship between a firm and its suppliers, its customers or both. Section 5 of the Competition Act prohibits, on a rule of reason-basis, an agreement between parties in a vertical relationship where it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive gain resulting from the agreement outweighs that effect. As explained by Sutherland and Kemp, vertical restrictive practices thus deal with firms that function in both the upstream and downstream markets - that is, those firms which usually control all, or at least most, aspects of the production and distribution chains. Vertical restrictions also deal with tying restrictions which, in basic terms, are those restrictions which are created in circumstances when consumers are forced to purchase other goods together with the initial good purchased.[269] Although section 5 is

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[266] *JD Group Ltd v Ellerines Holdings Ltd* 78/78/Jul00 at par 42 and later confirmed by the Competition Appeal Court in *American Natural Soda Ash Corporation v Competition Commission* 12/CAC/Dec00 [2003] 2 CPLR 221 (CAC).
[267] Section 4(1)(b)(i)-(iii).
[268] Section 4(1)(a).
[269] Sutherland and Kemp at 6-8.

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very broad in terms of the types of conduct that could be determined to be anti-competitive, the Act also specifically and per se prohibits the conduct of minimum resale price maintenance.[270]

3.2.3. Abuse of Dominance

In conforming to international best practices[271], the Act also seeks to prohibit dominant firms from abusing their dominant position within their relevant market. The test for dominance is set out in Section 7, which provides that where a firm's market share exceeds 45% that firm will be presumed dominant; where a firm's market share is between 35 and 45%, the onus will be on the firm in question to prove that it does not possess market power; and where its market power is below 35%, the onus will be on the Commission to prove that the firm concerned does in fact possess market power.

Dominance is thus acquired as a direct result of a firm possessing market power which the Act defines as *"the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".*[272] When originally enacted, and prior to its recent amendment as discussed in Chapter 7 hereinafter, Section 8(a) sought to specifically and per se prohibit a dominant firm from charging an excessive price to the detriment of consumers and section 8(b) prohibited, per se, the refusal by a dominant firm to grant its competitors access to an essential facility where it was economically feasible to do so.[273] Section 8(c)

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[270] Section 5(2). Retail/Resale price maintenance is the practice whereby a manufacturer and distributor agree that the distributor will sell the manufacturers products at a certain agreed price at or above a price floor or at or below a price ceiling. The manufacturer will leverage its market power against the distributor to force the distributor to agree to its terms otherwise the manufacturer will refuse to deal with the specific distributor. See Sutherland and Kemp at 6-7.

[271] See for example Article 82 of the Treaty of the European Union 1993 which states that:
"*Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.*
Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations." which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[272] See section 1. In terms of section 6, the abuse of dominance provisions of the Act apply to firms with an asset value or turnover in South Africa over R5 million.

[273] Section 8 (a) & (b).

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contained a "rule of reason" "catch-all" provision that prohibited any other exclusionary act by a dominant firm where no pro-competitive gains could be shown that outweighed the conduct's anti-competitive effect.[274] Additionally, section 8(d) prohibited five further forms of conduct which constitutes an abuse of dominance but in contrast to the two previous forms of prohibited conduct, such conduct only be deemed anti-competitive where the dominant firm could not prove any technological, efficiency or any other pro-competitive gain which outweighs its anti-competitive effects. This approach highlights a combination between the per se and rule of reason evidentiary approaches. The conduct listed in section 8(d) included: requiring or inducing suppliers or customers not to deal with competitors; refusing to supply scarce goods to a competitor in circumstances where it would be economically feasible to do so; selling a product on condition that the purchaser buys a separate product unrelated to the object of a contract or forcing the purchaser to accept a condition unrelated to the object of a contract; predatory pricing; and the buying-up of scarce resources required by competitors.[275]

In addition to the exclusionary practices prohibited in section 8, the Act in section 9 specifically prohibited a dominant firm from engaging in price discrimination[276] where it would have the effect of substantially preventing or lessening competition; it related to the sale, in equivalent transactions, of products of like grade and quality to different purchasers; and it related to the price charged, any discount, rebate, allowance for credit granted in respect of the supply of the product, the provision of services in respect of the product, or payment of services provided in respect of the product.[277]

3.3. Merger Control

One of the most important features of the Act was its introduction of substantial and in depth merger control provisions.[278] To redress the deficiencies of the previous pieces of legislation, the Act sought to define specific thresholds which would categorise mergers into small, intermediate and large mergers[279] as well as providing a definition for the term

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[274] Section 8(c).
[275] Section 8(d)(i)-(v).
[276] Price discrimination refers to the practice of a seller charging different prices to different customers, either for exactly the same good or for slightly different versions of the same good. See Phillips *Pricing and Revenue Optimization* (2005) at 74.
[277] Section 9. Also see Sutherland and Kemp at 7-100(4) – 7-100(8) and Harvey "An Overview and Update of the Federal and State Law of Price Discrimination" (2005) *PLI/Corp* 135, at 158 – 161.
[278] Chapter 3 of the Act.
[279] Section 11.

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"merger".[280] In terms of section 12A, specific factors have been listed which must be taken into consideration when evaluating mergers.[281] The Act also sets out specific notification and implementation requirements for intermediate and large mergers[282] together with the investigative powers of the competitionauthorities[283] and the specific proceedings to be followed in the consideration of intermediate and large mergers.[284]

3.4. Enforcement Authorities

3.4.1. The Competition Commission

The 1998 Competition Act evidently represents a concerted effort to address many of the policy deficiencies previously identified by the Mouton Commission.[285] However, it is submitted that the Act's most important contribution to effective competition regulation was the establishment of the three independent enforcement bodies tasked solely with ensuring effective competition regulation within the South African market. The first of these tiered institutions is the Competition Commission (hereinafter referred to as "the Commission") as the primary enforcer of the Act. The Commission is a juristic person established in terms of the Competition Act, that enjoys jurisdiction throughout the entire country and is tasked with carrying out its functions in accordance with the Act.[286] The Commission is headed by the Commissioner who is appointed by the Minister of Trade, Industry and Competition. Section 20 ensures the Commission's independence by making the Commission subject only to the law and the Constitution[287] and by requiring

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[280] Section 12(1) provides:
"12(1) For the purpose of this Chapter, "merger" means the direct or indirect acquisition or direct or indirect establishment of control. by one or more persons over all 45 significant interests in the whole or part of the business of a competitor, supplier. customer or other person. whether that control is achieved as a result of—
(a) purchase or lease of the shares. interest, or assets of that competitor. supplier, customer or other person;
(b) amalgamation or combination with that competitor, supplier, customer or 50 other person: or
(c) any other means."
[281] When evaluating mergers, authorities must determine whether or not the merger will have the effect of substantially lessening or preventing competition by taking into account various factors defined in the act and also by weighing up whether or not there any procompetitive gains which outweigh the mergers anti-competitive effects or whether or not same can justify on certain public interest grounds.
[282] Sections 13 and 13A. See Sutherland and Kemp at 9-1 – 9-70.
[283] Section 13B.
[284] Sections 14 and 14A. See Sutherland and Kemp at chapter 10.
[285] See previous discussions at par 1.2.
[286] Chapter 4 of the Act, Part A, section 19.
[287] Constitution of the Republic of South Africa 1996.

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that the Commission be impartial and perform its functions without fear, favour and prejudice.

The Act requires that all staff of the Commission refrain from engaging in any activity which undermines the integrity of the Commission, or from participating in any matter in which they have direct financial interest, or using any confidential information obtained through performing their functions at the Commission, and divulging any such confidential information to a third party where not permitted to do so.[288] A further obligation is placed on all organs of state to assist the Commission in maintaining its independence and impartiality and to assist it in effectively carrying out its functions.[289]

The functions of the Commission include: the investigation of alleged restrictive horizontal and vertical conduct as well as abuses of dominance; granting of exemptions to firm's that engage in horizontal and vertical restrictive practices; refusing, approving, approving with conditions, mergers or referring a particular merger to the Competition Tribunal; negotiating and concluding consent orders as envisioned in section 63; referring matters to the Competition Tribunal; participating and advising other regulatory bodies on issues that pertain to matters of competition; and to review legislation and public regulations and report any provisions to the Minister of Trade, Industry and Competition which may permit anti-competitive behaviour.[290]

Although the Commission is an independent body which exercises both administrative and *quasi*-judicial functions, the Minister of Trade, Industry and Competition retains a level of control and oversight over the Commission.[291] This control is however limited by the oversight powers exercised by Parliament over the Executive.[292]

3.4.2. The Competition Tribunal

In addition to the establishment of the Commission, the Act also establishes two judicial bodies, namely the Competition Tribunal and the Competition Appeal Court (hereinafter

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[288] Section 20(2)(a-d).
[289] Section 20(3).
[290] Section 21 (a)-(l).
[291] In terms of section 41 the Commission remains reportable to the Minister on a variety of issues including providing audited financial statements, a report of the activities undertaken by it as well as progress report for realisation of the purposes of the Act. The commissioners of the commission are also appointed by the Minister (sections 22 and 23).
[292] Section 41(2). See Sutherland and Kemp at 11-19 to 11-20. Also see Rautenbach & Malherbe *Constitutional Law* (2013) at 119.

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referred to as "the Tribunal" and "the CAC" respectively). The Tribunal is a juristic person with jurisdiction throughout the entire Republic and is a tribunal of record that must exercise its functions in accordance with the provisions of the Act.[293] The Tribunal consists of a chairperson and not less than three but no more than ten persons appointed by the President on the recommendation of the Minister of Trade, Industry and Competition after a process of public nominations.[294] Section 27 empowers the Tribunal to adjudicate on any conduct prohibited in terms of the Act and make any order it deems necessary. The Tribunal is further empowered to make any order provided for in terms of the Act; hear appeals from or review any decisions of the Commission referred to it; and to make any other ruling or order deemed necessary or incidental to the proper performance of its functions in terms of the Act.[295] The Tribunal is required to conduct a hearing in all matters referred to it subject to its rules.[296] It is confined to hear matters and make determination on matters that have specifically been referred to it and cannot make a determination on a matter not contained within its referral.[297] Hearings before the Tribunal are inquisitorial in their nature with all matters to be heard by a panel composed of three members of the Tribunal.[298]

3.4.3. The Competition Appeal Court

The Competition Appeal Court differs from both the Commission and the Tribunal in that the CAC is a specialized court as contemplated in section 166(e) of the Constitution with a status similar to that of the High Court.[299] The CAC too enjoys jurisdiction throughout the entire Republic and consists of three high court judges appointed by the President on the advice of the Judicial Services Commission.[300] The CAC is empowered to review any decision of the Tribunal as well as consider an appeal arising out of any final order of the Tribunal (except for consent orders concluded in terms of section 63 of the Act); and consider appeals of any interim or interlocutory orders of the Tribunal not permitted by the Act.[301] In terms of section 37(2) of the Act, the CAC is empowered to confirm, set

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[293] Section 26 (1).
[294] Section 26(2).
[295] Section 27 (a) – (d).
[296] Sutherland and Kemp at 11-20 to 11-21.
[297] Sutherland and Kemp at 11-20.
[298] Sutherland and Kemp at 11-21.
[299] Section 36(1)(a).
[300] Section 36(2).
[301] Section 37(1).

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aside or amend any order of the Tribunal as well as remit any matter back to the Tribunal on terms determined by the CAC.

4. South Africa's Unique Approach to Competition Regulation

It is easy to see how the South African government could lean heavily in favour of the structuralism foundation of the Harvard theory.[302] As indicated, the Act has clearly been envisioned as a means of addressing the structural problems that existed in the South African economy because of our past discriminatory laws. This however does create a unique problem by pitting the fundamental traditional goals (pure goals) of competition law, such as efficiency and consumer welfare, against the achievement of political goals of a socio-economic nature which have little, if not anything, to do with competition regulation. As observed above, clearly industrial policy has played a large role in the development of the Act. The belief that competition policy and industrial policy need to be aligned appears to be a central tenet of South African competition law. However, it is submitted that aligning competition law strictly with industrial policy may prove problematic and undermine the objectives of competition law. Perhaps, competition law should rather be viewed as a separate component of industrial policy and not as something that should be strictly aligned to industrial policy objectives in its entirety. It is submitted that the attainment of effective competition should rather be seen as a primary goal of industrial policy.

It follows that the Competition Act is two-pronged in its objectives. On the one hand the pure competition goals of efficiency and consumer welfare are placed at the forefront of the Act's objectives. On the other hand, however, the remaining goals of the Act, specifically those seeking to promote employment, international competitiveness and expansion by small and medium sized business and transformative ownership objectives, are clearly political in nature. The Act however provides no direction on how these different goals should be weighed against one another. As has been highlighted previously and will be discussed in greater detail later, the pure competition goals and political goals of the Act certainly have the potential to be at cross purposes with one another when applying the provisions of the Act. The wording and context of the Act

[302] Sutherland and Kemp at 1-33. Also see Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* LLD Thesis, University of South Africa (2016) at 182

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however appear, at least from the wording of the Act, to place these diverse goals on equal footing with one another. This creates the potential problem of whether, and how, these goals will need to be weighed up against each another in the enforcement of the Act. Given that the Act fails to provide any guidelines on how these goals are to weighed up against one another, it unfortunately leaves the weighing-up task to the regulatory bodies established in terms of the Act. The potential for uncertainty and unpredictability in South African competition regulation is thus. Competition authorities are now tasked with achieving a variety of objectives of vastly different natures through a single piece of legislation.

It is submitted that although the Act has largely been constructed in accordance with a foundation deeply reminiscent of the Harvard theory, the drafters of the Act have nevertheless also taken cognisance of various developments in international best practices in competition regulation including those developed through the Chicago and Post-Chicago theories.[303] The Act and the South African approach to competition regulation can therefore be viewed as *sui generis* in its nature. Not only does the Act attempt to maintain and promote competition within the already complex free market[304] that exists in South Africa, but, as pointed out by Fox, it also attempts to break existing monopolies by encouraging greater participation in the market by a greater number of South Africans while also attempting to foster a greater spread in ownership of the economy.[305] This unique approach to competition regulation now poses a number of questions: The first is how do these political goals that fall outside the scope of pure competition affect the manner in which the Act is applied to matters of competition regulation, and, second, are these political goals actually compatible with core aims of pure competition law? The third question is whether incorporating both pure competition goals and political goals in the Act compromises the Act's ability to contribute to the achievement of effective competition and whether the political goals captured in section

[303] The clearest elements of this in the Act per se prohibiting various forms of anti-competitive conduct but also leaving the door open for various forms of non-defined to be declared anti-competitive in accordance with the "rule of reason" approach.

[304] Unlike many other countries which had seen major political shifts and changes in ideology, such like in the various Eastern European countries which formed part of the Soviet Union, South Africa had already prior to the enactment of the Act embraced the concept of a market economy with various sectors of the economy, such as banking and retail, already being well developed. See Török (2005) at 4.

[305] See Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *Harvard International Law Review* 579, at 587.

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2 of the Competition Act could not be achieved more appropriately through other policy instruments.

In addition to attempting to answer these questions, an attempt will be made in this thesis at finding an alternative means of providing a framework within which these political goals can be achieved that is more aligned with the pure competition goals of competition law.

5. The Evolution of South African Competition Law

Notably in the lead up to its 5th National Policy Conference in July 2017, the ANC published its *Discussion Document on Economic Transformation*[306] in which it introduced a new policy goal that it called "radical economic transformation". Although no formal definition was provided for the concept "radical economic transformation", the Discussion Document stated that it is about "fundamentally changing the structure of South Africa's economy from an exploitative exporter of raw materials, to one which is based on beneficiation and manufacturing, in which our people's full potential can be realised".[307] The Discussion Document further stated that, aside from seeking to ensure increased participation by black people in the "commanding heights of the economy", radical economic transformation should seek to reduce racial, gender and class inequalities in the country by achieving more equity with regards to incomes, ownership of assets and access to economic opportunities.[308]

In order to achieve this goal, the ANC identified a range of goals which would require substantial policy intervention. These goals include: reducing unemployment; land ownership reform; increasing black ownership and control in the economy; activating small business; raising the levels of investment; strengthening social justice; reducing unemployment and poverty; dismantling monopoly practices and structures;, asserting local interests in the global economy improving integration into the African economy; and stimulating inclusive growth.[309]

[306] ANC Discussion Document on Economic Transformation – ANC 5th National Policy Conference, 30th June – 5th July 2017 ("the Discussion Document") available at https://www.sahistory.org.za/sites/default/files/archive-files/national_policy_conference_2017_economic_transformation_1.pdf (last accessed on 22/10/2019).
[307] The Discussion Document at 2.
[308] The Discussion Document at 2.
[309] See the Discussion Document at 3.

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Notably several of these goals already overlap with the political goals contained in the Act. However, under the *Discussion Document on Economic Transformation's* goal of inter alia dismantling monopoly practices and structures, an interesting glimpse is provided into the potential future of South African competition policy and law as a whole. The Discussion Document indicated that the then Department of Economic Development, had been mandated to bring legislation to cabinet that would seek to amend the Competition Act with the aim of "de-concentrating the high levels of ownership and control that currently exist in the economy and thereby build a more inclusive economy".[310] These amendments would be further aimed at opening up the economy to new players, thereby giving black players greater opportunity.[311]

The policy document in an interesting twist, subsequently welcomed the Commission's (then) recent investigation into price-fixing by a variety of banks in foreign currency trading[312] and proceeded to recommend that barriers to entry and monopolies in certain key sectors be dismantled.[313] The relevance of this statement will be discussed in greater detail later in this thesis but it is worth noting, at this point already, that one of the ANC's proposed solutions to the issues that it identified as needing to be addressed as mentioned above, is the creation of a state-owned bank which will be aimed at changing the structure of the South African financial sector.[314]

Following the publication of the Discussion Document, the then Minister of Economic Development issued a statement (hereinafter referred to as "the Note") which outlined the need to amend the Act in order to deal with issues of economic concentration.[315] The Minister again addressed the issue of high economic concentrations in certain industries and how these high concentrations may result in increased barriers to entry for new market participants. He further stated that "these concentrations together with South Africa's historical racial ownership profiles has had the effect of stunting economic

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[310] See the Discussion Document at 5. This culminated in the enactment of the Competition Amendment Act No.18 of 2018.
[311] See the Discussion Document at 5.
[312] This is reference to the Commission's investigation of collusion by a variety of banks in the trading of foreign currency. This will be discussed in greater detail in Chapter 4.
[313] See page 6 of the Discussion Document.
[314] See the Financial Matters Amendment Bill, Bill B1B 2019 which was adopted by the National Assembly on 13 March 2019.
[315] See Background Note issued by the Minister of Economic Development "Changes to the Competition Act – addressing economic concentration" issued on the 25th of May 2017 ("The Note").

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growth, preventing the entry of new players, reducing consumer choice, limiting the levels of innovation and dynamism in the economy and increasing the level of resentment of black people occasioned by the failures of the Act".[316]

The then Minister proposed that the Act be amended to enable it to more effectively deal with these structural factors that he believed were hindering effective competition in the South African market.[317] He stated that the proposed amendments would require that consideration be paid to the concentration, ownership profile and barriers to entry that may exist in a particular market when assessing mergers and allegations of anti-competitive conduct.[318] He pointed out that the proposed amendments would however go a step further. The Commission would also be granted the power to proactively investigate these structural factors, whether on its own accord or at the request of "key stakeholders" in the market or by firms which are unable to overcome the barriers to their entry into the market. A further obligation would also be placed on the Commission to identify these markets plagued by over-concentration and "untransformed ownership" and apply the appropriate remedial action to remedy these structural market impediments with the specific aim of targeting greater market entry and ownership by black South Africans.[319] Lastly, these proposed amendments would also seek to incentivise firms to develop relationships and adopt strategies that would reduce these structural impediments present in markets and thereby encourage greater black participation and ownership in the market.[320]

The then Minister subsequently established a committee with the aim of developing these legislative proposals for the then Department of Economic Development to consider and ultimately develop into an amendment for Parliament to consider.[321] From the above overview the intention behind the amendments that were subsequently proposed to the

[316] See paragraph 5 of the Note. It is important to bear in mind that the Minister has provided no evidence which seeks to support his view in this regard and no data which provides support for the various conclusions that he and the Department of Economic Development appeared to have already drawn.
[317] The Note states that the Act is primarily concerned with the anti-competitive effects arising from the conduct of market participants as opposed to optimising the structures of markets in order to achieve its purposes. The aim of thesis is two-fold in that it will attempt to show that the Act in its present form places too much emphasis conduct at the expense of its ant-competitive effects and to determine whether controlling market structures is an effective means of promoting competition within a market.
[318] See the Note at par 8.
[319] See the Note at par 9.
[320] See the Note at par 10.
[321] The committee was to be made up of various competition law practitioners and academics were given six weeks to submit its report to the Ministry.

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Act appears to be quite clear. Both the Discussion Document and the Note indicate that the proposed amendments would be aimed squarely at addressing market structure in order to achieve the various political goals contained in the preamble and section 2 of the Act. These documents have subsequently culminated in the recent amendment of the Act through the Competition Amendment Act 2018.[322] Portions of the Amendment Act have been promulgated but when the remaining provisions come into effect remains to be seen. This will be discussed in greater detail later in this thesis.

[322] Adoption of the Amendment Bill was completed on the 5th of December 2018 and subsequently assented to by the President on the 13th of February 2019 as the Competition Amendment Act No.18 of 2018.

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CHAPTER 4 – RESTRICTIVE HORIZONTAL PRACTICES

1. Introduction

This chapter will examine specific instances of breaches of section 4 of the Competition Act that were investigated by the Commission, focusing specifically on cartel activity in the form of collusion. The discussion will cover collusion in the bread and milling industries, collusion in the construction industry, and the allegations of collusion in the banking industry relating to foreign currency trading. The purpose will be to examine each specific case of collusion with specific emphasis being placed on the remedies and sanctions imposed in the bread and construction cartels to determine whether these remedies were developed and imposed with the aim of furthering a competitive purpose or whether, the political goals contained in the Act influenced the development of these remedies with the aim of furthering a larger state agenda. In addition thereto, an inference will be drawn as to whether these specific instances of remedial action may potentially be used as a template for the development of remedies in future instances of collusion specifically aimed at using the Act as a mechanism for the furtherance of certain state agendas, especially affirmative action and a redistribution of wealth, rather than the goal of the advancement of effective competition.

2. Collusion, and why it should be avoided

Collusion, in its simplest form, occurs when firms in a horizontal relationship conspire amongst themselves to remove some element of competition between them and thereby acquire a competitive advantage over their competitors who are not party to the collusive practice.[323] These competing firms which seek to collude with one another in a manner that is usually very secretive are commonly referred to as "cartels." The various firms which make up a particular cartel, will jointly engage in some form of prohibited practice

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[323] Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Economic Affairs – Competition Committee, Global Forum on Competition – "Policy Roundtable on Collusion and Corruption in Public Procurement" DAF/COMP/GF(2010)6 (available at http://www.fne.gob.cl/wp-content/uploads/2017/10/oecd_0003_2010.pdf date last accessed 12/08/2017) (hereinafter referred to as OECD Roundtable on Collusion). Also see the European Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006/C 298/11, OJ at point 1 which defines an cartel as "*agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors*".

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to either limit output or manipulate some other trade condition with the sole aim of increasing prices and maximising profits.[324]

A cartel by its very nature is quite unique. Unlike the various other forms of anti-competitive conduct which can sometimes be justified by the potential pro-competitive benefits which the particular conduct can produce, collusion is seen as only capable of producing consequences which are detrimental to all other market participants and substantially lessens competition within the market.[325] The reason for this is simple: competitors no longer have any incentive to compete with one other. A cartel shields its participants from the ordinary market forces present in an ordinarily competitive market.[326] Prices will no longer be driven down as a consequence of increasing competition from other market participants and by the entry of new participants into the market. As observed by Doerr, competitors engaged in cartel conduct are now empowered to maintain profitability levels through no effort of their own, which in turn creates an environment where business leaders no longer need to come up with new strategies aimed at maintaining a firm's competitive edge. As a direct consequence of this, innovation in the market as a whole suffers.[327] Bajari and Summers point out that innovation is a key market factor which has the potential to drive down prices as well as increase the quality of goods supplied to consumers.[328] Where innovation is lacking, that market will generally be characterised by poor product choices and high consumer prices.

The ultimate losers when it comes to collusive practices will always be the consumers. Firms that participate in cartels seek to maximise profits by exploiting consumers through the charging of excessive prices. For this reason, Scormagdalia remarks that collusion is

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[324] Monti "Fighting Cartels – Why and How? Why should we be concerned with cartels and collusive conduct?" Speech delivered at the 3rd Nordic Competition Policy Conference, Stockholm 11-12 September 2010 (Available at http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm (last accessed on 12/05/2017) (hereinafter referred to as Monti (2010)).
[325] See Monti (2010) at 3. Also see Scordamaglia "Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees (2010) *The Competition Law Review* 5 at 20.
[326] See Lec Clair "Exigency and Innovation in Collusion", (2012) *Journal of Competition Law and Economics* 8(2), 399-415.
[327] Doerr "The Problem of Collusion: How Best to Resolve it?" (2000) *Auckland University Law Review* 104, at 107.
[328] Bajari & Summers "Detecting Collusion in Procurement Auctions" (2003) *Antitrust Law Journal* 143, at 150.

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widely held as the most egregious form of anti-competitive conduct.[329] The far-reaching consequences of collusion necessitates that the prevention of such practices should be of paramount importance to competition regulatory authorities worldwide.[330]

3. Collusion in the South African Context

In terms of section 1 of the Act, firms are deemed to be in a horizontal relationship when they compete against each other in the same market.[331] When firms are alleged to have engaged in prohibited horizontal practices, it becomes necessary to establish whether or not the firms in question can be regarded as competitors. The question then needs to be answered as to whether or not the conduct in question can be regarded as being horizontal in its nature - which will always be a question of fact that needs to be determined on a case-by-case-basis.[332]

In addition to establishing if the firms in question can be regarded as being competitors, it will also have to be established whether or not these competitors have entered into an agreement, concerted practice or a decision by an association for purposes of section 4 of the Act.[333] The Act defines "an agreement" as a contract, arrangement or understanding, whether or not legally enforceable.[334] This definition provides the

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[329] Scordamaglia "Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees" (2010) *The Competition Law Review* 5 at 7.
[330] See OECD Roundtable on Collusion at 39 – 40 and Monti (2010) at 2 – 3.
[331] The Act provides no formal definition for the term "competitor" but in the decision of *American Soda Ash Corp v Competition Commission* 12/CAC/Dec01 at par 24, the Competition Appeal Court held that firms will be regarded as competitors if they compete in the same market in respect of the same or interchangeable or substitute goods or services. Also see the decision of *The Commission v United South African Pharmacies* 04/CR/Jan02 22/01/2008 where the Tribunal held that in order for firms to be regarded as being in a horizontal relationship they merely need to be in the same line of business. The tribunal further held that it is unnecessary for the firms in question to be in the same geographical market for them to be considered competitors. The definition of a competitor is further extended to include "potential competitors" which include firms that have the ability to be compete but are not competing at the time of the infringement as well as firms that have ceased to compete but have the ability to resume competing.
[332] See the decision of *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May10. It is also important to bear in mind that in order to effectively determine whether or not firms can be regarded as competitors, the relevant market will first need to be established.
[333] These terms have been transplanted from European Law which will require an analysis the relevant decision of the European courts when interpreting these terms. See Article 101 of the TFEU as well as the decisions of *Rhône-Poulene v Commission* T-1/89, *ICI v Commission* [1972] ECR 619 and *Co-operative Vereniging Suiker Unie v Commission* 40/73.
[334] See section 1 of the Act. Also see C. Cucu "Agreements, Decisions and Concerted Practices: Key Concepts in the Analysis of Anticompetitive Agreements" (2013) *Challenges of the Knowledge Society. Private Law* 213 at 214 – 215.

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Commission with a wide discretion in determining whether the conduct in question can in fact be prohibited in terms of section 4 .[335]

The European Commission and European courts have regarded consensus as the essential feature for the establishment of an agreement and in the context of section 4 of the South African Competition Act, this notion has found acceptance by both the Tribunal and the CAC.[336] Therefore, for purposes of proving the existence of an agreement in terms of section 4, Sutherland and Kemp point out that all that will need to be proved is that the parties to the agreement have indicated that they themselves will be bound and will regard the other parties as being bound, to the agreement regardless of whether or not such agreement would be legally or morally binding upon them.[337]

The term "concerted practice" is defined by the Act as "co-operative, or co-ordinated conduct between firms, achieved through direct or indirect contact, that replaces their independent action but which does not amount to an agreement".[338] It is important to remember that when dealing with allegations of cartel conduct in terms of section 4, a distinction must be drawn between conduct that is engaged in independently or unilaterally for a firm's own self-interest and conduct engaged in collectively for the benefit of all the firms concerned.[339] The term "concerted practice" has been transplanted into South African law from European case law as a catch-all provision to cater for situations where the conduct in question may not meet the definition of an "agreement".[340]

Although the existence of a concerted practice will always be a question of fact, Sutherland and Kemp indicate that the provision has been included mainly to deal with situations of conspiracy and situations where firms have shown an intention to collude but have not agreed on the specific terms of such collusion.[341]This follows from

[335] Sutherland and Kemp at 5-15.
[336] See the decisions of *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May10 15/02/2011 and *Pioneer Foods (Pty) Ltd* 15/CR/May08 03/02/2010.
[337] Sutherland and Kemp at 5-16. Also see *Netstar (Pty) Ltd v Competition Commission* 97/CAC/May10.
[338] See section 1 of the Act. Also see Office of Fair Trading *Agreements and Concerted Practices* (2004) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284396/oft401.pdf (last accessed on 22/10/2019) at 2.11 - 2.13
[339] Sutherland and Kemp at 5-11.
[340] See the decisions of *ICI v Commission* [1972] ECR 619 and *Co-operative Vereniging Suiker Unie v Commission* 40/73.
[341] Sutherland and Kemp at 5-28.

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developments in the EU concerning concerted practices.[342] Nevertheless, Sutherland and Kemp point out that concerted practices speak more to the behaviour of firms, as opposed to their states of mind, when it comes to establishing an agreement, the existence of which is to be proved through inferences deduced from indirect evidence.[343]

The inclusion of decisions by trade associations in section 4 also seeks to regulate the conduct of firms which have come together to form large associations which can often be used to establish complex cartels between competitors.[344] Through such associations, member firms will seek to promote their own collective self-interests, often at the expense of competitors and consumers.

4. Collusion in the South African Market

4.1. Collusion in the Bread, Baking, Milling and Other Food Industries

During December 2006, the Commission received a number of complaints from various distributors of bread alleging collusive conduct in the Western Cape against several large bread producers.[345] The producers whom these allegations were made against included Tiger Consumer Brands (Pty) Ltd ("Tiger Brands") as the producer of the Albany brand of bread, Premier Foods (Pty) Ltd ("Premier Foods") as the producer of the Blue Ribbon brand, and Pioneer Foods (Pty) Ltd ("Pioneer Foods") as the producer of the Sasko and Duens brands.[346] The allegations against the respondent firms were that during 2006, several meetings were held between them in which they had agreed on certain price increases on bread that each producer would apply during December 2006; that the rebates afforded by each producer to independent distributors would be limited to 75 cents (R0.75) per loaf of bread; and that they would not seek to acquire one another's independent distributors.[347]

These allegations prompted the Commission to initiate an investigation into the aforesaid allegations of collusion, the outcome of which led to the Commission initiating its complaint against the respondent firms in 2007. Soon after the Commission initiated the

[342] See *Rhône-Poulene v Commission* T-1/89 and *Soda Ash/Solvay* OJ [1991] L 152/1.
[343] Sutherland and Kemp at 5-25. Also see *ICI v Commission* [1972] ECR 619.
[344] Sutherland and Kemp at 5-21.
[345] *Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/Feb07 at par 2.
[346] The firms will hereinafter jointly be referred to as "the respondent firms".
[347] *The Competition Commission v Tiger Consumer Brands (Pty) Ltd* 15/CR/Feb07 at par 2.4.

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complaint, Premier Foods approached the Commission and applied for leniency in terms of the *Competition Commission's Corporate Leniency Policy* (CLP)[348] in exchange for its full co-operation with the Commission's investigation into collusion between the respondent firms. Premier Foods revealed that not only had the respondent firms colluded to fix the selling prices for bread and other trading conditions in the Western Cape, but they had also engaged in similar conduct in various other industries.[349]

In particular, Premier Foods also revealed that the respondent firms had engaged in similar collusive conduct in the milling industry.[350] The significance of collusion in the milling industry was due to the fact that all the respondent firms were vertically integrated firms with their own milling divisions through which they milled their own wheat. Wheat is the primary ingredient in bread and is the single biggest cost in the production of a loaf of bread making up roughly 41% of the cost of production of a single loaf.[351] The ability to control the price of such an essential input, could have severe consequences for smaller downstream competitors who rely on the respondent firms for this input and thereby would be much more sensitive to increases in the price of wheat.[352]

Together with uncovering the collusion in the milling industry, Premier Foods also revealed that collusive conduct between the respondent firms was not limited to the Western Cape but instead, such conduct had been engaged in on a national level. This

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[348] The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP. The CLP is a compliance mechanism that that has been devised to encourage cartel participants to disclose to the Commission a cartel activity, to discourage or prevent the formation of cartels and eradicate this harmful conduct. See the CLP at http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf (last accessed on 19/04/2019). See C. Van Heerden & M. M. Botha "Challenges to the South African Corporate Leniency Policy and Cartel Enforcement" (2015) *TSAR* 308 and J. E. Harrington "Optimal Corporate Leniency Programs" (2008) *The Journal of Industrial Economics* 215. The CLP has also been codified in section 50 of the Amendment Act.

[349] Several complainants were initiated by the Commission which included the maize and wheat milling complainant (2007Mar2844), the wheat milling and baking information complainant (2009Nov4744), the white maize milling information exchange investigation (2009Dec4819), the exclusionary conduct complainant (2008Dec4165), the poultry industry complainants (2009Apr4389, 2009Apr4390, 2009Apr4391) and the egg industry complainant (2010May5133). These complaints included the original respondents to the Western Cape and national bread cartel complainants as well as several other firms in each of the relevant markets. See the Consent and Settlement Agreement concluded between the Commission and Pioneer Foods in *The Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 03/02/2010 at par 3 – 9.

[350] The allegations against the producers in terms of the milling industry centered around these producers engaging in a concerted practice to fix the prices of flour and maize both national and regionally from time to time. See *The Competition Commission v Tiger Consumer Brands (Pty) Ltd* 15/CR/Feb07 at par 3.6.

[351] *The Competition Commission v Pioneer Foods (Pty) Ltd* 15/CR/May08 03/02/2010 at par 18.

[352] *The Competition Commission v Pioneer Foods (Pty) Ltd* at par 18 – 19.

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then prompted the Commission to institute a further investigation based on a second complaint received by the Commission during 2008, alleging that the respondent firms had engaged in collusion on a national scale together with Foodcorp (Pty) Ltd who had also been cited as a respondent in this complaint.[353]

Prior to the Commission initiating its national complaint, Tiger Brands, in an attempt to negotiate a settlement with the Commission, undertook to conduct its own comprehensive investigation into the allegations of collusion in both its baking and milling divisions nationally. Once this investigation was completed, Tiger Brands provided the Commission with a copy of its report which concluded that it had engaged in various meetings with its competitors in which several agreements were made on the price increases that the respondent firms would apply on bread nationally. The report also concluded that Tiger Brands had engaged in similar conduct in the milling industry and it appeared as though Tiger Brands had been the ring leader in the cartel activity.[354] As a consequence of its report, Tiger Brands sought to negotiate and conclude a consent order with the Commission in terms of which an administrative penalty in the amount of R98 874 869.90 was imposed on Tiger Brands.[355] The consent order was confirmed by the Tribunal on the 28th of November 2007.[356]

Pioneer Foods however defiantly persisted to deny that it had engaged in any anti-competitive conduct and denied its involvement in the both the bread and milling complaints. With Pioneer Foods being the only respondent left in both the Western Cape and national complaint, both complaints were subsequently consolidated and the hearing of the complaints commenced before the Tribunal on the 15th of June 2009. Soon after the commencement of the hearing, Pioneer Foods conceded that it had engaged in the

[353] Soon after filing its answering affidavit, Foodcorp entered into a consent order with the Commission which was confirmed by the Tribunal on the 6th of January 2009. In terms of this consent order, an administrative fine in the amount of R45 406 359.82 was imposed against Foodcorp. See *The Competition Commission v Pioneer Foods (Pty) Ltd* at par 7.

[354] It is important to note that the report provided to the commission by Tiger Brands has been claimed as confidential by both it and its parent company Tiger Brands Limited and the exact contents of same are unknown. *The Competition Commission v Pioneer Foods (Pty) Ltd* at par 6. Additionally, the CLP does not prohibit ringleaders from applying for immunity but rather works on a "first to the door" principle, see the CLP at 5.6.

[355] *The Competition Commission v Tiger Consumer Brands (Pty) Ltd* 15/CR/Feb07 at par 6.2.

[356] See the Consent and Settlement Agreement concluded between the Commission and Pioneer Foods in *The Competition Commission v Tiger Consumer Brands (Pty) Ltd* 15/CR/Feb07.

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conduct complained of in respect of the Western Cape complaint but persisted with its denial that it had not engaged in such conduct in relation to the national complaint.[357]

Pioneer's defence to the national complaint was premised on its denial that any meetings had taken place and that where meetings had in fact taken place, such meetings did not involve discussions about price increases and market allocations. Pioneer also attempted to rely on the defence of prescription of complaint referral in terms of section 67(1) of the Competition Act in light of the fact that the Commission based the complaints on agreements reaching as far back as 1999.[358] Both these defences were rejected by the Tribunal due to the fact that firstly, the very documents discovered by Pioneer Foods provided clear evidence of Pioneer Food's intention to increase prices in co-operation with its competitors. Secondly, Pioneer Foods failed to discharge the onus that rested on it to prove that the conduct complained about had ceased more than three years prior to the initial complaint in 2007.[359] The Tribunal accordingly held that Pioneer Foods had engaged in prohibited conduct in terms of section 4(1)(b)(i) and (ii) and imposed an administrative penalty in the amount of R195 718 614.00 on Pioneer Foods.

In light of the administrative penalty imposed on Pioneer Foods and in light of the fact that it was now facing the reality of having several more such penalties imposed on it resulting from various other complaints,[360] Pioneer Foods approached the Commission with the view of settling all other outstanding claims. A settlement agreement was subsequently concluded between the Commission and Pioneer Foods and this new consent order incorporating the settlement agreement, was confirmed by the Tribunal on the 30th of November 2010.[361]

In this settlement agreement, Pioneer Foods admitted to various contraventions of the Act in respect of each of the other complaints initiated against it.[362] In terms of the

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[357] *The Competition Commission v Pioneer Foods (Pty) Ltd* at par 38.
[358] Section 67(1) provides that a complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased. See *Leonard & Others v Nedbank & Others* 84/CR/Aug07 and *Linpac Plastics SA (Pty) Ltd and Another v du Plessis and Others* (2381/2008) [2012] ZAWCHC 392.
[359] See *Pioneer Foods* at pars 86, 87 and 128.
[360] See the additional complaints recorded under case numbers 2007Mar2844, 2008Dec4165, 2009Apr4389, 2009Apr4390, 2009Apr4391, 2009Nov4744, 2009Dec4819), and 2010May5133.
[361] See the Consent and Settlement Agreement concluded between the Commission and Pioneer Foods in *The Competition Commission v Pioneer Foods (Pty) Ltd* (10/CR/Mar10 15/CR/Mar10) (hereinafter referred as "the Consent Order").
[362] See the Consent Order at par 10.

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settlement agreement, Pioneer Foods agreed to fully cooperate with the Commission in the investigation and prosecution of any other parties who were party to the conduct that was subject to the (then) current complaints as well as provide the Commission with any evidence in its possession and testify as a witness for the Commission in any matters involving these complaints. Pioneer Foods also agreed to implement a corporate governance compliance programme which was designed to ensure that its employees, management and subsidiaries did not in future engage in in any conduct prohibited by section 4(1)(b) of the Act.[363] Pioneer Foods additionally agreed not to engage in in any forms of conduct admitted by it in the settlement agreement in the future and further undertook to not make any utterances to its competitors that could be construed as a threat to enter into a price war to exclude competitors or induce a price increase in the bread industry.[364]

In addition to these undertakings, Pioneer Foods was required to pay an administrative penalty in the amount of R500 million. However, the settlement then placed further obligations on Pioneer Foods which extend beyond merely conduct and fines, namely an obligation to adjust the pricing of certain wheaten flour and bread products.[365] These price adjustments resulted in an estimated loss of profits for Pioneer Foods in the region of about R160 million in the subsequent financial year.[366]

A further obligation was placed on Pioneer Foods to maintain its intended capital expenditure as detailed in the settlement agreement[367] together with increasing its future capital investment by an additional R150 million.[368] Although the Commission conceded that certain market factors might require that Pioneer Foods deviate from these capital investments, the settlement agreement stated that *"it is Pioneer's firm intention to retain the overall investment level as set out in Annexure C, together with the additional minimum spend of R150 000 000 referred to herein, to contribute to the creation of jobs*".

[363] Pioneer Foods would submit details of this programme to the Commission within 60 days from the date that the settlement agreement was confirmed by the Tribunal Consent Order, at par 11.2.
[364] The Consent Order, at pars 11.2 & 11.3.
[365] The Consent Order, at par 14. The nature and the details of the price adjustments were contained in "Annexure B" to the Consent Order.
[366] See the Consent Order at par 14.
[367] This capital expenditure was detailed "Annexure C" to the settlement agreement. Neither Annexure B nor C were provided with the electronically available copy of the settlement agreement.
[368] See the Consent Order at par 15.

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The most unique feature of the aforesaid settlement was that the Commission, the then Department of Economic Development and National Treasury decided that that the then Department of Economic Development would submit a budgetary proposal to National Treasury for the creation of a R250 million Agro-processing Competitiveness Fund which would be drawn from the penalty and administered by the Industrial Development Corporation.[369] The purpose of this fund would be to facilitate the entry of new participants into the entire value chain of the agro-processing market, specifically small to medium sized businesses owned by historically disadvantaged individuals, by lowering the barriers of entry through the provision of financial support.[370]

4.2. Collusion in the Construction Industry

During 2009, the Commission started to receive several complaints about the massive costs associated with the construction of various stadiums for the 2010 FIFA World Cup. This then lead the Commission to initiate a complaint on 10 February 2009 against the following construction firms: WBHO Construction, Group Five, Aveng, Murray & Roberts, Stefanutti Stocks and Basil Read for allegedly engaging in prohibited conduct in the rigging of bids for the construction of the stadiums in question.[371] The Commission proceeded to investigate these allegations and after discovering the existence of previous meetings held between the firms in question and during the collection of several pieces of evidence obtained through various applications for leniency made to the Commission,

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[369] Bonakele & Mncube "Designing Appropriate Remedies for Competition Law Enforcement: The Pioneer Foods Settlement Agreement" presented at the Fifth Annual Competition Law, Economics and Policy Conference in South Africa, 4&5 October 2011 (available at http://www.compcom.co.za/wp-content/uploads/2014/09/Designing-Appropriate-Remedies-for-Competition-Law-Enforcement-The-Pioneer-Foods-Settlement-Agreement-25082011.pdf) (last accessed on the 15/08/2017) (hereinafter referred to as Bonakele & Mncube). Agro-processing was chosen because of its labour intensive nature and extended far beyond the mere production and milling of wheat and flour products.

[370] Organisation for Economic Co-Operation & Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "Serial Offenders: Industries Prone to Endemic Collusion" Session IV DAF/COMP/GF/WD(2015)23 (available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)23&docLanguage=En (last accessed on 15/0/2017).

[371] See the Commission's initial referral to the Tribunal and founding affidavit deposed to by Fhatuwani Elphus Mudimeli in the matter of *The Competition Commission v WBHO Construction (Pty) Ltd, Group Five Construction Ltd, Aveng (Africa) Ltd, Murray & Roberts Ltd, Stefanutti Stocks Holdings Ltd and Basil Read (Pty) Ltd* 2009Feb4279 at par 17 (hereinafter referred to as "Commission's Initial Complaint").

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the Commission uncovered that the construction industry as a whole was characterised by an "entrenched and endemic culture of cartel activity".[372]

During the Commission's investigation, it uncovered that following South Africa's successful bid to host the 2010 FIFA Soccer World Cup, the FIFA Local Organising Committee ("the LOC") invited several large construction firms including, amongst others, WBHO Construction (Pty) Ltd, Group Five Construction Ltd, Aveng (Africa) Ltd, Murray & Roberts Ltd, Stefanutti Stocks Holdings Ltd and Basil Read (Pty) Ltd to a meeting. At this meeting the LOC sought to determine the Rand value and geographical spread of the major construction firms' (then) current construction projects and to determine where these firms had capacity to take on additional projects.[373] During this meeting, the LOC informed the relevant construction companies that it would deliver ten stadiums for the event which included the construction of four new stadiums in Port Elizabeth, Nelspruit, Cape Town and eThetwini. Together with these new stadiums, major upgrades would be conducted at the existing FNB and Polokwane Stadiums and medium to minor upgrades would be conducted at the Mangaung, Loftus Versfeld, Ellis Park and Bafokeng Stadiums. The tenders for these stadiums would be issued during the course of August 2006 and submissions would close at the end of November 2006. Each of the relevant municipalities were placed in charge of the projects within their municipal area and would be responsible for the awarding of each tender.[374]

On the 27th of September 2006, a meeting was held between the aforesaid e construction firms at the offices of WBHO[375] where it was discussed how the tenders for the construction and upgrades of the stadiums would be allocated between them. A second meeting was held on the 6th of October 2006 where these firms discussed which firms would or would not be interested in submitting tenders for the various stadium projects;

[372] These findings lead to the Commission initiating a second complaint. The respondents in this complainant included Grinaker LTA, Aveng (Africa) Ltd, Stefanutti Stocks Holdings Ltd, Group Five Ltd, Murray & Roberts, Concor Ltd, G. Liviero & Son Building (Pty) Ltd, Giuricich Coastal Projects (Pty) Ltd, Hochtief Construction AG, Dura Soletanche-Bachy (Pty) Ltd, Nishimatsu Construction Co Ltd, Esorfranki Ltd, VNA Pilings CC, Rodio Geotechnics (Pty) Ltd, Diabor Ltd, Gauteng Piling (Pty) Ltd, Fairbrother Geotechnical CC, Geomechanics CC3 Wilson Bayly Holmes-Ovcon Ltd as well as several other joint ventures. See the Commission's Initial Complaint at par 18.
[373] The Commission's Initial Complaint at par 29.
[374] The Commission's Initial Complaint at par 30.
[375] The Commission's Initial Complaint at par 31.

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which firms would then submit cover prices[376] in respect of these tenders; which firms were not present at these meetings that could potentially disrupt the system proposed; and which firms those firms that were awarded tenders would partner with.[377]

The Commission alleged in its initial complaint that the participating construction firms had reached agreement on the following:[378]

a) Before any tender was submitted, the firms would review the proposed tenders as well as the cover tenders to ensure that the cover tender was less competitive than the allocated tender and to ensure that the prices of the allocated tenders were lower than the relevant cover prices;

b) The tender for the Moses Mabhida Stadium in Durban would be allocated to the joint venture of WBHO and Group 5 and Aveng would submit the cover price;

c) The tender for the Soccer City Stadium in Johannesburg would be allocated to Aveng with Covac submitting the cover price;

d) The tender for the Cape Town Stadium would be allocated to the joint venture of Murray & Roberts and WBHO;

e) The tender for the Mbombela Stadium in the Nelspruit would be allocated to the joint venture of Concor (as a division of Murray & Roberts) and Hochtief with WHBO or Group 5 and Bouygues or Basil Read submitting the cover prices;

f) The tender for the Peter Mokaba Stadium in Polokwane would be allocated to Stefanutti Stocks and its joint venture partner and Concor and WBHO or Group Five would submit the cover prices;

[376] A cover price was a price submitted by one of the construction firms that did not intend to win the tender. The cover price was intended to create the impression that the various construction firms were competing in order to win the tender but, the cover price would be sufficiently higher or contain certain conditions that make the bid unacceptable to the client and would then enable the firm allocated the tender to submit a lower bid and secure the tender. See J Khumalo, P. Nqojela & Y. Njisane "Cover pricing in the construction industry: understanding the practice within a competition context" at 2, available at http://www.compcom.co.za/wp-content/uploads/2014/09/Cover-pricing-in-the-construction-industry-Final.pdf (last accessed on 24/04/2019).
[377] The Commission's Initial Complaint at par 36.
[378] The Commission's Initial Complaint at par 37.

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g) The tender for the Nelson Mandela Stadium in Port Elizabeth would be allocated to Stefanutti Stocks; and

h) The net profit margin in respect of each project would 17.5% and the risk contingencies would be factored into the price to avoid any dilution of the agreed profit margin.

The tenders for the Cape Town, Soccer City and the Moses Mabhida stadiums were awarded to the allocated bidders. However, the remainder of the projects were allocated to other construction companies, often being the cover bidders. The reason why these bids were awarded to other construction companies even in circumstances where such bids did not represent the lowest bid for the projects remains unclear.[379]

As a result of the widespread practice of collusion in the construction industry, the Commission was now tasked with not only investigating collusion in tendering for the construction of the 2010 stadiums, but also investigating the entire construction industry in several different markets, including the markets for cast concrete products, plastic pipes, reinforcing steel, bricks, cement and pilings. In an attempt to hasten the process, the Commission issued an "Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act" on the 1 February 2011. [380] Through this process, the Commission aimed to:[381]

a) incentivise firms to admit their anti-competitive conduct by proposing settlement on financially advantageous terms;

b) ensure that all firms truthfully and comprehensively disclosed their anti-competitive conduct;

c) strengthen the Commission's evidence against those firms that did not take advantage of the Commission's invitation;

[379] The Commission's Initial Complaint at par 40.
[380] The Competition Commission's Invitation to Firms in the Construction Industry to Engage in Settlement of Contraventions of the Competition Act issued on the 1st of February 2011 available at http://www.compcom.co.za/wp-content/uploads/2014/09/Media-Release-Competition-Commission-invites-construction-firms-to-settle.pdf (last accessed on 22/10/2019) (hereinafter referred to as the "Commissions Invitation") at 1.
[381] The Commission's Invitation at 2.

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d) minimise the legal costs associated with, and speedily resolve, the complaints and cases arising out of the Commission's investigations; and

e) set the construction industry on a new competitive trajectory, which would promote the efficiency, adaptability and development of the construction sector and the economy as a whole.

In terms of the Commission's Invitation, firms would have to apply to the Commission on a "with prejudice" basis and would be required to provide the Commission with a truthful disclosure, including any information and documents in their possession or under their control, relating to any prescribed or non-prescribed prohibited[382] horizontal practices. They were also required to provide their full co-operation to the Commission concerning these prohibited horizontal practices and would be required to undertake to co-operate fully with the Commission when required to do so pending the finalisation of any proceedings before the Tribunal and/or the CAC. They further had to provide the Commission with a written undertaking that they would" immediately cease, and would not engage in the future, in any form of prohibited practice; would not destroy, falsify or conceal any information, evidence and/or documents relating to these prescribed or non-prescribed prohibited horizontal practices; and would not make any wilful or negligent misrepresentation concerning the material facts of these prescribed or non-prescribed prohibited horizontal practices or otherwise act dishonestly."[383]

It would then fall to the Commission to decide whether or not such application would be accepted, whereafter a consent order would be concluded in terms of which an administrative penalty would be imposed on the applicant firms. In terms of the Commission's Invitation, the fine would be calculated as a percentage of the particular firm's turnover determined on a sliding scale dependent on the number of non-prescribed contraventions found to have been committed by that firm.[384]

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[382] Prescribed prohibited practices refers to prohibited restrictive horizontal practices relating to the construction industry that are contemplated in section 4(1)(b) of the Act and that ceased after 30 November 1998, but more than three years before the complaints were initiated, and non-prescribed prohibited practices refers to prohibited restrictive horizontal practices relating to the construction industry that are contemplated in section 4(1)(b) of the Act and that are on-going or had ceased three years before the complaints were initiated , as contemplated 1.7 of the Act. See *Competition Commission v Aveng (Africa) Limited* 2009Feb4279/2009Sep4641 at par 1.13 and 1.15.

[383] The Commissions Invitation at 6.

[384] The Commission's Invitation at 7 – 8.

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Despite the Commission's Invitation, few of the respondent firms to the stadium investigation initially took up the Commission's offer to settle.[385] However, the Commission did subsequently receive a number of applications from the vast of majority of large, medium and small construction firms which detailed a total number of 298 prohibited practices, of which 141 were non-prescribed prohibited practices, in contracts amounting to a total value of R111.9 billion.[386] These applications ultimately lead to several consent orders being concluded between the Commission and various construction firms,[387] including all the respondent firms, with the total value of the administrative penalties contained in these consent orders amounting to R14.3 billion.[388] These consent orders also required that the firms concerned undertake to "immediately cease their relevant horizontal restrictive practices, not engage in such practices in future, provide the Commission with any evidence and/or testimony required for its prosecution of other firms for such conduct, and that they develop, implement and monitor

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[385] Only Aveng concluded a consent order on the strength of the invitation. Murray & Roberts had received conditional immunity in terms of the CLP and WHBO did disclose the conduct in terms of the invitation however did not settle the investigations into the stadiums tenders as it was of the opinion that such conduct did not amount to contravention of section 4(1)(b) of the Act. Group Five, Stefanutti Stocks and Basil Read did not disclose the conduct pertaining to the stadiums and requested that the complaint be referred to the Tribunal. See https://www.iol.co.za/business-report/economy/construction-firms-face-big-penalties-1780064 (last accessed on 16/08/2017).

[386] See Organisation for Economic Co-operation & Development, Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "Serial Offenders: Why Some Industries Seem Prone to Endemic Collusion".

[387] It must be bore in mind that several firms disclosed the same offences but only the firm that disclosed the relevant conduct first would be granted impunity in terms of the CLP. See the CLP at par 5.6.

[388] These consent orders, all granted under case number 2009Feb4279/2009Sep4641, can be broken down as follows: Aveng disclosed a total amount 57 offences and was implicated in a further seven offences not disclosed. Aveng agreed to pay an administrative fine in the amount of R306 576 143.00 which was payable over three years. Basil Read disclosed ten offences and was implicated in a further one offence not disclosed. The administrative fine imposed amounted to R94 936 248.00. Esorfranki disclosed one offence and agreed to pay an administrative fine the amount of R155 850.00. G Liviero & Son Building (Pty) Ltd disclosed ten offences and was implicated a further two offences and agreed to pay an administrative fine in the amount of R2 011 078.00. Guirich Bros Construction (Pty) Ltd disclosed eight offences and was implicated in one further offence and agreed to pay an administrative fine in the amount of R3 552 568.00. Haw and Inglis Civil Engineering (Pty) Ltd disclosed ten offences and agreed to pay an administrative fine in the amount of R45 314 041.00. Hotchtief Construction AG disclosed three offences and agreed to pay an administrative penalty in the amount of R1 315 719.00. Murray & Roberts disclosed 21 offences and was implicated in a further 11 offences. The administrative penalty levied against Murray Roberts amounted to R309 046 455.00. Norvo Construction (Pty) Ltd disclosed one offence and agreed to pay an administrative offence in the amount of R714 897.00. Raubex (Pty) Ltd disclosed nine offences and agreed to pay an administrative penalty in the amount of R58 826 626.00. Rumdel Construction Cape (Pty) Ltd disclosed three offences and agreed to pay an administrative fine in the amount of R17 127 465.00. Stefanutti Stocks disclosed 39 offences and was implicated in a further nine offences. The administrative fine levied against Stefanutti Stocks amounted to R306 892 664.00. Tublar Technical Construction (Pty) Ltd disclosed two offences and agreed to pay an administrative fine in the amount of R2 634 667.00. Vlaming (Pty) Ltd disclosed seven offences and was implicated in one further offence and agreed to pay an administrative fine in the amount of R3 421 662.00.

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a competition compliance programme incorporating corporate governance measures designed to ensure that they do not engage in future contraventions of the Act."[389]

Due to the fact that Commission's Invitation required firms to disclose their collusive conduct on a "with prejudice" basis, it meant that these firms would now also be subject to possible civil claims arising out of such conduct.[390] Inevitably and following this fast-tracked settlement process, during the course of 2016, the South African National Roads Agency Limited (Sanral) instituted civil action against Murray & Roberts, WHBO, Group Five, Basil Read, Stefanutti Stocks, Concor and Raubex (hereinafter collective referred to as "the Construction Companies") for damages ranging between R600 million and R760 million arising out of these firms' collusive conduct in the awarding of Sanral tenders.[391] This, together with the potential threats of several other claims being instituted against these firms by various other state-owned entities, lead to an extensive negotiation period between the national government and the construction firms which culminated in a settlement being concluded between six of these firms[392] and the National Government. Such settlement was captured in the *Voluntary Rebuild Programme Agreement* ("the VRP").[393]

4.2.1. *Voluntary Rebuild Programme Agreement* ("the VRP")

In terms of the VRP, any claims and/or potential claims for damages that certain public entities identified in the VRP, may have and/or may be entitled to make against the Construction companies arising out of the Commission's Invitation, would be fully and finally settled.[394] The settlement in the VRP entailed two pillars. One pillar was founded

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[389] See all consent orders under case number 2009Feb4279/2009Sep4641 under the paragraphs labelled "Co-operation" and "Agreement Concerning Future Conduct" at par 8 & 9. A copy of such programme was then required to be submitted to the Commission within 60 days of the confirmation of the relevant consent orders

[390] See section 65 of the Act.

[391] See http://pressoffice.mg.co.za/sanral/PressRelease.php?StoryID=266837 (last accessed on 15/05/2017).

[392] By this stage Murray & Roberts and Concor had merged. See *Murray & Roberts Limited and Concor Limited* (101/LM/Oct05).

[393] At the time of writing this thesis the VRP had not been publicly released by the Government or any of the construction companies party to the VRP. The writer has accordingly been forced to rely on several news articles on the subject as well the "Announcement Regarding the Settlement Agreement Concluded with the South Africa Government" ("the Announcement") released by Basil Read Holdings Limited as a notice to its shareholders dated the 11th of October 2016 which can be found at http://www.basilread.co.za/downloads/sens/2016/11Oct/2016-10-11_BSR%20SENS%20VRP.pdf (last accessed on 15/05/2017).

[394] The Announcement at par 1.1(c).

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on the payment of various administrative penalties and the formation of a trust funded from such payments, while the other pillar concerned an economic transformation agenda of the construction industry as a whole.[395] The Construction Companies further made several integrity commitments in terms of which they undertook to avoid collusion and corruption in all their dealings with the Government, their competitors and customers and to further partner with the Government in exposing all forms of corruption and tender irregularities in the construction industry.[396]

4.2.2. The VRP: the Trust Pillar

The VRP required that the signatory firms would collectively make annual payments totalling R103 750 million over a period of 12 years beginning in 2016 for a total contribution amounting to R1.5 billion to the National Revenue Fund.[397] These funds would then be used to establish a fund which would be constituted as a trust and would be known as the Trisano Trust ("the Trust").[398] The Trust would be governed by a board of trustees that would be jointly appointed by the national government, the signatory firms and the South African Forum of Civil Engineering Contractors.[399] The payments made by the signatory firms would be used by the Trust to implement initiatives to develop and enhance the construction industry in accordance with the government's transformation objectives and promote the development of emerging contractors and suppliers in the South African construction industry.[400]

The then Department of Economic Development further developed these objectives to include the support for: bursaries for black students studying engineering, quantity surveying and building science; bursaries for the development of black artisans including through mentorship and employment placements; mathematics and science education in public schools; special social development projects such as rural bridges, student

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[395] See the Announcement at pars 1.1(a), (b) and (d).
[396] See The Department of Economic Development's press briefing on construction industry Settlement Agreement *Promoting construction-industry transformation through partnerships* (13 February 2017).
[397] Basil Read would be required to contribute R2 million for years 2016 – 2018; R8 million for years 2019 and 2020, R10 million in 2011, R14 million for years 2022 – 2025 and R16 million for 2026 and 2027. At the time of writing this thesis it is unclear how the other construction companies' contributions have been structured.
[398] See G. Mofokeng *Statement delivered by Black Business Council in the Built Environment* (2017/03/18) available at http://www.bbcbe.org/2018/04/27/statement-dilivered-by-black-business-council-in-the-built-environment (last accessed on 06/06/2017).
[399] The Announcement at par 1.1(b).
[400] The Announcement at par 1.1(b).

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accommodation, clinics, schools and sport fields; building capacity in the state on engineering, project management and other infrastructure services in the design, construction, operation and maintenance of public infrastructure; and enterprise development programs for small, black-owned constructions firms, including through the provision of working capital at concessional rates and support on performance bonds.[401]

4.2.3. The VRP: the Transformation Pillar

Together with the establishment of the Trust, the signatory firms further undertook to actively assist the government in transforming the construction industry. The signatory firms have been required to either:[402]

a) launch development initiatives aimed at identifying, developing and mentoring up to two emerging contractors of their choosing to ensure that these emerging contractors will have the necessary skills and quantity of work required to generate a cumulative combined annual turnover equal to at least 25% of civil engineering and general building annual turnover of the relevant construction company generated within South Africa; or

b) dispose of not less than 40% of their economic interest in their South African civil engineering and general construction business, to an enterprise of their choice that is more than 51% black owned, managed and controlled.

The signatory firms would be required to meet their transformation target of choice within a period of seven years from the conclusion of the VRP. The VRP attached interim period targets for these transformation projects and further attached penalties for the failure to achieve these targets. These targets however remain unclear but the fines would be calculated in accordance with a formula detailed in the VRP.[403] The construction

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[401] See The Department of Economic Development's press briefing on construction industry Settlement Agreement Promoting construction-industry transformation through partnerships (13 February 2017) available at https://www.safcec.org.za/news/331076/Government-releases-press-statement-on-industry-settlement-agreement.htm (last accessed on 12/10/2018).
[402] The Announcement at par 1.1(d).
[403] The fines payable would be calculated in accordance with how many non-prescribed prohibited practices the relevant firm disclosed it had been a party to in the relevant sector. In this regard, the administrative penalty would calculated in accordance with the following sliding scale; where the number of non-prescribed practices was between 1 and 4 the fine would be between 1 – 4% of the firm's turnover in the relevant sub-sector, where the non-proscribed practices were between 5 and 12 the fine would be between 4 – 7% of the firm's turnover in the relevant sub-sector , where the non-prescribed practices were between 13 and 22 the fine would be between 7 – 12% of the firm's turnover in the relevant sub-sector, and where

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companies' liability arising from its contributions to the Trust as well as any penalties levelled due to a firm's failure to meet its transformation targets, would be limited to 29% of that firm's total market capitalisation at the date it signed the VRP in terms of the agreement reached between the construction firms and Government.[404]

4.3. Collusion in the Forex-Trading Industry by Several Banks

On the 1st of April 2015, the Competition Commissioner initiated a complaint against eleven banks for allegedly engaging in price fixing in contravention of section 4(1)(b)(i) of the Act.[405] The complaint was then amended on the 23rd of August 2016 to include a further allegation that the respondent firms engaged in the prohibited conduct of allocating markets in terms of section 4(1)(b)(ii) of the Act and a further six firms were added to the initial complaint.[406]

The nature of the complaint involved the allegation that between 2007 and 2013, the respondent banks engaged in an agreement, arrangement and or concerted practice to directly or indirectly fix the prices of bids, offers and bid-offer spreads in respect of spot, forward and future trades[407] through the coordination and alignment of the bids, offers and bid-offer spreads that they quoted to their customers purchasing foreign currency in transactions involving the South African Rand (ZAR).[408] The amended complaint also contained the allegation that the respondent firms engaged in an agreement, arrangement and or concerted practice to directly or indirectly fix the prices of certain forex pairs and divide markets through the allocation of bids, offers and bid-offer spreads

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the non-prescribed prohibited practices exceeded 23 the fine payable would be between 10 – 12% of the firm's turnover in the relevant sub-sector. The Announcement at par 1.1(d).

[404] The Announcement at par 1.1(e).

[405] The complaint was initiated under case number 2015Apr0147 ("the complait") and included the following banks; Bank of America Merill Lynch International Limited (Merrill Lynch), Barclays PLC and Barclays Africa, BNP Paribas and BNP SA (BNP), Citigroup and Citigroup SA (Citigroup), JP Morgan Case Co, JP Morgan Chase Bank N.A. and JP Morgan SA (JP Morgan), Standard New York Securities Inc (SNYS), Investec Limited (Investec), and Standard Chartered Bank (Standard Chartered).

[406] The additional firms added to the initial complainant included HSBC Bank PLC (HSBC), Citibank N.A. (Citibank), ABSA Bank Limited (ABSA), Barclays Capital Inc and Barclays Capital PLC (Barclays), Credit Suisse Group (Suisse), Commerzbank AG (Commerzbank), Macquarie Bank Limited (Macquarie), Standard Bank of South Africa Limited (Standard Bank), Nomura International PLC (Nomura), Australia and New Zealand Banking Group Limited (ANZBG), and JP Morgan Bank.

[407] Spot transactions involve transactions where settlement takes place within two days after the transaction, forward transactions are those transactions where settlement occurs more than two days after the transaction, and future transactions relate to transactions that give rise to an obligation to buy or sell a specific currency at a fixed exchange rate and at a specified date. See the Complaint at 31.

[408] See the Complaint at par 38.

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in respect of spot trades dealing in US Dollars (USD) and ZAR.[409] This was done, as the Commission alleged[410], through a general understanding[411] between the respondent firms to divide markets by refraining from trading, taking turns trading on, and by pulling and or holding their trading activities on various trading platforms.[412]

In support of the Commission's allegations of collusion, the Commission listed the following examples of the conduct that it believed amounted to prohibited conduct in terms of section 4:[413]

a) Several of the respondent banks engaged in the collusive posting of fictitious bids on the various trading platforms in order to manipulate the prices of bids and offers either up or down in an attempt to maximise profits;

b) Several of the respondent banks colluded to coordinate their trading activities around a FIX[414] by informing each other of how much of a particular currency they needed to sell by that FIX to minimise their risk exposure. The banks would then create fictitious bids and offers to create a false impression of over-supply of ZAR or USD to drive the relevant price down to enable the banks to purchase that currency cheaply and thereby hedge the FIX;

c) Several of the respondent banks would share certain information on their clients to enable the respondent banks to coordinate and fix their quotations to these clients;[415]

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[409] See the Complaint at par 40.
[410] See the Complainant at par 41 – 45.
[411] The Commission alleged that these understandings were reached through various bilateral and multilateral interactions through the Bloomberg instant messaging system, telephonic conversations and various meetings held between the respondent banks.
[412] The majority of trading was done through a variety of trading platforms namely; Reuters Dealing 3000, EBS and Bloomberg, which are all interbank trading platforms specifically designed for currency trading, as well as various other Dealer owned trading platforms.
[413] See para. 45 in its entirety of the Complainant.
[414] FIX refers to a specific time of the day in respect of which trading in currencies result in benchmark rates for the currencies in question. The general belief is that the FIX rates closely reflect their true value and offer spreads are likely to be narrower during this period. See the Complaint at 37.
[415] Certain clients may engage in a strategy of splitting or spraying orders whereby they would split up one big order into several smaller orders split across several banks. By coordinating the prices they quote the customer, the relevant banks ensure that they will not be competing against each other. See the Complaint at 41.

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d) Several of the respondent banks agreed on the size of bid-offer spreads[416] that they would charge clients for agreed volumes of currency exchange; and

e) From 2010, several of the traders of the respondent banks reached agreements in terms of which they would refrain, take turns and would pull or hold their trading activities on the Reuters Dealing 3000 platform.[417] These traders had also agreed to reserve client orders to purchase or sell foreign currency and thereby refrain from placing them on the Reuters platform in order to ensure that these transactions would only be concluded between traders from the respondent banks.[418]

Following the institution of the complaint, there have been several significant developments in the matter. Firstly, during the course of January 2017, a settlement agreement was concluded between the Commission and Citibank.[419] In terms of this settlement agreement, Citibank admitted that from September 2007 until October 2013, it and the other respondent banks had manipulated the price of bids and offers for certain currencies through various agreements. These agreements included agreements to refrain from trading, agreements to create fictitious bids and offers and to hold or pull their bids to reserve liquidity to trade with each other instead of trading in the normal market as well as the manipulation of prices in respect of spot trades involving various ZAR currency pairs.[420]

Citibank further undertook to appear as a witness in the prosecution of the Commission's complaint against the remaining respondents and undertook to not engage in any further contraventions of the Act. Additionally, an administrative fine in the amount of R69 500

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[416] A bid-offer spread is the difference between the price at which the currency is purchased and the price at which it is sold. The difference is the transactional cost charged by the bank. See the Complaint at 41.
[417] Reuters 3000 was an electronic trading platform which was released by Reuters in 1999 and supported until the end of 2013. It was typically used by professional traders and financial analysts in trading rooms. It was superseded by the Eikon platform, first released in 2010. Reuters 3000 provided real-time market data such as price data on exchange traded stocks, warrants, options, futures, indices, bonds, commodities and currencies, as well as streaming news and comprehensive economic indicators and financial data. Originally designed as an information system, later versions also introduced trading functions, allowing orders to be placed on a number of electronic exchanges and with other dealing desks See the Complaint at 33.
[418] This would allow the traders to agree on prices and avoid prices from being driven up or down as a consequence of excessive bids or offers being placed on the trading platforms.
[419] Citibank is the consumer division of financial services multinational Citigroup headquartered in New York in the United States. See the Complaint at 21.
[420] See the Tribunals press release entitled "Competition Tribunal confirms Citibank N.A's R69 500 980 settlement agreement" dated the 26th of April 2017.

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860.00 was imposed against Citibank.[421] Separately, Standard Chartered has since pleaded guilty in the United States to manipulating various currencies, including the Rand, and has agreed to pay the New York Department of Financial Services a settlement in the amount of $40 million.[422]

Secondly, following a pre-hearing that was convened before the Competition Tribunal on the 10th of March 2017, the Tribunal issued a directive requiring the Commission to supplement its initial referral of the complaint to the Tribunal and thereafter the remaining respondent banks would be permitted to file their exceptions to the Commission's referral. The Commission proceeded to deliver its supplementary affidavit which primarily dealt with the Tribunal's jurisdiction to hear the Commission's complaint. All the remaining respondent banks then excepted on the basis that the Tribunal did not have jurisdiction over several of the respondents and that the Commission's allegations were vague and embarrassing and did not comply with the provisions of the Act.[423]

At the time of writing this thesis, the Tribunal had not yet made any ruling on the Commission's complaint. The Tribunal has however partially upheld the respondent banks' exception application and required the Commission to file a new referral detailing what this new referral should contain.[424] What has further since transpired is that

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[421] The Settlement Agreement was incorporated into the Consent Order granted by the Tribunal on the 26th of April 2017 under case number CR212Feb2017.

[422] See Competition Commission's Media Statement 5 February 2019 available at http://www.compcom.co.za/wp-content/uploads/2019/01/Standard-Chartered-Bank-Pleads-Guilty.pdf (last accessed on 26/04/2019).

[423] See the various Exceptions filed by the 17 remaining respondent banks under case number CR212Feb2017.

[424] See Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others (CR121Feb17) [2019] ZACT 50 (12 June 2019) specifically the order at par 3.4 where the Tribunal held that the new referral must:

"3.4.1 In the case of the local peregrini respondents set out the facts the Commission relies to allege that it was foreseeable that the impugned conduct would have a direct or immediate, and substantial effect in the Republic;

3.4.2 Confine the case to a single overall conspiracy (SOC), provided, subject to 3.4.3 below, that the Commission is not restricted from alleging that this may be founded on an agreement, arrangement or concerted practice;

3.4.3 Indicate whether the same facts are relied on for proof of the concerted practice or allege any different facts if they are not;

3.4.4 Allege whether its case for an SOC relies on proof of an express agreement or arrangement or whether this is an inference based on facts; if the latter, allege in general terms what those facts are;

3.4.5 Provide each respondent with a date, or period. in which they are alleged to have joined the SOC or deemed to have joined the SOC;

3.4.6 Provide the facts that are relied on to prove that the particular respondent joined or had joined the SOC;

3.4.7 If the SOC has ceased;

3.4.7.1 provide what dates the SOC is alleged to have ceased;

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Standard Bank brought an application seeking to compel the Commission to deliver its record of investigation. This application was challenged by the Commission on various procedural grounds that were subsequently dismissed by the Tribunal. However, the Tribunal ultimately ruled that the relief sought by Standard Bank was not reasonable given the fact that the Commission had tendered to deliver its record as part of the discovery process and Standard Bank had failed to provide any reasons why it would be prejudiced if did not receive the record earlier. The Tribunal ultimately ruled that the Commission's record of investigation must be delivered at the same as the Commission produces its discovery.[425]

5. The Evolving Nature of the Remedial Action sought by the Commission and its growing Political Element

5.1. The Pioneer Settlement Agreement

In order to properly contextualise the remedial action ordered in the bread and construction cartel matters, one must first look at the structural factors that underpin these industries. The bread industry in particular was heavily regulated until 1991. This regulation started in 1935 with the establishment of the Wheat Industry Control Board and was further increased by the enactment of the Marketing Act in 1937.[426] All producers and bakeries were thereupon required to be registered with the Wheat Board which was

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3.4.7.2 what facts are relied on for establishing that the conduct had then ceased; and
3.4.7.3 whether all the respondents remained participants in the SOC on that date; and, if not, when the respective respondent/s exited.
3.4.8 If the SOC is still alleged to be ongoing;
3.4.8.1 what facts this is based on; and
3.4.8.2 Whether all the respondents are still part of it; if not, when the respective respondent/s exited;
3.4.8.3 In relation to the relationship between the respondent banks and their respective traders:
3.4.8.3.1 Is it alleged that some traders acted for more than one respondent at the same time? If so, details should be provided;
3.4.8.3.2 If a trader ceased to act for a respondent bank, did this end the respondents' participation in the SOC or if not, on what basis is it alleged that the respondent's participation continued?
3.4.8.3.3 Is it alleged that all the traders named as participants in paragraph 40 the December affidavit were so-called active participants or were some so called passive participants."

[425] See the Tribunal's "reasons and orders" issued on 6th November 2017 in the matter of *Standard Bank of South Africa Limited v The Competition Commission of South Africa* CR212Feb17/DSC027Apr17.

[426] The Wheat Industry Control Board ("the Wheat Board") was first tasked with the control of the importation of wheat and flour products in order to protect local producers but the Marketing Act 26 of 1937 empowered the Wheat Board with control over the entire wheat to bread chain. See Stanwix "Wheat, Bread and the Role of the State in Twentieth South Africa" (2012) *The History Project* available at www.histproj.org/completed/STNAWIX-thesis.pdf (date of last access 2017/09/01) at 7 (hereinafter referred to as Stanwix (2012)).

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given control over the import and export of wheat products, the sale of wheat only to its registered members, the prices of wheat and flour, as well as being responsible for ensuring that all millers and bakers were registered with it.[427] In addition to the establishment of the Wheat Board, the Government also adopted a bread subsidy which was aimed at keeping the price of bread affordable and available to the entire population.[428] These factors empowered the Wheat Board to determine and prescribe the width, size and weights of a loaf of bread and determine the end selling price of a loaf bread. The Board went even further by establishing a quota system in terms of which volumes and distribution areas would be assigned to specific producers.[429]

The Wheat Board also allowed for the establishment of a forum, which became known as the Chamber of Bakers, through which its various member producers were able to engage one another on numerous issues, particularly the issues of encroachment by producers on each other's allocated territories and producers exceeding their assigned volumes, as well as the fines the infringing producers would be required to pay.[430] The effect of these structural factors was to provide the largest members of the Wheat Board, which were the respondent firms to the bread cartel case, with a legislative cocoon which shielded them from competition. The argument can therefore be made that these very factors have enabled firms such as Pioneer to establish themselves as dominant firms within the baking and milling industries.[431]

During the late 1980's, following several negotiations between the incumbent apartheid Government and the ANC, a process was started to gradually phase out the bread subsidy over a three year period with the subsidy finally being terminated in 1991.[432] The price of wheat however remained regulated until 1997 but this too was terminated with the enactment of the Marketing of Agricultural Products Act[433] and eventual abolishment of the Wheat Board.[434] As pointed out by Stanwix, the only lasting legacy of the regulation

[427] Stanwix (2012) at 8.
[428] This bread subsidy was undertaken at great cost to the Government as it amounted to about 3.5% of the national budget between 1947 and 1960. B Stanwix (2012) at 18.
[429] Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition – "Serial Offenders: Industries Prone to Endemic Collusion" at 3.
[430] See *The Competition Commission v Pioneer Foods* at par 13 – 16.
[431] See Stanwix (2012) at 10.
[432] Stanwix (2012) at 29.
[433] 47 of 1996.
[434] Stanwix (2012) at 29.

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of the wheat and bread industries is that brown bread today remains exempt from value added tax (VAT).[435] The hope was that this deregulation would expose the industry as a whole to a level of competition it had been immune to for the previous 60 years. It was hoped that this new competition would lead to the breaking up of the existing monopolies in the industry and thereby foster a culture of innovation which would drive the prices of bread and wheaten products down for the ultimate benefit of consumers.[436]

The deregulation of the 1990's did indeed result in new entrants coming into the market. According to the South African Chamber of Baking, the number of large scale industrial plant bakeries has drastically reduced from about 200 in 1991, to between 60 and 70 today.[437] This gap in the market has since been filled by a large group of smaller bakeries comprising of about 600 in-store supermarket bakeries, 250 franchise bakeries and between 3 500 – 4 500 small independent and in-store bakeries.[438] As a consequence of this new competition, the respondent firms today jointly only enjoy between 50 - 60% of the total baking market in South Africa. The major difference however between these smaller firms and the respondent firms is that the respondent firms, through the pre-1991 regulation of the industry, were able to establish themselves as dominant players in the milling industries too.[439] This resulted in these firms being vertically integrated[440] throughout the entire wheat-to-bread chain and establishing them as the dominant firms in the industry as a whole.[441] The decreased regulation together with the increased

[435] The ANC sought to do away with the bread subsidy for primarily three reasons. Firstly, the subsidy had become too great of a financial burden on the national budget. Secondly, the ANC was of the opinion that price-setting of final end market goods was an unsustainable practice that made little economic sense and finally, the ANC was of the opinion that the subsidy was not a practical way of benefitting the poor and largely benefitted those that did not require state assistance. The ANC's aim was to rather transfer wealth to poorer sections of the economy through its transformative and empowerment policies. It is also important to keep in mind that white bread is completely unregulated and is therefore subject to VAT. The VAT generated from the sale of white bread, which was mainly consumed by the wealthier white and coloured sections of the populations, has proved to be a significant source of revenue for the state since deregulation. See B Stanwix (2012) at 30.
[436] See Stanwix (2012) at 30.
[437] See the Chamber of Baking's home page at http://www.sacb.co.za/webroot/main/history_of_bread.html. (date of last access 16/08/17).
[438] See http://www.sacb.co.za/webroot/main/history_of_bread.html (last accessed on (16/08/2017). These bakeries came into existence as a direct consequence of the deregulation of bread industry who immediately took advantage of the availability of a cheap un-unionised work force with their operations requiring substantially less fiscal and human capital than the largescale plant bakeries.
[439] The Respondent firms collectively control about 90% of the national milling industry. See Bonakele & Mncube at 6.
[440] A vertically integrated company refers to a company that owns other companies either in its upstream production value chain or in the downstream distribution or retail value chain.
[441] OECD – "Serial Offenders: Industries Prone to Endemic Collusion" at 5.

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competition that it spawned in the bakery industry as well as the vertically integrated nature of the respondent firms, created an environment which was ripe for collusion. These firms now sought to maintain the protections they previously enjoyed through state regulation of the industry by means of private arrangements amongst themselves.

5.1.1. The Price Adjustment Remedy

When evaluating the remedies imposed in the *Pioneer* matter, the importance of both wheat and maize from a South African perspective must be given the proper context. Notably wheat and maize are the two most widely consumed food products in South Africa.[442] These consumption patterns can be attributed to the large number of people living below the poverty line and the relatively cheap and nutrient rich nature of wheat and maize.[443] For this very reason, these anti-competitive practices in both the baking and milling industries, affected the consumer welfare of the poorest segments of the population.

The Commission was thus presented with a unique opportunity in the *Pioneer* settlement. As opposed to just simply imposing an administrative penalty, the Commission negotiated pricing reductions in both flour and bread products produced by Pioneer. It was hoped that the price reductions would undo some of the anti-competitive effects caused by price fixing in the relevant markets in a number of ways.[444] A reduction in price would firstly and most importantly, benefit consumers as they would now be paying less for a loaf bread.[445] This was a simple remedy that enabled the Commission to benefit consumers as a whole without having to engage in a lengthy and complicated investigation in an attempt to try and determine who was in fact impacted by the price-fixing and trying to

[442] See Ronquest-Ross, Vink, Sigge "Food Consumption changes in South Africa since 1994" (2015) *South African Journal of Science* 111 (hereinafter referred to as Ronquest *et al).* Maize and Wheat consumption in 2009 amounted to 104kg and 60.9kg per capita per year, far in excess of any other food product. It is also interesting to note that maize consumption has gradually been decreasing since 1994 while wheat consumption as gradually been on increase over the same period.
[443] See Ronquest *et al* at 114.
[444] See Bonakele & Mncube at 6.
[445] See Bonakele & Mncube at 8. This was a novel remedy that had not been used in the past both in South Africa and any other market. US authorities however pioneered the use of "discount vouchers" (See settlement reached between the Justice Department and Delta Airlines, Continental Airlines, Northwest Airlines, Transworld Airlines and Alaska Airlines in 1994 and the settlement in the Circa Pharmaceuticals class action) in terms of which customers who were prejudiced by higher costs as a consequence of collusion were provided with these discount vouchers when purchasing from the firms in question. The intention was to reimburse consumers for the higher prices they were charged during the collusive practices.

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compensate them individually. A further benefit that the price reduction would have was to disgorge some illicit profits that Pioneer had acquired through price fixing.[446] The final benefit that the price reduction had was to stimulate competition within the market. The Commission was careful to ensure that the price reduction was not arbitrary and that it would not have a predatory pricing effect on smaller competitors.[447] For this reason, Bonakele and Mncube indicate that the Commission accordingly chose to draw a comparison on the average profits realised during a base period, which would not correspond with the period subject to collusion. These average profits would be compared against the average profits realised during the period subject to collusion.[448] The price reductions realised through this process then would be coupled with minimum gross profit thresholds.

By reducing the price of bread and flour, the larger competitors in the markets would be forced to reduce their own prices in order to avoid being undercut by Pioneer. Small producers would also benefit from this price reduction due to the fact that the price of flour, the primary ingredient in bread making, would also be reduced, which would then ensure that such producers would still be able to maintain levels of profitability at the lower bread prices.[449] To further aid the competitive process, competitors were aware of the price reduction that Pioneer would be applying but the minimum profit thresholds were

[446] See Bonakele & Mncube at 12, the price reduction amounted to about a R160 million reduction profits.
[447] Predatory pricing refers to a situation where a dominant firm sells its goods or services below its marginal or average variable costs. See the matter of *Competition* Commission v *Media 24 Proprietary Limited* CR154Oct11/REM144Sep15 where the Tribunal found a breach of section 8(c) applying a cost-based standard based on average total cost. The Tribunal's decision was however based on the notion of "predatory intent". The CAC however rejected this notion on the basis that the wording of the Act did not support the requirement of "predatory intent". The CAC further held that the average total cost standard was too strict a standard as would only apply to firm recovering its variable costs but its fixed costs. The CAC was of the opinion that this could potentially encourage higher prices. Instead the CAC found the standard of average avoidable costs to be a more appropriate benchmark when assessing a s8(c) predation case. The average avoidable cost standard is better suited to determining whether a dominant firm is capable of excluding an equally efficient competitor. This is because pricing below average avoidable cost means that more profit would have been made by forgoing sales altogether by not producing the product. In other words, if these costs are not covered, an equally efficient competitor would need to operate at a loss to match the price. Such a situation would accordingly be *prima facie* instance of predatory pricing. See *Media 24 Proprietary Limited* v *Competition* Commission *of South Africa* 146/CAC/Sep16.
[448] See Bonakele & Mncube at 12.
12. This ultimately led to a price reduction of R350 per tonne for flour and a reduction of about 30 cents for selected 600 and 700g loaves of bread. See Bonakele & Mncube at 12.
[449] See Bonakele & Mncube at 13.

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not disclosed. This maintained a level of flexibility and uncertainty in the market that the Commission hoped would ensure and promote effective competition within the market.[450]

Pricing data obtained from Statistics South Africa shows a clear decrease in prices of both flour and wheat immediately following the implementation of the Pioneer Settlement.[451] It is also interesting to note that these decreases in price came amongst increasing global wheat prices in the midst of a global shortage as well as an increase in local production costs.[452] It is clear that the price reductions imposed on Pioneer created sufficient competition in the bread market given that its competitors were forced to lower their own prices and thereby keep the average wholesale price of bread depressed.[453] Another interesting development was that although the demand for brown bread remained relatively unchanged, demand for white bread increased, particularly with Pioneer's brand Sasko.[454] This resulted in Pioneer seeing a large increase in its volumes while its competitors, especially Tiger Brands, began to lose market share.[455]

It appears as though the price reduction remedy had the desired effect of increasing competition in the bread market which in turn had a direct benefit for consumers occasioned by the lower bread prices. As a remedy for redressing the effects of anti-competitive conduct, it appears evident that a price reduction commitment is an extremely effective remedy that has the added benefit of directly benefitting the victim of such conduct, namely the consumer, particularly in the case of the poor, without the need of having to engage in complex and lengthy civil litigation.

5.1.2. The Agro-Processing Competitiveness Fund Remedy

The Agro-Processing Competitiveness Fund ("the Fund") was established in November 2010 as part of the settlement concluded between Pioneer and the Commission. As

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[450] See Bonakele & Mncube at 13.
[451] See Statistics South Africa's: "Average Monthly Food Prices" dated July 2017. The document has not officially been published but has been made available for information purposes at http://www.sagis.org.za/food_stats%20sa.html (lasted accessed 20/08/17).
[452] South Africa is import dependent for wheat as local production is insufficient to meet local demand. During 2010, new import tariffs were introduced on the importation of wheat which increased the cost of wheat. See The International Trade Administration Commission of South Africa "Review of the Dollar-based domestic reference price and variable tariff formula for wheat" Report No. 538.
[453] See Bonakele & Mncube at 16, see more particularly figures 3 & 4 which tracks the prices of brown and white bread between June 2010 and June 2011.
[454] See Bonakele & Mncube at 18.
[455] See Bonakele & Mncube at 17.

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stated previously the Fund would be capitalised to the value of R250 million[456] which would be financed from the R500 million administrative fine paid by Pioneer as part of the settlement. In July 2012, the then Economic Development Department appointed the IDC as the administrator of the Fund to manage the Fund on its behalf.[457] The objective of the Fund was to increase competition, employment and development through the provision of funding to small and medium sized entities in the agro-processing and beverage sectors.[458]

The Fund was envisioned as a remedy to not only achieve the goal of increased competition, but also as a means of achieving various Government policy objectives in an industry identified as vitally important for job creation in a variety of policy documents.[459] The Fund sought to achieve these goals through the provision of loan finance and business support grants to qualifying firms.[460] In order to qualify for finance from the Fund, the firm in question would need to be in the agro-processing or beverage sector; be at the start-up or expansion phase; be sustainable from a financial, technical and environmental standpoint; not be in a dominant position within the market; and be unable to secure finance from ordinary financial institution or other third parties.[461]

The question remains whether the Fund is capable of and has been successful in achieving these goals. In the Commission's working paper entitled *The Impact of the Agro-Processing Competitiveness Fund in Facilitating Entry into selected Agro-*

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[456] The Fund's capital was placed into three separate channels namely; an investment channel capitalised to the tune of R231 million, a business support channel capitalised the value of R6.5 million and a research grants channel capitalised to the value of R12.5 million. See Mandiriza, Sithebe & Viljoen "The Impact of the Agro-Processing Competitiveness Fund in Facilitating Entry into selected Agro-Processing Sectors" The Competition Commission of South Africa, Working Paper CC2016/02 available at http://www.compcom.co.za/wp-content/uploads/2016/11/CC201602-Mandiriza-T-Sithebe-T-and-Viljoen-M-2016-The-impact-of-the-agro-processing-competitiveness-fund-in-facilitating-entry-into-selected-agro-processing-se.pdf (last accessed on 24/10/2019) (hereinafter referred to as Mandiriza, Sithebe & Viljoen) at 4.

[457] Mandiriza, Sithebe & Viljoen at 3.

[458] Mandiriza, Sithebe & Viljoen at 3.

[459] The Economic Development Department's policy document entitled *A New Growth Path Framework* identifies infrastructure development along the agricultural value chain as a vital requirement for employment growth. The Department of Trade and Industry's *Industrial Development Plan* calls for increased competition in the agro-processing sector due it being one of the largest manufacturing sectors from an employment perspective. These policy goals have also been incorporated into The National Planning Commission's *National Development Plan 2030 Our Future – make it work* (2014) which emphasises the barriers to entry faced by small to medium sized firms in these sectors and the development of which particular types of firms are necessary in order to achieve these policy objectives.

[460] These loans would range between R250 000 and R3 million and would often be interest free and payable over a period of up to 10 years. See Mandiriza, Sithebe & Viljoen at 4, fn 10.

[461]Mandiriza, Sithebe & Viljoen at 4.

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Processing Sectors, the Commission attempts to answer this question. The working paper states that between April 2011 and March 2016, the Fund approved funding to the value of R201 425 701 to a total of 34 firms.[462] Through co-funding from various other third party financiers as well as the IDC, the total value of funding approved to these firms increased to a value of R498 284 342.[463] Of these 34 firms, 10 were start-up firms (4 of which were in sectors previously cartelised by Pioneer) and the remaining 24 were existing firms to which funding was granted to expand their operations (8 of which were in sectors previously cartelised by Pioneer). The Commission estimated that the funding granted to these firms had the potential of creating about 2 401 jobs.[464]

The Commission goes further and also attempts to establish the potential impact that the Fund may have on the industry as a whole going forward. To assess this impact, the Commission relies on the social accounting matrix model[465] for 2011 which will aid in assessing the potential pass-through effects the fund may have. The Commission also uses employment multipliers to attempt to establish the potential effect that the Fund may have on employment too. The Commission estimates that the R201 425 701 of funding approved by the Fund has the potential of increasing output to value of R249.8 million and when analysing the total value of funding afforded to these firms, the potential increase in output would amount to R527.4 million. When applying the employment multipliers, the Commission estimates that each R1 million in investment would translate into nine jobs being created in the agricultural industry or six jobs being created in the downstream food industry.[466] This translates into a potential for 2 752 jobs to be created in the food sector, when applying the multiplier to the value of funding approved to the 34 firms.[467] These projections show that the Fund does actually have the potential to have positive effects on the industry as well as on employment.

[462] Mandiriza, Sithebe & Viljoen at 5, see more particularly Table 1.
[463] Mandiriza, Sithebe & Viljoen at 5.
[464] Mandiriza, Sithebe & Viljoen at 6, see more particularly Table 2.
[465] The social accounting matrix model ("SAM") is a model that represents flows of all economic transactions that take place within an economy. The SAM is a useful tool for providing a static picture of the economy for benchmarking purposes. See McDonald & Punt "General Equilibrium Modeling in South Africa: What he future holds" 2005 *Agrekom* 73.
[466] These employment multipliers were contained in the Department of Trade and Industry's *Industrial Policy Action Plan* (2013) which used the SAM model to determine which value-added industries would have the highest employment multipliers. Mandiriza, Sithebe & Viljoen at 11.
[467] Mandiriza, Sithebe & Viljoen at 10 – 12, also see Table 5 and Table 6.

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The settlement agreement and the establishment of the Fund have however proved to be contentious issues. The National Treasury was the first to object to the settlement agreement due to the fact that the original settlement called for Pioneer to pay an administrative fine in the amount of R250 million and a further amount of R250 million that was to be paid to the IDC to set up the Fund. Treasury's objections were premised on the fact that the settlement agreement breached section 59(4) of the Competition Act and section 213[468] of the Constitution, which required that administrative fines imposed in terms of the Act were to be paid directly into the National Revenue Fund. These objections ultimately lead Treasury to intervene in the hearing where the settlement agreement was intended to be incorporated into a consent order to be confirmed by the Tribunal.[469]

The purpose of the Fund itself is also a contentious issue. As stated previously, it was envisaged that the Fund would enable the Commission to achieve the policy goals of efficiency in the agro-processing sector and ensuring a greater participation of previously disadvantaged persons in the economy. It is clear that the Fund, through the provision of finance, will lower the barriers of entry into the agro-processing industry by providing new entrants with the necessary capital to enter the market in the first place or expand their existing businesses. What is interesting though is that the Commission acknowledges that the South African manufacturing sector, of which agro-processing is a sub-sector, has seen its global competitiveness steadily decline over the last decade.[470] This decline has been due to a variety factors including skills and infrastructure shortages, high labour costs and labour instability, unfavourable macroeconomic policies as well as a lack of sustained and integrated industrial policies.[471]

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[468] Section 213 of the Constitution provides for the establishment of the National Revenue Fund to which all monies received by the national government are to be paid and from which funds can only be withdrawn in terms of appropriation by an Act of Parliament.
[469] See Mandiriza, Sithebe & Viljoen at fn 8, also see Organisation for Economic Co-Operation & Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "Serial Offenders: Industries Prone to Endemic Collusion". These interventions ultimately lead to the settlement agreement being amended so that the entire penalty was paid into the National Revenue Fund and a budgetary allocation would be made from there to the Department of Economic Development for the establishment of the Fund.
[470] Manufacturing has seen its contribution to GDP decline from 21.4% in 2006 to 14.6% in 2010 and the sector's contribution to fixed domestic investment and export decreased from 28.5% in 2006 to 13.6% in 2010. See https://tradingeconomics.com/south-africa/gdp-from-manufacturing (lasted accessed on 20/08/17).
[471] Mandiriza, Sithebe & Viljoen at 9.

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A further structural issue that the industry currently faces is the industry's growing dependence on international imports as well as competition from imported products. Agriculture has seen its contribution towards GDP decline from around 4.6% in 1990 to 2.5% in 2010 and this decline has further been coupled with a sharp decline in field crops from about 1990.[472] These decreases in production have also necessitated an increase in imports with agricultural imports increasing roughly 344% from 1990 to 2010.[473]

The deregulation of the agricultural sector in the 1990's, not only opened the sector up to new entrants, but also removed many of the import controls that insulated the industry from competition of cheaper international imports.[474] In the context of the *Pioneer* settlement, the milling industries' primary input is wheat of which South Africa needs to import roughly half of its domestic needs.[475] A large portion of the wheat that South Africa imported came from the United States which did not set prices in the same manner as pre-1991 South Africa, but maintained subsidies and import control tariffs in their agricultural sector that were aimed at maintaining the global competitiveness of their agricultural products.[476] This import reliance makes firms in the agro-processing sector extremely vulnerable especially regarding those risks arising out of supply and currency fluctuations.[477]

The South African poultry industry, another industry that was subject to the *Pioneer* settlement agreement, is also under threat from cheap imports from the European Union, Brazil and the United States. In June 2016 following substantial pressure from the United States, South Africa scrapped its punitive import tariffs that existed on American chicken products for the previous 15 years.[478] These cheap imports have placed severe pressure

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[472] Liebenberg *South African Agricultural Production, Productivity and research Performance in the 20th Century* Department of Agricultural Economics, Extension and Rural Development, Faculty of Natural and Agricultural Sciences, University of Pretoria (February 2013) (hereinafter referred to as Liebenberg (2013)), see 16 table 2.1 and 20 panels a & b.
[473] Liebenberg (2013) at 21, see table 2.2.
[474] Liebenberg (2013) at 10.
[475] See Stanwix (2012) at 29.
[476] See Stanwix (2012) at 29 – 30.
[477] The Rand has seen significant fluctuations in the last few years from a low of about R6 to the Dollar in 2011 to highs of about R17 to the dollar in 2016. These fluctuations represent a significant increase in production costs for producers in the agro-processing industry particularly those dependent on imports. See https://www.resbank.co.za/research/rates/pages/selectedhistoricalexchangeandinterestrates.aspx (last accessed on 20/08/2017).
[478] The United States threatened to excluded South Africa from participation in the Africa Growth and Opportunity Act (Agoa) which provides duty free access to the American market for more than 4 600 sub-Saharan products the majority of which come from South Africa. This represented a potential death sentences to several firms within the South African manufacturing sector which would have had far-

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on the entire value chain of the poultry industry by virtue of the price pressures this over-supply of chicken is creating in the market. When these price pressures are coupled with the increased costs of production occasioned by the weakening Rand[479] and the drought of 2016 and the erratic rainfalls in subsequent years, the negative effects on the industry are only compounded.[480]

The actual effect that the Fund will have on the agro-processing industry remains unclear. The Commission's investigation into the Fund's effect was done in 2016 and was based solely on economic models focussing only on the potential effects that the investments in the 34 firms that were awarded funding may have on a value-added return and on employment. The Commission has not yet had the opportunity to assess the Fund's real effect on the sector and will not have the opportunity for some time still. This is because the Commission will need to provide the Fund with sufficient time for its investments to mature so that the positive effects thereof can be assessed and the actual benefit of the Fund on the industry can be determined and measured.

It is however submitted that the models employed by the Commission in themselves do not take into account the various other factors which influence the agro-processing and manufacturing sectors of the economy. It is also interesting to note that the Commission acknowledges that the sector is beset with many other structural issues which have been identified by both the previous Department of Trade and Industry and the Department of Economic Development[481] in their various policy documents and proposals.[482] However, no provision has been made for these factors in the models employed by the Commission to assess the Fund's potential effects on the sector. A further aspect that must be borne in mind is that the Fund is mainly focussed on assisting previously disadvantaged

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reaching consequences for the economy as a whole. See https://agoa.info/news/article/15265-strict-agoa-rules-put-african-policies-and-trade-on-the-line-columnist.html. (last accessed on 20/08/2017).

[479] The Rand weakened from an average of R10.88 to the Dollar in 2014 to an average of R15.81 in 2016. See https://businesstech.co.za/news/business/108555/how-far-the-rand-has-fallen-from-2000-to-2016/ (last accessed on 20/08/2017).

[480] See Hlomendlini "Drought Made 2016 a Tough Year for Farmers" Chief Economist at Agri-SA (30/12/2017) available at https://www.scribd.com/document/383864036/Drought-Made-2016-a-Tough-Year-for-Framers-2 (last accessed on 22/10/2019). The 2016 drought saw maize production drop by 28%. Maize is a key component of chicken feed.

[481] The Departments of Trade and Industry and Economic Development were consolidated in June 2019 into the Department of Trade, Industry and Competition.

[482] See previous discussions on The National Planning Commission's *National Development Plan 2030 Our Future – make it work* (2014), *A New Growth Path Framework,* Department of Trade and Industry's *Industrial Policy Action Plan* (2013).

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persons with entry or expansion into the agro-processing market.[483] Bonakele and Mncube argue that this element of the Fund has the potential of placing the various policy goals that the Commission seeks to achieve through the Fund at odds with one another. The potential exists for a firm that may present a real possibility to erode the market shares of the dominant firms within a particular market, being refused funding due to it not being owned or sufficiently controlled by previously disadvantaged persons.[484]

The IDC, through the Fund, will then be faced with weighing the competing interest of a more efficient and competitive market against Government's affirmative action policies. However, the maintenance of effective competition within the South African economy falls within the sole mandate of the Commission and not within the mandate given to the IDC. One can therefore only assume that when faced with a scenario of having to decide between two competing interests when awarding funding, the IDC, as a Government institution, will favour awarding funding to a firm which seeks to achieve the current administration's greater transformative objectives at the expense of achieving a more competitive market.

This calls into question why the Act intends for the Commission to be an institution tasked with balancing political goals with the maintenance and promotion of effective competition within the market, especially when these goals may be at cross-purposes with one another. It is submitted that the Commission is certainly not equipped nor empowered to influence industrial policy. A remedy such as that of the Fund places the ability of the Commission to balance pure competition goals with political goals in perspective.

Be that as it may, the agro-processing industry has greater problems than its current domination by Pioneer Foods, Tiger Brands, Premier Foods and Foodcorp. Both the *Industrial Policy Action Plan* and *National Development Plan*[485] identify the various infrastructure bottle necks that currently beset the greater manufacturing industry. The lack of a focussed industrial policy which seeks to adequately address these infrastructure deficiencies has been problematic for many years and as the *National*

[483] See previous discussions under paragraph 5.1.3.
[484] See Bonakele & Mncube at 6.
[485] The National Planning Commission's *National Development Plan 2030 Our Future – make it work* (2014), *A New Growth Path Framework,* Department of Trade and Industry's *Industrial Policy Action Plan* (2013).

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Development Plan has proven, national Government seems incapable or unwilling to implement what little policy there currently is.[486]

The severe skill shortages that beset many industries is another problem which the Fund does not address.[487] It seems inconceivable that a firm, no matter how much funding it receives, will be able to thrive in such a challenging market especially when deprived of the necessary skilled workforce. On top of this, the agro-processing industry receives no support and policy protection from Government which has exposed the industry to an increased level of competition from cheap international imports. This makes competing in an already challenging market even more difficult for the small to medium sized start-up firms identified by the Fund. The industry has also become more dependent on imports for the provision of raw materials due to declining agricultural activity in South Africa which has resulted in local production being insufficient to meet local demand. These firms are then placed at the mercy of currency fluctuations which, as the last few years have shown, have the potential of greatly increasing the costs of production.[488]

When taking these factors into account, it appears that Commission, when creating the idea of the Fund, was more concerned with breaking down the structural barriers in the agro-processing industry, more particularly the dominant firms' large market shares, at the expense of all other structural barriers that limit entry and expansion in the market. The *National Development Plan* in itself purports that the move towards large scale farming and vertically integrated firms has created substantial barriers to entry for smaller firms.[489]

Against the backdrop of the amendments to the Act as discussed in more detail in Chapter 7 it would appear as though Government and the Commission are more concerned with eroding established firms' market share without even evaluating the possible effect that such actions may have on competition as a whole and its subsequent effect on consumer welfare. The hope is merely that plurality will foster greater competition. These large firms however possess one distinct advantage over their smaller

[486] The National Development Plan was presented in 2012 but seven years later very few of its policies have been implemented.
[487] Daniels "Skills Shortages in South Africa" University of Cape Town, Development Policy Research Unit, Working Paper 07/121 (May 2007) at 17.
[488] See See Stanwix (2012) at 29 and Bonakele & Mncube at 11.
[489] *The National Development Plan* at 217.

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rivals. Through economies of scale[490], which will be discussed at length in Chapter 8 of this thesis, these firms are able to better hedge themselves against many of the structural challenges currently besetting the industry.[491] Only time will tell if the funding provided by the Fund will be sufficient for smaller firms to establish themselves within the market. The odds are however stacked against them. Until such time as the various other structural impediments that seek to limit entry and expansion into the market have been addressed, the writer has little optimism that the Fund will have any real and lasting effect on promoting effective competition in the agro-processing market and achieving its various other goals.

5.2. The Construction Industry Cartel and the Trisano Trust Remedy

When developing the Trisano Trust, it is apparent that Government followed the blueprint laid down by the Commission in the settlement concluded with Pioneer, especially with regards to the establishment of the Fund. Several of the mistakes[492] made by the Commission in negotiating the settlement directly with Pioneer were avoided in that the settlement agreement was now negotiated directly with the national Government, all payments would be paid directly to the National Revenue Fund, and the necessary funds would be appropriated to the Trust by way of an act of Parliament.[493] But there are interesting differences both in how the respective remedies were arrived at and, in the objectives of the remedies themselves.

When looking at the bread cartel, the effect that such anti-competitive conduct had had on consumers and the market as a whole, as well as it potential for further damage, was

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[490] Economies of scale refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm. See OECD Glossary of Statistical Terms available at https://stats.oecd.org/glossary/detail.asp?ID=3203 (last accessed on 25/04/2019).

[491] See Roberts "Barriers to entry and implications for competition policy" prepared for Competition Commission and Tribunal 2016 Conference. Available at http://www.compcom.co.za/wp-content/uploads/2016/07/BTE_CompComConference2016_Roberts_draftsent.pdf (last accessed on 25/04/2019) and B. Basu ""Economies of Scale and Imperfect Competition" (2003) *International Economics Finance and Trade* https://www.eolss.net/Sample-Chapters/C13/E1-23-01-03.pdf (last accessed on 24/10/2019) at 2 – 5.

[492] As discussed previously, National Treasury objected initially objected to the settlement agreement on the basis that the Commission exceeds to mandate and powers and due several illegalities in the manner in which payments would be made.

[493] See the Department of Economic Development's press briefing on the construction industry Settlement Agreement *Promoting construction-industry transformation through partnerships* 13 February 2017 available at http://www.economic.gov.za/communications/media/press-releases-2017 (last accessed 23/08/2017).

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quite clear. This cartel sought to raise the price of a staple food product consumed by the extremely large poor portion of the population. Engaging in conduct that sought to raise the price of bread solely in the pursuit of higher profits did nothing more than subject the poorest portions of the population to further unjustifiable economic hardships. Collusion in public procurement is a peculiar problem due to the fact that public money is at stake.[494]

As pointed out by the OECD, the Government's overall goal should be to ensure that it achieves the best value for money in its procurement practices to enable it to best use public funds.[495] The effect that collusion can have in the public procurement process occasioned through the loss of public funds as a result of a lack of a competitive process, can have an extremely detrimental effect on the greater population as a whole. This can particularly affect the poor, due to the Government having less funds available for the provision of basic services to the larger population.[496]

This highlights the present problem with the matter at hand. As was revealed through the Commission's investigation into the collusive tendering for the Soccer World Cup projects, the firms in question agreed to fix their profit margins for the projects at 17,5% of the project value. The assumption is that the cost of these projects would have been lower had the bids been subject to a more open competitive bidding environment. There are however another two problems with this assumption. Firstly, the bids were only open to grade 9 contractors on the Construction Industry Development Boards register[497] who

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[494] Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Economic Affairs Competition Committee, Global Forum on Competition "Policy Roundtable on Collusion and Corruption in Public Procurement" DAF/COMP/GF(2010)6 (available at http://www.fne.gob.cl/wp-content/uploads/2017/10/oecd_0003_2010.pdf) (last accessed on 15/0/2017) at 8.

[495] Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Economic Affairs Competition Committee, Global Forum on Competition "Policy Roundtable on Collusion and Corruption in Public Procurement" at 10.

[496] Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Economic Affairs Competition Committee, Global Forum on Competition "Policy Roundtable on Collusion and Corruption in Public Procurement" at 10, this however presupposes that government accounts are effectively management and does not take into account the effect corruption has on the public purse. This is a problem of particular importance in South Africa as will be discussed further in this thesis.

[497] The Construction Industry Development Board (CIDB) is a statutory body appointed by the Minister of Public Works and was established in terms of CIDB Act 38 of 2000. The CIDB was mandated to provide strategic leadership to construction industry stakeholders to stimulate growth, reform and improvement of the construction sector. The CIDB would establish a National Register of Contractors which would categorise contractors in a manner that facilitates public sector procurement and promotes contractor development. Grade 9 contractors would have to have a minimum annual turnover in the previous two years of R240 million, the largest contract awarded to it in the last two years could not be less than R80 million and would need to have employable capital of not less than R60 million. Grade 9 contractors accordingly have no limit on the value of a contract that can be awarded to them while grade 8 contractors are limited to contracts not exceeding R100 million.

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represent less than 1% of all contractors registered on the register with even fewer having the necessary experience to carry out such large-scale projects. Secondly, only the three largest projects, being the Soccer City, Moses Mabida and Green Point Stadiums, were awarded to the "nominated" bidders with all the remaining projects being awarded to other bidders and in some circumstances, the cover bidders.[498]

Taking these factors into account, it would be difficult to prove to what extent prices were actually inflated and it would be even more troublesome trying to learn the rationale for awarding some of the contracts to cover bidders whose bids were purposely designed to be unattractive in order to favour the firm who had been nominated by the cartel to receive the contract. This also reinforces the fact that each one of the contracts would not be awarded to the cheapest bidder in respect of each of the specific contracts. There were a variety of factors that were taken into account when awarding the contracts which would have included a geographical spread of each firm's available capacity. It would be illogical to assume, had the process been perfectly competitive, and had one firm decided to undercut all of its competitors on each contract, that all the contracts would have been awarded to it solely on the basis of price.

The argument can also not be made that the construction firms have made exorbitant profits at the public's expense. Since 2009, the construction industry has seen its net profit decrease from 5.1% of annual turnover to 0.8% in 2015 with the industries contribution to GDP also decreasing from 4% in 2009 to 3.8% in 2014.[499]

The Commission's investigation into the Soccer World Cup tenders and the revelations that surfaced from the Commission's Invitation, lead to very little civil action being taken against the firms in question. It would appear that only two civil actions have materialised against any construction firms where the affected parties have attempted to reclaim any loss suffered from the Respondent firms. The first civil action was instituted by Sanral[500]

[498] The Mbombela Stadium was awarded to the joint venture of Basil Read and Boygues despite it not being the lowest bid and the Peter Mokaba stadium was awarded to the WHBO and Paul joint venture even though it was not the lowest bidder. See the Commission's Initial Complaint at pars 40.4; 40.5; 40.8 & 40.9.
[499] See Statistics South Africa "Construction Industry 2014" Report No. 50-02-01 (2014) available at http://www.statssa.gov.za/publications/Report-50-02-01/Report-50-02-012014.pdf (last accessed on 20/08/2017 at 15h00) and also see PWC "SA Construction" (4th edition) available at https://www.pwc.co.za/en/publications/sa-construction.html (last accessed on 20/08/2017) which highlight the trends in the South African Construction Industry November 2016.
[500] It is interesting to note that Sanral made third party submission to the Tribunal when the various settlement agreements concluded in terms of the Commission's Invitation and specifically made it known

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against Murray & Roberts, Basil Read, Concor, WHBO, Group Five, Stefanutti Stocks and Raubex to value of between R600 and R750 million related to the Gauteng Freeway Improvement Project and the Second being instituted by the City of Cape Town Metropolitan Municipality against WHBO for an amount of R429.4 million related to the construction of the Green Point stadium.[501] It would however appear that the Sanral action and the threats of further action were sufficient to coerce the relevant constructions firms to the negotiating table which ultimately lead to conclusion of the VRP.[502]

Both the VRP and the Fund share the common goal of attempting to provide a vehicle aimed at achieving the transformative goals of the present Government in two different industries. The two remedies however differ quite substantially from one another in a few important respects: firstly, the Fund was established through negotiations between Pioneer and the Commission arising out of several complaints initiated by the Commission against Pioneer.[503] The VRP, however, was concluded through negotiations between the national Government, more particularly the Presidential Infrastructure Planning Committee, and the construction firms.[504] The VRP negotiations arose out of the potential threat of various civil cases being instituted against these firms as a consequence of the findings of the Commission subsequent to its Invitation.

The second difference flows directly from the first in that the Fund sought to stimulate competition within the relevant sector while the VRP seeks to achieve an industrial policy objective. The Fund sought to achieve a passive transformative objective through enabling and supporting the formation and expansions of SME's in the agro-processing sector.[505] The Fund's primary goal was to stimulate competition in the industry by lowering the barriers of entry and expansion for these smaller firms and thereby erode

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that it reserved its rights to institute legal action against the firms in question. See Sanral's letter addressed to the Chairman of the Tribunal dated the 10th of July 2013 available at http://www.comptrib.co.za/assets/Uploads/Collusive-Tendering/SANRAL.pdf (last accessed on 21/08/2017).

[501] See http://www.sacommercialpropnews.co.za/south-africa-provincial-news/western-cape/8452-cape-town-suing-construction-companies-over-world-cup-losses.html (last accessed 22/10/2019).

[502] It is interesting to note that the City of Cape Town was not party to the VRP and the scope of the VRP did not include the City's claim against WHBO.

[503] See previous discussions at paragraph 4.1.

[504] See Basil Read Holdings Limited "Announcement Regarding the Settlement Agreement Concluded with the South Africa Government" notice to its shareholders dated the 11th of October 2016 available at http://www.basilread.co.za/downloads/sens/2016/11Oct/2016-10-11_BSR%20SENS%20VRP.pdf (last accessed on 20/08/2017).

[505] See previous discussion at paragraph 5.1.3.

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the market shares of the established dominant firms existing in the industry.[506] The VRP on the other hand solely has a transformative objective. The VRP requires that signatory firms either support emerging contractors through skill development and by procuring their services or, by disposing of at least 40% of the South African civil engineering and general construction businesses to enterprises that are more than 51% black owned.[507]

The Trisano Trust's mandate, the second leg of the VRP, has also been limited to the implementation of initiatives and supporting emerging contracts within the construction industry in line with the national Government's transformation objectives.[508] The VRP makes no mention of promoting or facilitating any form of competition within the construction industry and is merely concerned with a transfer of ownership of the industry from predominantly white firms to emerging black owned firms. The only element of the VRP that seeks to deal with aspects of competition are the integrity commitments made therein that the signatory firms will refrain from engaging in collusive and corrupt practices in their dealings with the state, their competitors and their customers, and through their undertaking to assist the state in exposing corruption in public procurement.[509]

It is apparent that the promotion of effective competition within the construction industry was of no concern to Government when concluding the VRP. Instead, it appears that Government was quick to seize the opportunity to use competition policy and law as a tool to achieve some the objectives set out it in its broader industrial policy aspirations. The final difference is that the settlement agreement in terms of which the Fund was created had a largely restorative nature particularly through the price reduction and capital expenditure commitments imposed on Pioneer.[510]

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[506] *Ibid.*
[507] Murray & Roberts has since sold 100% of its civil engineering and construction businesses to a black-owned consortium led by Southern Palace Group, Aveng has sold 51% stake to Grinaker-LTA to a black-owned consortium while WHBO, Stefanutti Stocks and Raubex have all entered into agreements with various black-owned contractors. Only Group 5 and Basil Read are yet to make an announcement on how they intend to comply with this part of the VRP. See https://www.iol.co.za/business-report/companies/vrp-agreement-has-been-thrown-into-doubt-13303218 (last accessed on 25/04/2019).
[508] See the Department of Trade and Industry "Strategic Plan 2014 – 2019" available at https://www.thedti.gov.za/parliament/StratPlans_APPs/dti_strat_plan.pdf (last accessed on 12/10/2018).
[509] See The Department of Economic Development's press briefing on construction industry Settlement Agreement *Promoting construction-industry transformation through partnerships* (13 February 2017) available at https://www.safcec.org.za/news/331076/Government-releases-press-statement-on-industry-settlement-agreement.htm (last accessed on 12/10/2018).
[510] See previous discussions at paragraph 5.1.1.

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In contrast, the VRP seeks to achieve a Government agenda at the expense of undoing the effects caused by the collusion of the firms in question. It is for this very reason that the City of Cape Town, being a Democratic Alliance (the official political opposition to the ANC) run municipality, objected to the VRP and more particularly the fact that it settled any existing or potential claims that the various Government bodies and institutions would have against the firms in question as a consequence of the higher prices they were forced to pay.[511]

The VRP appears to be nothing more than an opportunistic attempt, facilitated under the auspices of competition, to achieve transformative goals of the current administration that it has failed at achieving through the relevant policy instruments enacted specifically for those purposes, more specifically BEE.

5.3. The VRP, a sign of things to come in the Banking Sector?

From the outset, it must again be borne in mind that the Commission's complaint against the respondent banks has not yet been finally adjudicated upon which leaves little option other than to speculate on what the potential outcome of the complaint may be. There do however appear to be several major differences between the banking cartel and the cartels that existed in the bread and construction industries. The bread cartel affected the population as a whole given the fact that bread and maize were staple foods whose consumption far exceeded any other food products.[512] The effects of having to pay higher than necessary prices for these products had an even greater effect on those living below the poverty line as they would be the most vulnerable to price fluctuations and would be severely prejudiced as a consequence of having to pay these higher prices.

The construction industry cartel in particular had the effect of raising the prices that Government would be required to pay in the public procurement of construction and civil engineering services.[513] The 2010 stadia projects would have been paid for from public funds, the same funds from which the Government would be required to fund all its various other social responsibilities such as housing, education and healthcare to name but a few. The effect that follows is clear: Government will simply have less money to

[511] See the news article available at https://www.news24.com/SouthAfrica/News/court-rules-in-cape-towns-favour-in-stadium-collusion-case-20170402 (last accessed on 23/08/2017).
[512] See previous discussions under paragraph 4.1.
[513] See previous discussions under paragraph 4.2

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fund the rest of its responsibilities because it has been forced to pay unnecessarily excessive prices in its public procurement processes. This again affects the population as a whole but most of all, the poorest of the poor, who are the most dependent on the provision of Government services.

In the case of the banking cartel, the effects appear to be a lot less clear. The Commission alleges that traders from the respondent banks fixed the prices of various currency trades.[514] These fixes would be dependent on whether the firms in question would be purchasing or selling the relevant currency pairs. Depending on the nature of the trade in question, the changes in currency occasioned by the alleged price fixing would be of a very low monetary value and it can only be assumed that these changes would be small, most likely in the region of a few cents per transaction.[515]

It therefore becomes difficult to determine any harm to consumers generally that would be associated with such alleged price fixing. Ordinary consumers would not be trading on the relevant trading platforms that the respondent banks were using nor would they be trading in the same volumes as the respondent banks. Furthermore, it becomes difficult to assess how the alleged conduct may have affected the population at large. As stated above, unless evidence to the contrary is later provided, the variations to the currency would in all likelihood be extremely small and affect the currency for a relatively short period of time. The value of the currency is however affected by a variety of factors[516] and an under-valuation of the currency in an import dependent nation such as ours can often result in steep increases in prices for consumers.[517]

It is illogical to assume that the alleged conduct has had a sufficient effect on the value of the Rand to the point where it may affect consumers due to the probable minor and

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[514] See previous discussions under paragraph 4.3.
[515] Traders will usually be dealing in low margin high volume trades where minor changes in the prices that currency pairs are bought or sold at will have a greater effect on the client's bottom line.
[516] The value of a currency is determined by the demand for such currency. Demand will be influenced by six risk factors namely; differentials in inflation, differentials in interest rates, a nation's current-account deficit, a nation's level of public debt, the terms of trade and a nation's political stability and economic performance. See P. Clark and R. MacDonald1998 "Exchange rates and economic fundamentals: a methodological comparison of BEERs and FEERs". IMF Working Paper No. 67, Washington.
[517] This is particular true for commodities such oil that are priced in USD and where we import almost all of our domestic needs. See D. Fowkes, T. Radebe & S. Nomdebevana "Crowding out: diagnosing South Africa's stubborn current account deficit" 2018 available at https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8886/05Crowding%20out%20%E2%80%93%20diagnosing%20South%20Africa%E2%80%99s%20stubborn%20current%20account%20deficit%20%E2%80%93%20January%202018.pdf (last accessed on 25/04/2019) at 28 – 32.

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momentary nature of the currency fluctuations. The Rand has also been under severe pressure for several years mainly due to political instability, weak economic performance and increasing public debt.[518] However, the greatest single effects on the Rand over the last two year have been as a direct result of the previous President's removal of the country's previous two finance ministers and the subsequent downgrades to South Africa's sovereign credit rating which followed such removals.[519] These executive actions have had a far greater effect on the value of the Rand than the alleged collusive conduct could ever have had. It will be interesting to see how the Commission will prove the effect that the alleged conduct has had on the value of the Rand and on the population, as a whole.

The second major difference with the alleged conduct is in the nature of the conduct itself. In both the bread and construction industry cartels, the various decisions and agreements were entered into at a senior management level while the Commission alleges that the agreements in the banking cartel were entered into between various traders of the bank.[520] This too will pose a difficulty to the Commission in proving that an agreement actually existed between the banks as an entity and that the alleged conduct was not the actions of a few a "rogue" traders at the various banks seeking to benefit themselves. The settlement in the Standard and Chartered matter certainly seems to agree with this notion.[521]

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[518] The recent infighting within the ANC coupled together with declining GDP growth (down from 3.1% in 2014 to negative growth in 2016) and increasing public debt (41% of GDP in 2012 to 51.7% of GDP in 2016) have placed severe downward pressure on the value of the Rand. See R. Tayob "Is the Rand Overvalued – and would weadmit it if it was? Available at http://nedgroupinvestments.co.za/NewsInsights/DownloadPdf?files=0dc94298-cd1f-49d4-b2be-28fbfa7b880b (last accessed on 25/04/2019) at 2 – 3.

[519] The removal of Minister Nhlanhla Nene saw the Rand lose almost 3% of its value in matter of a few days. The subsequent removal of Minister Pravin Gordhan and its ensuing downgrade of South Africa's Sovereign Debt rating saw the currency again lose over 2% of its value. See R. Tayob "Is the Rand Overvalued – and would we admit it if it was? Available at http://nedgroupinvestments.co.za/NewsInsights/DownloadPdf?files=0dc94298-cd1f-49d4-b2be-28fbfa7b880b (last accessed on 25/04/2019) at 2.

[520] In the bread cartel case, the Commission relied on several witness statements from various senior managers of Premier Foods from both their Western Cape and National operations. In the construction industry cartel, the meetings at which the various stadium projects were allocated were attended by the various CEO's of the respondent firms or the managing directors of their Civil and Building Divisions. In the case of the alleged banking cartel, the Commission relies on the fact that the various respondent banks were represented by certain individual traders. The Commission's complainant provides no detail on what position these individuals hold at the respondent banks but it does not appear as though they are senior managers that can be regarded as being in strategic control of the respondent banks business operations.

[521] See the Consent Order granted by the Tribunal on the 26th of April 2017 under case number CR212Feb2017.

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This then poses the question of whether the alleged conduct can even be regarded as a contravention of section 4 of the Act, or even as a contravention of the Act itself. The conduct in question appears more akin to market manipulation which is prohibited in terms of section 80 of the Financial Markets Act 19 of 2012. Section 80 states that

"(1) No person –

(a) May either for such person's own account or on behalf of another person, knowingly directly or indirectly use or participate in any practice which has created or is likely to have the effect of creating –

(i) a false or deceptive appearance of the demand for, supply of, or trading activity in connection with; or

(ii) an artificial price for that security;"

The purpose of the Financial Markets Act is to ensure that South African financial markets are fair, efficient and transparent and promote the interests of the various market participants in such markets.[522] It must however be pointed out that the Financial Markets Act relates to the trading of "securities" as defined in section 1 of the Act. The Financial Markets Act[523] further provides its own sanctions against individuals who have contravened the Act and more specifically, section 80 of the Act.[524] It is therefore apparent, specifically in view of section 80 of the Financial Markets Act, that the conduct

[522] See section 2 of the Financial Markets Act.

[523] The explanatory note of the Act states it has been enacted "to provide for the regulation of financial markets; to license and regulate exchanges, central securities depositories, clearing houses and trade repositories; to regulate and control securities trading, clearing and settlement, and the custody and administration of securities; to prohibit insider trading, and other market abuses; to provide for the approval of nominees; to provide for codes of conduct; to replace the Securities Services Act, 2004, as amended by the Financial Services Laws General Amendment Act, 2008, so as to align this Act with international standards; and to provide for matters connected therewith." Section 2 states that the "Act aims to:
(a) Ensure that the South African financial markets are fair, efficient and transparent;
(b) Increase confidence in the South African financial markets by –
  (i) Requiring that securities services be provided in a fair, efficient and transparent manner; and
  (ii) Contributing to the maintenance of a stable financial market environment;
(c) Promote the protection of regulated persons, clients and investors;
(d) Reduce systemic risk; and
Promote the international and domestic competitiveness of the South African financial markets and of securities services in the Republic."

[524] In terms of section 82 of the FMA, a person found to have breached section 80 will liable civilly for the profit derived through such unlawful activity together with an administrative penalty. In addition thereto, section 87 provides a claimant with any other remedy provided for in terms of the common law provided that such liability is not covered by section 82.

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in question appears to fall within the scope of the newly established Financial Sector Conduct Authority's[525] mandate and not within the mandate of the Commission or within the scope of application of the Competition Act. The nature of the trades in question may however require an amendment to the Financial Markets Act to better place them within the jurisdiction of FSCA.

In light of the purpose and objectives of the Financial Markets Act, one can only wonder why the Competition Act was chosen to prosecute the alleged collusive conduct. One possible explanation could be that the Government may attempt to use the Commission's complaint to achieve its own policy goals through possible settlement agreements in the style of the blueprint laid down by the VRP. Prior to concluding the VRP, the then Department of Trade and Industry proposed a document entitled the *Construction Sector Broad-Based Black Economic Empowerment Charter*[526] which would require that the various role players in the construction industry cooperate with one another in order to achieve at least 30% black ownership of the construction industry and achieve at least 40% black representation on the boards of construction companies by 2013. These proposals were eventually included the DTI's *Codes of Good Practice on Broad Based Black Economic Empowerment: Framework for Measuring Broad-Based Black Economic Empowerment in the Construction Sector*[527] which has since required black ownership of 51% for purposes of BEE.[528]

While this goal has remained elusive within the larger construction groups, the Commission's prosecution of the firms involved in the construction industry cartel provided the Government with a unique opportunity to finally achieve some of these goals through the VRP. One need only look at the *ANC's Discussion Document on Economic Transformation*[529] to potentially get a glimpse at the Government's hidden hand with the Commission's investigation into the respondent banks. The Discussion Document makes

[525] The Financial Sector Conduct Authority (FSCA) replaced the Financial Services Board (FSB) on the 1st of April 2018 in terms of the Financial Sector Regulation Act 9 of 2017 which introduced a "Twin Peaks" model of financial regulation in South Africa.
[526] Version 6 dated the 26th of January 2006 available at https://static.l2b.co.za/Forms/Broad_Based_Black_Economic_Empowerment_Charter.pdf (last accessed on 23/10/2019).
[527] GN 41287 of 1 December 2017.
[528] Department of Trade and Industry "Codes of Good Practice on Broad Based Black Economic Empowerment: Framework for Measuring Broad-Based Black Economic Empowerment in the Construction Sector" GN 41287 of 1 December 2017 at 8 – 10.
[529] As discussed in chapter 2 at paragraph 5.

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no secret of the fact that the Government currently has plans to establish a state-owned bank.[530] The purpose behind this new state owned bank would be to break down the existing monopolies that exist within the banking sector as well as opening up credit facilities to the historically disadvantaged portions of the economy.[531] The calls for the establishment of a new state owned bank appear to have gained traction within certain political circles.[532] The Economic Freedom Fighters have since sought to introduce an Amendment Bill through which the Banks Act can be amended providing the legal framework for the establishment of a state-owned bank and which amendments have subsequently been accepted by the National Assembly.[533]

It is submitted that the Commission's complaint against the respondent banks may provide the Government with the perfect opportunity through which to establish a state-owned bank. Both the establishment of the Fund, through the Pioneer settlement, as well as the Trisano Trust, through the VRP, were funded directly from the administrative penalties imposed against the firms in question. Given the fact that these administrative

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[530] See ANC Discussion Document on Economic Transformation – ANC 5th National Policy Conference, 30th June – 5th July 2017 at 5 & 11.

[531] See Cull, Peria & Venter "Bank Ownership: Trends and Implications" *IMF Working Paper* WP/17/60, which makes the argument that state ownership of banks breeds operational inefficiencies which limit these banks competitiveness and that state ownership of banks appears to be positively associated with the likelihood of banking crises occurring. Further on the issue of access to credit, which usually forms the basis on which state-owned banks are formed and which is certainly the case made by the South African government, state ownership appears to compound the problem barriers to entry and access to credit. These problems are also compounded by the fact that state-owned banks can be used for furtherance of state agenda and politically affiliated individuals and firms. See Cull, Peria & Venter at 14 – 15, 21 – 22, & 26 – 27.

[532] During the ANC's National Policy Conference held on the 30th of June to the 5th of July 2017, ANC treasurer-general Zweli Mkhize confirmed that there were growing calls within the ANC for the establishment of black-owned bank with the aim of supporting small businesses. On the 5th of May 2017 Kwazulu-Natal Economic Development MEC Sihle Zikalala informed members of the Kwazulu-Natal Provincial Legislature that the province would have a state-owned bank by the end of 2017.

[533] See the Banks Amendment Draft Bill published under GG 41595 of 25 April 2018. The purpose of the amendment bill is to provide for the establishment of a state-owned company that:

a) Will be able to register and conduct the business of a bank in terms of the Bank Act.
b) Will be able to register with the Commissioner, appointed in terms of section 189 of the Companies Act, a memorandum of incorporation of a state-owned company formed for the purposes of conducting the business of a bank.
c) Will be able to exercise control over a bank.
d) Will be eligible to apply for registration as a controlling company.
e) Registered as a bank or as a controlling company to be able to continue to be a company in terms of the Companies Act, and the provisions of that Act to, subject to the provisions of section 51(2)(i) of the Banks Act, continue to apply to such company to the extent to which they are not inconsistent with any provision of the Banks Act, provided that the provisions of the Companies Act governing the conversation of state-owned companies into other forms of companies shall not apply to any such company.

The Financial Matters Amendment Bill, Bill B1B 2019 has since been adopted by the National Assembly on the 13th of March 2019.

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penalties are calculated as a portion of a firm's turnover in the Republic and its exports from the Republic in the firm's preceding financial year to a maximum of 10%[534], the extremely high turnover of banks may result in record high administrative fines being imposed for the alleged collusive conduct.[535]

The possibility exists that another settlement agreement, learning from both the Pioneer settlement and VRP, could be concluded between Government and the respondent banks in terms of which these penalties could be allocated for the formation and capitalization of a state-owned bank. Whether or not such an eventuality will arise awaits to be seen but, if the history of cartel investigation is anything to go by, it remains a distinct possibility that the Act may again be used as a means of achieving a Government policy and not effective competition.

6. Conclusion

There is little doubt about, and opposition to, the notion that collusive conduct should be avoided at all costs. Collusion between competitors certainly presents the most egregious form of anti-competitive conduct possessing the greatest potential to have severely negative consequences for the market, especially for the most vulnerable sections of the population. The Commission has proved to be alive to the dangers that collusion poses and has been aggressive in the pursuit of firms accused of such conduct.

Both the bread and construction industry cartels had the effect of enriching large corporates at the ultimate expense of the poorest segments of the population. In trying to redress the damage caused by these cartels, the Commission can only be lauded for its creativity in the imposition of the price reduction commitment against Pioneer. Such a remedy not only disgorges some of those illicit profits obtained through collusion, but also returns some of that value back to consumers.

The Fund however, and its stated purposes, leaves much to be desired. The Fund appears to be nothing short of an attempt to use the Competition Act as tool for the achievement of other industrial policy goals that should not ordinarily find application in

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[534] As provided in terms of sections 49, 58 and 59 of the Act, read together with the Commission's "Guidelines for the Determination of Administrative Penalties for Prohibited Practices" (November 2014) developed in accordance with section 79(1) of the Act.

[535] In 2014, Absa Bank posted turnover of R63.1 billion, Standard Bank R84.2 billion, FNB R37.6 billion and Nedbank R23 billion.

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competition regulation. Whether the Fund will even achieve its intended purposes remains to be seen.

Much too, can be said about the VRP and Trisano Trust. While these remedies were negotiated between the cartel firms in the construction industry and national Government, this was done merely to avoid making the same mistakes as in the bread cartel where the Commission was found to have exceeded its mandate in negotiating the establishment of the Fund. The true purpose behind the VRP appears to be more sinister. It is clearly a tool aimed squarely at achieving Government's transformative objectives in the construction industry that it has failed to achieve through its other policy instruments.[536]

The foundation on which the VRP was founded is also tainted. The Commission's Invitation requiring the cartel firms to disclose their collusive conduct on a "with prejudice" basis exposed these firms to risk of civil litigation. Proof of this is evident from the subsequent action initiated by Sanral. But it is submitted that this should be examined more closely. Notably Sanral is a state-owned enterprise ultimately conducting its business under the supervision of the executive branch of Government.[537]

Perhaps one should not rule out the possibility of the Commission's Invitation being part of a well thought out plan in terms of which Government could coerce construction companies into agreeing to the terms of the VRP and thereby furthering its own transformative agenda for that particular industry. Perhaps this may be too cynical a view but the terms of the VRP certainly seem to support it. The VRP does little to stimulate competition in the construction industry while essentially gifting certain black-owned construction firms a larger stake in the market.

The Commission's investigation into collusion by the banks should also be viewed with circumspection as it does not appear to have the objective of the enhancement of

[536] See Department of Trade and Industry "Codes of Good Practice on Broad Based Black Economic Empowerment: Framework for Measuring Broad-Based Black Economic Empowerment in the Construction Sector" GN 41287 of 1 December 2017. Black ownership has lagged behind the 25% black ownership target with black ownership currently accounting for between 15 and 17% of the industry. Also see Construction Industry Development Board *Construction Monitor* 2017 available at http://www.cidb.org.za/publications/Documents/Construction%20Monitor%20-%20January%202017.pdf (last accessed on 23/10/2019).

[537] The South African National Roads Agency SOC Ltd is a parastatal responsible for the management, maintenance and development of South Africa's national road network and falls under the authority of the Department of Transport.

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competition in the industry at its core. Government has made no secret of its desire to establish a state-owned bank aimed at promoting its transformation agenda. Following Government's success with the VRP, it is quite likely possible that competition machinery is being manipulated for the furtherance of a state agenda. This inference can certainly be drawn given Government's larger objectives for the banking sector. What comes of the Commission's investigation into the alleged collusion by the banks remains to be seen. The point however remains that should the banks be found to have contravened the Competition Act, remedial action should be aimed at achieving the competition objectives of the Act and not as a means of achieving other state goals.

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CHAPTER 5 – ABUSE OF DOMINANCE

1. Introduction

Abuse of their dominance by dominant firms has long been one of the primary concerns of competition regulators worldwide. Munayi points out that regulators have traditionally adopted hostile attitudes towards these dominant firms on the assumption that because of these firms' dominant positions within their markets, there is a greater likelihood that they will engage in some form of anti-competitive conduct with the aim of abusing such dominant position.[538]

Over the years, the manner in which various jurisdictions define, measure and establish the concept of "dominance" has differed substantially - from the mainly conduct-based tests of the EU to the effects-based tests of the US. However, in the EU, which has largely served as the original template for the abuse of dominance provisions contained in the South African Competition Act, there has been a shift in thinking. Much like in the US, a formalistic approach to establishing dominance has fallen out of favour in the EU also, giving way to a more effects-based approach which requires that the conduct in question actually have an anti-competitive effect in order to support a finding of an abuse.[539] In the same way, the concept of "dominance" has also evolved to merely mean the possession of substantial market power.[540]

As will be discussed in this chapter, South Africa has adopted an extremely rigid approach to establishing dominance and has adopted a largely prohibitive approach to certain types of conduct by dominant firms that it earmarks as abusive conduct. In this Chapter the manner in which the Competition Act establishes the concept of "dominance" and defines the concept of "market power" will be compared to those adopted and developed in the US and EU. Various decisions of the Tribunal and CAC will then also be reviewed against the backdrop of this comparative context. The aim is to determine if the political goals

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[538] Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* LLD Thesis, University of South Africa (2016) at 3. Also see Smit (2005) at 8 and Bradley "On the Origins of the Sherman Act"(1990) *Cato Journal* 737-42 at 737-8;

[539] See Theron "The effects-based approach to abuse of dominance" Competition Commission of South Africa available at http://www.compcom.co.za/wp-content/uploads/2014/09/CompCom-conf-2009-Nicola-Theron-PDF.pdf (last accessed on 23/10/2019).

[540] DG Competition Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses (December 2005), available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (last accessed on 29/04/2019) at par 23.

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contained in the Competition Act have influenced the formulation of the abuse of dominance provisions in the Act. Additionally, an attempt will also be made to determine if these goals and the formulation of these provisions themselves, have had any influence on the effective regulation of such abusive conduct by dominant firms within the South African market.

The manner in which dominance has been evaluated and dealt with in the US will be examined first given the fact that US antitrust laws have served as the basis for the formulation of various competition laws globally. The EU will be evaluated secondly due to the fact that its abuse of dominance laws have evolved from the principles laid down in the US but for the regulation of a market vastly different from that of the US. Lastly, South Africa will be evaluated with the aim of establishing how the rules established in the US and the EU have influenced the formulation of the test for dominance and the abuse of dominance provisions contained in the Competition Act.

2. Understanding the Terms "Market Power" and "Dominance"

The way "market power" is defined in a specific jurisdiction will largely depend on the manner in which competition law is regulated in that particular market. Accordingly, Monti indicates that market power can be defined in four different ways:[541] The first draws on economic principles related to a firm's ability to raise prices. When looking at market power from this perspective,[542] a firm will possess market power when it has the ability to raise prices above those of its competitors with little loss of customers and thereby increasing its profits.[543] In terms of the second method of defining market power, a firm will be said to have market power if it can be shown that the firm possesses "commercial power".[544] Commercial power is simply the power of one firm to act in a manner that may harm the interests of all other market participants and not just those of its competitors.[545] The third method of defining market power is to define it as the power of a firm to exclude

[541] Monti *EC Competition Law* (2008) at 125.
[542] Monti, *EC Competition Law* (2008) at 125.
[543] See *United States v Oracle Corporation* 331 F Sup 2d 1098 (2004), at 1114, where the court held *"it is the reduction in output and the elevation of price that has been the historic concern of antitrust."*
[544] Monti, *EC Competition Law* (2008) at 125 - 126.
[545] Monti "The Concept of Dominance" *European Competition Journal* (2006) 31 (hereinafter referred to as Monti "The Concept of Dominance), at 39, also see Monti, *EC Competition Law* (2008) at 125 – 126 where commercial power is equated with contractual concepts such as economic duress.

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its competitors and gain a competitive advantage.[546] The final method of defining market power suggests market power as a jurisdictional issue which simply implies that the abuse of dominance provisions of a particular jurisdiction will not apply below a monetary threshold determined by that jurisdiction's policy makers.[547]

Drawing from the above, the simplest and most widely accepted definition for market power is that it refers to the power of a firm to profitably raise prices above the competitive level for a sustained period of time.[548] Simply put, this means a firm would have the power to raise the price of its product above the competitive price determined by the ordinary market forces of supply and demand and would still be able to make a profit due to the fact that any loss of customers will not represent a significant enough loss in demand and any loss in sales revenue will be offset by the higher price charged. Economists consequently view a firm as having market power if such firm has the ability to set prices above marginal cost.[549] Marginal cost is the change in the total cost that arises when the quantity of the product is incremented by one additional unit. In general terms, marginal cost can thus be said to be the cost of producing one more unit of a particular product.[550] This economic definition of market power is important to bear in mind in establishing dominance given the significant intersection that exists between law and economics in dealing with competition matters.[551]

2.1. Defining Market Power and Dominance in the United States

In order to fully understand the concept of market power, especially from an American perspective, it is important to bear in mind, as pointed out in Chapter 2, that economic analysis stemming from the Chicago and Post-Chicago theories has played a significant role in the application and development of antitrust laws in US markets. The anti-competitive effects of a firm abusing its dominant position or market power are governed

[546] See Monti, *EC Competition Law* (2008) at 126. Here the purpose of competition policy is to penalize the conduct of firms which harm their competitors.
[547] Monti "The Concept of Dominance" (2006) at 31.
[548] See Gellhorn & Kovacic *Antitrust Law and Economics in a Nutshell* (1994) at 94.
[549] Posner & Landes "Market Powerin Antitrust Cases" (1994) *The Harvard Law Review* 937 at 939.
[550] Under normal market conditions, an increase in price will lead to a reduction in the quantity demanded. However, where the reduction in the quantity sold does not outweigh the increase in a firm's profits that firm will be deemed to have market power. See Posner & Landes "Market Powerin Antitrust Cases" at 940.
[551] Massimiliano "The Ordoliberal notion of market power: an institutionalist reassessment" (2010) *European Competition Journal* 689 at 690.

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by section 2 of the Sherman Act which creates an offence against monopolization of a market by a firm.[552] Section 2 provides as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felon."

It is evident from section 2 of the Sherman Act that US competition law equates a dominant firm with a firm that can be said to hold a monopoly in a particular market. But the possession of dominance and/or a monopoly cannot not in itself be regarded as an offence and as such, given the fact that there has been little further legislation enacted for purposes of regulating monopolies, the task of developing the "monopoly offence" has largely fallen to the US Courts. [553] The US Supreme Court accordingly laid down the principles for the monopoly offence in the matter of *United States v Grinnell Corp*[554] where it held that in order for a firm to be guilty of the monopoly offence contained in section 2 of the Sherman Act two elements would need to be present, namely: the possession of market power in the relevant market *and* the wilful acquisition and maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.[555] What the *Grinnell* matter highlights, as stated above, is that the *possession* of market power and/or dominance is not what competition policy should seek to avoid, but rather the *abuse* of such power by a dominant firm.[556]

In dealing with matters of monopolization and abuse of dominance by a firm, market power consequently plays a central role. The US Supreme Court has defined market power as "the power to control prices or exclude competition".[557] It thus becomes clear that the definition of market power from a US perspective draws heavily on the underlying

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[552] The terms monopoly and market power will be treated as synonymous unless otherwise stated.
[553] Facey & Assaf "Monopolization and Abuse of Dominance in Canada, the United Sates, and the European Union: A Survey" (2012) *Antitrust Law* 524 at 525 (hereinafter referred to as A. Facey & D.H. Assaf "Monopolization and Abuse of Dominance in Canada, the United Sates, and the European Union: A Survey")
[554] 384 U.S. 563 (1966) at 570 – 571
[555] Also see *United States v Microsoft Corporation* (D.C Cir. 2001) 253 F.3d, at 34, where the court held that "a firm is a monopolist if it can profitably raise prices substantially above the competitive level."
[556] Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 26.
[557] *United States v E. I. du Pont de Nemours Co* 351 U.S. 377 (1956) at 391.

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economic principles of a firm's ability to raise prices above a competitive level.[558] It follows that where a firm possesses the power to raise prices above the competitive level and still remains profitable, then that firm will be regarded as having market power. Therefore, in terms of US anti-trust law, a firm with market power can be said to be dominant, or hold a monopoly, within a particular market.[559]

2.2. Defining Market Power and Dominance in the European Union

Abuse of dominance in the European market space has been codified in Article 82 (previously Article 86) of the Treaty on European Union (Maastricht Treaty).[560] Article 82 provides that:

"An undertaking, or group of undertakings, is prohibited from abusing a position of dominance within the common market or substantial part thereof".

The Treaty however fails to define the concept of a "dominant position" which has left the task of interpreting Article 82 to the relevant European Courts. In the matter of *United Brands v The Commission*[561], the European Court of Justice interpreted a "dominant position", within the ambit of Article 82, to mean:

"a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave in an appreciable extent independently of its competitors and customers and ultimately of consumers."

This interpretation of Article 82 has since become the *locus classicus* for establishing dominance and has found application in various other cases.[562]

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[558] Gal, "Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?" (2004). New York University Law and Economics Working Papers 15 at 9.
[559] Gal, "Monopoly pricing as an antitrust offense in the U.S. and the EC: Two systems of belief about monopoly?" (2004). New York University Law and Economics Working Papers 15 at 2.
[560] "Treaty of Maastricht on European Union", 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002 available at https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/maastricht-treaty (last accessed on 04/05/2021).
[561] (1978) ECR 207 at par 65.
[562] See *Hoffman La Roche v Commission* (1979) ECR 461 at par 38, and *Nederlandsche Bandem-Industrie Michelin NV v Commission* (1983) ECR 3461 at par 30

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There however seems to be an ideological shift in how European authorities are currently defining the term "dominance".[563] This new approach entails that a firm will be dominant when it has the power to assert "substantial market power"[564] within a market.[565] This ideological shift can be seen in the guidelines which have been published by the different European competition authorities for dealing with matters of abuse of dominance. For example, the *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* states:

"For dominance to exist the undertaking in concern must not be subject to effective competition constraints. In other words, it must have substantial market power."[566]

This new definition of dominance has further been endorsed by the UK Office of Fair Trading (OFT)[567] which states that a firm will not be dominant if it lacks substantial market power.[568] Both the European Commission and the OFT have accepted that market power is the ability to sustain prices above the competition level or restrict output or quality below competitive levels.[569]

In particular the OFT pointed out that the possession of market power in itself does not necessarily mean that a firm is dominant in that specific market in which it possesses

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[563] See European Commission DG Competition "Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses" (December 2005) available at https://ec.europa.eu/competition/antitrust/others/discpaper2005.pdf (last accessed on 23/10/2019) and UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" 2004 OFT 415 available at http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft415.pdf (last accessed on 17/09/2017).

[564] Both US and EU authorities have failed to define what the term "substantial" but the dictionary definition of substantial is that of something that is "large in size, value or importance". See https://dictionary.cambridge.org/dictionary/english/substantial (last accessed on 23/10/2019).

[565] Geradin, Hofer, Louis, Petit & Walker "The Concept of Dominance in EC Competition Law Research Paper on the Modernization of Article 82" *EC Global Competition Law Centre* (July 2005), See DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses and UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" 2004 OFT 415. Also see Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 226.

[566] DG Competition Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses (December 2005), available at http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf (last accessed on 29/04/2019) at par 23 (hereinafter referred to as "DG Competition Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses").

[567] The OFT was a non-ministerial government department of the United Kingdom which was established as the UK's economic regulator responsible for the enforcement of competition law and consumer protection. The OFT was replaced on the 1 April 2004 by the Competition and Markets Authority when the UK transitioned from a single regulator model to a "Twin Peaks" model of financial regulation.

[568] UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" at par 2.9 and DG Competition Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses (December 2005) at 9 – 10.

[569] UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" at par 1.4.

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market power. Naturally, most market participants will have some degree of market power, however only a firm that can be shown to possess *substantially more* market power than other market participants which will allow that firm to act in an appreciable way independently of its competitors, will be deemed dominant. The dominant firm can then potentially use this power to harm the economic freedom of other market participants.[570]

2.3. Defining Market Power and Dominance in South Africa

Notably South African authorities have deviated substantially from their American and European counterparts in their approach to dealing with the concept of dominance. Instead of seeking to define the term "dominance", the Competition Act is more concerned with providing a framework within which dominance can be established. As will be discussed in greater detail below, the issue of whether or not a particular firm is dominant for purposes of South African competition law is dependent on that firm's market share and whether it possesses market power. Therefore, rather than attempting to define dominance, the Act instead provides a market share test for dominance supplemented by a definition for "market power".

Sutherland and Kemp point out that the definition of market power as contained in section 1 of the Competition Act has been directly imported and adapted from the principles of dominance developed and laid down by previous decisions of the American and European Courts.[571] The Act defines market power as "the power of a firm to control prices, to exclude competitors or to behave in appreciable extent independently of its competitors, customers or suppliers".[572] Three distinct elements can be extracted from this definition.[573] The first is the ability to control prices which, as stated above, entails the ability of a firm to raise prices above the competition level and still maintain a level of profitability. The second element is the ability to exclude competition. This refers to the power of a firm to raise the costs of competitors to the extent where it reduces the ability of those competitors to compete in the relevant market or excludes them from the market altogether.[574] The final element of the Act's definition of market power is the power of a

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[570] See UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" at par 1.4.
[571] See *United Brands v The Commission* and *United States v Microsoft Corporation*.
[572] Section 1 of the Act.
[573] Sutherland and Kemp at 7-28.
[574] Sutherland and Kemp at 7-31.

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firm to act independently of its competitors. This particular element of market power has been directly imported from the definition of dominance as laid down by the European courts.[575] Although the" power to act to an appreciable extent independently of competitors "is a very vague and far reaching concept, it would seem, having regard to European authority on this aspect, to lend itself to an interpretation relating to the power of a firm to influence prices, output, quality or the variety of a product or even limit innovation in a market for a substantial period of time.[576]

2.4. The Relationship between Dominance and Market Power

As pointed out, in determining whether a firm has abused its dominant position, it becomes clear that dominance is largely dependent on that firm possessing market power. However as also previously indicated, the manner in which the various jurisdictions define these concepts has differed substantially. US legislation equates the term "dominance" with the offence of monopolization which, through the application of case law, has been extended to the acquisition and maintenance of market power.[577] Dominance, from an American perspective, has been heavily influenced by the economic enquiries advanced by the Chicago School and Post-Chicago approaches to competition regulation.[578] As such, American antitrust authorities have been more concerned with the *establishment* of market power, as the power to raise prices above the competition level, in determining whether antitrust laws have been breached, than the existence of certain defined market features.[579]

European competition policy, which seeks to prohibit a firm from abusing a dominant position, has dealt with the concept of "dominance" by defining the term "dominant

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[575] See paragraph 2.2 above and *United Brands Co v Commission* at par 65 and *Hoffman La Roche v Commission* at par 38.
[576] DG Competition *Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses* at par 24.
[577] See previous discussions at paragraph 2.1.
[578] See previous discussions in Chapter 2 where it was discussed that the Chicago School theory advocates that small competitors should not be protected at the expense of competition. In this regard, single firm should be viewed through the lense of price theory and certain practices may lead to proficiency gains which are thus procompetition. This means that certain firms which hold a dominant position in their market would in certain circumstances lack the necessary incentives to engage in conduct which be seen to lessen competition. See also G. Sandicchi "American and European Perspectives on Monopolization and Abuse of a Dominant Position: A Comparative Law and Economic Analysis of Single Firm Conduct" at 20, available at http://people.stern.nyu.edu/lwhite/al&e.spring2005/TermPapers/sandicchi.pdf (last accessed on 01/09/2017).
[579] See see *United States v Microsoft Corporation* (D.C Cir. 2001) 253 F.3d at 34.

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position".[580] This position has however changed in recent years with European authorities starting to adopt a more economic orientated approach that equates dominance with "substantial" market power.[581]

As observed by Sutherland and Kemp, the South African policy makers have used the developments in both American and European competition law as the template for many of the provisions of the Competition Act, including the abuse of dominance provisions.[582] However the Act, which focuses largely on the possession of market power for the establishment of dominance, has not specifically defined the concept of "dominance" but has rather endeavoured to define the term "market power".[583] Regardless of the various approaches adopted by the different jurisdictions, the one common feature in the establishment of dominance in all three jurisdictions is the possession of market power. As pointed out by the OFT above, all market participants will possess some degree of market power, but it is submitted that only those firms which possess significantly more market power than their competitors can truly be considered dominant. However, as discussed below, when looking at the manner in which the Competition Act establishes dominance through assumptions about market power based on a firm's market share, it appears as though the Act does not properly account for such an eventuality.

3. How Dominance is established

Now that it has been established that a firm can only be regarded as "dominant" where such firm can be shown to possess market power, the manner in which dominance is established in the US, EU and South African markets needs to be analysed. Sutherland and Kemp point out that in order to establish whether or not a particular entity can be deemed dominant for purposes of competition law, the following three questions will generally need to be answered:[584]

a) Firstly, will the abuse of dominance provisions of the relevant jurisdiction apply to the entity in question;

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[580] See *United Brands v The Commission*, *Hoffman La Roche v Commission* and *Nederlandsche Banden Industrie Michelin v Commission* OJ 2002 L143/1 at fn.430.
[581] See previous discussions at paragraph 2.2.
[582] Sutherland and Kemp at 7-5.
[583] Section 1 of the Act.
[584] Sutherland and Kemp at 7-11 – 7-12.

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b) Secondly, what is the relevant market, how can it be defined and what is the entity in question's market share; and

c) Lastly, does this entity possess market power?

As will be discussed further in this chapter, the question of the relevant market and its definition has followed a fairly uniform approach in all of the above jurisdictions. Whether or not the applicable competition law applies to the entity in question will depend on the jurisdictional requirements of the competition law of that jurisdiction. The process of establishing dominance will also need to be answered in accordance with the methods laid down and practiced in each market.

3.1 Do the Abuse of Dominance Provisions apply to the Entity in question?

3.1.1. United States

The monopoly offence contained in section 2 of the Sherman Act makes specific reference to the term "person". Section 7 of the Sherman Act defines "person" or "persons" to include "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country. The evolving nature of corporate structures has however necessitated that the definition be extended. In terms of the US civil code, the term "person" means *"any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State Law"*.[585]

3.1.2. European Union

The competition law of the European Union applicable to the abuse of dominance applies to all conduct by an "undertaking or association of undertakings".[586] The term "undertaking" has however remained undefined which has left the task of defining the

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[585] US Code, Title 15, Chapter 34, § 1311, (f). Section 7 of the Sherman Act defines a person to include "*corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country*". See J. S. Stanford "The Application of the Sherman Act to Conduct Outside the United States: A View from Abroad," (1978) *Cornell International Law Journal* 194, at 195. Also see the matter of *FTC v Phoebe Putney Health Systems, Inc* 133 S. CT. 1003 (2013) where the US Supreme Court confirmed a ruling from a lower court that antitrust laws were also applicable to government departments where their actions could be seen to harm competition.

[586] Article 82 of EC Treaty and Article 101 of the Treaty on the Functioning of the European Union (TFEU).

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concept to the courts. In the matter of *Klaus Höfner and Frits Elser v Macrotron GmbH*[587] the European Court of Justice adopted a functional approach to defining the term "undertaking" and accordingly held that an undertaking can be defined as every entity engaged in economic activity, regardless of its legal personality or status or the way in which it is financed.

This definition has further been extended in the matter of *Hydrotherm Gerätebau GmbH v Compact del Dott Ing Mario Andreoli & C Sas*[588] to denote

"an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal."

From these definitions, it becomes clear that the term "undertaking" is a very broad concept which encompasses natural persons, partnerships, juristic entities, both state and public entities as well parties engaged in contractual relationships. When taking into account how broad the definition of an "undertaking" is, the undertaking in question may not always be easy to isolate.[589] Therefore, and until a more uniform definition is provided, Jones observes that determining whether the entity in question is indeed an undertaking for purposes of EU competition law, will require an examination of the facts in question.[590]

3.1.3. South Africa

The abuse provisions of the Act only apply to dominant firms with an annual turnover in, into or from South Africa, at or above R5 million or a dominant firm that has assets in South Africa valued at or above R5 million.[591] In a departure from the competition laws of the US and the EU, the Act defines a "firm" to include a person (natural or juristic), partnership or a trust.[592] Given the limited scope of the above definition, Sutherland and Kemp point out that the question has since arisen whether or not the concept of a "single economic entity" falls within the definition of a firm as envisaged by the Act.[593] This question was first raised in the matter of the *Competition Commission v Patensie Sitrus*

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[587] (1991) ECR I – 1979 at par 21.
[588] Case 170/82 (1984) ECR 2999 at par 11.
[589] Jones, "The Boundaries of an Undertaking in EU Competition Law" (2012) *European Competition Journal* 301, at 304.
[590] Jones, "The Boundaries of an Undertaking in EU Competition Law" also see O. Odudu, "The Meaning of Undertaking within Article 81 EC" (2005) *Cambridge Yearbook of European Legal Studies* 209, at 211.
[591] Section 6 of the Act.
[592] Section 1 of the Act.
[593] Sutherland and Kemp at 7-12.

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Beherend Beperk[594] where the Tribunal made specific reference to the concept of a "single economic entity". On appeal, the CAC held that it was unnecessary to decide whether this concept should apply to the abuse of dominance provisions of the Competition Act given the fact that the entities in question shared no commonality aside from membership to the appellant and further no evidence existed of "complete unity of actions" between these entities.[595] Despite the Tribunal making reference to a single economic entity in subsequent matters[596], no basis has to date been put forward for the definition of a "firm" to be extended to include a single economic entity for purposes of abuses in terms of section 8 of the Competition Act.

3.1.4. Joint Dominance

A further issue to consider is the concept of "joint dominance" when evaluating allegations of abuse of dominance. This concept has been rejected by the South African competition authorities[597] as well as the US authorities, which rejects the notion of a shared monopoly due to the fact that the monopoly offence is an enquiry into unilateral firm conduct and therefore requires a single firm to possess a monopoly.[598] Generally speaking, joint dominance seems more akin to collusive conduct in light of the fact that joint dominance entails economic links between, and the adoption of a common policy by, a number of firms.[599] This appears to fall squarely within definition of an "agreement" as envisaged in the horizontal restrictive practices that are prohibited by section 4(1) as discussed in Chapter 3.[600] The EU has however differed in its approach to the theory of joint dominance in that the mere fact that a dominant position is held by more than one firm acting collectively, will not necessary insulate a single firm from claims of abuse of

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[594] 37/CR/June01, at par 95.
[595] *Patensie Sitrus Beherend Beperk v Competition Commission 16/CAC/Apr02* at par 22 – 25 & 45 – 46.
[596] *Nationwide Airlines (Pty) Ltd v South African Airways (Pty) Ltd* 80/CR/Sep06 and *Bulwer SA (Pty) Ltd v Distillers Corporation SA Ltd* 94/FN/Nov00.
[597] See *Nationwide Airlines (Pty) Ltd* v *South African Airways (Pty) Ltd* 80/CR/Sep06 at par 138 and *Loungefoam (Pty) Ltd v Competition Commission* 102/CAC/Jun10 at par 65.
[598] Assaf & Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey" at 541, also see *Sun Dun Incorporated v Coca-Cola Corporation* 704, F. Supp, 381 (D. Md. 1990), at 390. Such instances would in all likelihood be dealt with as horizontal restrictive practices.
[599] See Sutherland and Kemp at 7-14 and UK Office of Fair Trading *Competition Law Guideline: Assessment of Market Power* at par 2.13 – 2.16.
[600] See chapter 3 at paragraph 3.2.1 and Sutherland and Kemp at 5-11 where they highlight the importance of distinguishing collusive conduct from single firm conduct.

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dominance.[601] This was the position in the matter of *Italian Flat Glass v Commission*[602] where the court held:

"There is nothing, in principle, to prevent two or more independent economic entities from being, on a specific market, united by such economic links that, by virtue of the fact, together they hold a dominant position vis-à-vis the operators on the same market. This could be the case, for example, where two or more independent undertakings jointly have, through agreements or licenses, a technological lead affording them power to behave in an appreciable extent independent of their competitors, their customers and ultimately of their consumers."

Although the concept of joint dominance may not find application in South African competition law and US antitrust law, it will remain an important consideration in the determination of dominance in the EU. It is nevertheless interesting to note that the concept of joint dominance appears to represent a departure from the traditional idea that the abuse of dominance is generally concerned with single party conduct and appears to overlap quite substantially with collusive conduct.

3.2. Identifying and Defining the Relevant Market

As competition transgressions do not occur *in vacuo*, identifying and defining the relevant market plays a crucially important role in defining the boundaries of the analysis regarding the effect of a firm's conduct on competition. Once the relevant market has been established, it becomes clear who the firm in question's competitors are as well as the factors which constrain that firm's ability to act independently of its competitors.[603] A further important purpose of establishing the relevant market will be for the determination of the firm in question's market share, the purpose of which will be discussed later in this chapter. To best understand the process of identifying and defining the relevant market of the firm in question in the US, EU and South Africa, regard will mainly be had to the process developed by the US authorities as it would appear that this process has found widespread acceptance and application in both the EU and South Africa.

[601] Assaf & Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey" at 542.
[602] (1992) 5 C.M.L.R. 302 at 358.
[603] Van Bael & Bellis, *Competition Law of the European Community* (2021) at 116.

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3.2.1. United States

In the US the general test used for defining the relevant market is the "hypothetical monopolist test" which was first introduced in the *US Merger Guidelines* of 1982.[604] The hypothetical monopolist test defines the market as a group of suppliers of substitute goods that could control prices if they worked together as a single supplier.[605] Where it is shown that the hypothetical monopolist would not be able to control the price of the relevant product nor remain profitable within the relevant geographic region or focal market, the test will then be repeated including the next best substitute until the hypothetical monopolist will be able to control the price and remain profitable.[606] Accordingly, the aim of the test is to determine whether or not the market is one worth monopolizing.[607]

Criticism has however been levied against the hypothetical monopolist theory test in situations where inferior substitute goods or services have already failed to curtail the prices of the product complained about. This will usually exist in a situation where the product subject to the complaint is already being sold at a price above the competitive level.[608] The inclusion of substitute goods in such a situation is then flawed due the fact that such products have already failed to constrain the prices of the product in question.[609] This has become known as the "cellophane fallacy" which takes its name from the matter of *United States v E.I. du Pont De Nemours & Co.* (the "cellophane case").[610]

In this matter the US Government alleged that du Pont had monopolized the cellophane market, which market was regarded as distinct from the market of all other wrapping materials, with these other wrapping products affording strong competition to prevent du

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[604] Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (2002) at 132.
[605] See Areeda and Hovenkamp *Antitrust Law* at 233 – 237, G. Werden, "The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm," (2003) *Antitrust Law Review* 253 at 253-269 and Sutherland and Kemp at 7-19.
[606] Sutherland and Kemp at 7-20.
[607] Bishop & Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* at 132.
[608] Monti, *EC Competition Law* (2008) at 151.
[609] Sutherland and Kemp at 7-22.
[610] 351 U.S. 377 (1956). See various writings on the issue including Maurer School of Law "Antitrust Law: The Impact of the Cellophane Case on the Concept of Market" (1957) *Indiana Law Review* 374, D. J. Aron "Regulatory Policy and Reverse Cellophane Fallacy" (2008) *Journal of Law and Economics* 973, and L. M. Froeb and G. J. Werben "The Reverse Cellophane Fallacy in Market Delineation" (1992) *Review of Industrial Organisation* 241,

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Pont from exercising monopoly power in the packaging market as a whole. Du Pont produced about 75% of the cellophane sold in the US but cellophane only constituted about 20% of total flexible material package sales in the US.[611] The court *a quo* held that the market in question included all flexible material packaging and as such du Pont could not be regarded as a monopolist.[612] However, the US Supreme court held that the assessment of market power in a market with differentiated products required evidence on "cross-elasticity of demand". , Cross-elasticity of demand refers to the percentage change in the quantity demanded of a product that results from one percentage change in the price of another product. The concept therefore measures the responsiveness of demand of one product when the price of another product changes. [613] The reason for the court requiring evidence on "cross-elasticity of demand" was that each producer of a different product had a monopoly in the market of its own product and it would not make sense to equate the power to control the price of one's own product with monopoly power. The majority held that since cellophane met competition from many end users, those producers who needed or wanted only cellophane would not be entitled to the benefits of competition.[614]

The approach followed by the US Supreme Court in the cellophane case has however been heavily criticised by many economists due to the fact that the court carried out its analysis without taking into account that du Pont was already charging a monopolist price for cellophane and as a consequence, any further price increases would no longer be profitable.[615] In order to avoid this problem, Monti points out that the analysis should have been carried out at a time when du Pont was pricing at a more competitive level to accurately assess how consumers would react to any change in price.[616] Given the problems that have arisen from the cellophane fallacy and in an attempt to avoid same, the *US Merger Guidelines* have subsequently stated that a competitive price should be

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[611] Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003) at 236.
[612] Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003) at 236.
[613] See Monti, *EC Competition Law* (2008) at 134See R. Bordley "Relating Cross-Elasticities to First Choice/Second Choice Data" (1985) *Journal of Business and Economic Statistics* 20.
[614] See Elhauge & Geradin *Global Antitrust Law and Economics* (2007) at 282.
[615] Monti, *EC Competition Law* (2008) at 134. Also R. Posner *Antitrust Law: An economic Perspective* (1976) at 127 – 128.
[616] Monti, *EC Competition Law* (2008) at 134.

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used in circumstances where suspicion exists that present prices have already been overinflated.[617]

3.2.2. European Union

Previous decisions of the European courts have largely defined the relevant market in accordance with the hypothetical monopolist test as laid down by the US authorities.[618] However for the sake of providing guidance in the establishment of the relevant market, the European Commission has issued *The Notice on Market Definition* (hereinafter referred to as "the Notice").[619] Van Bael and Bellis explain that the Notice is based on a classical constraints approach which recognises that market power can be constrained by demand-side substitutability[620], supply-side substitutability[621] and by competition.[622] The Notice therefore calls for a two-stage enquiry in defining the relevant market. Firstly, it requires that the relevant "product market" be established, which can be defined as all those products and services which are regarded by the consumer as interchangeable or substitutable by the consumer, by reason of the products' characteristics, price and intended use.[623] Secondly, it requires that the relevant "geographic market" be established. The geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.[624] The Notice therefore provides a means for establishing the relevant

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[617] U.S. Department of Justice and the Federal Trade Commission *Horizontal Merger Guidelines* (2010) at par 1:11.
[618] See *Hoffman La Roche v Commission* at par 28: where the court stated "the concept of the relevant market implies that there can be effective competition between the products which form part of it presupposes that there is a sufficient degree of inter-changeability between all the products forming part of the same market in so far as a specific use of such product is concerned".
[619] European Commission, Notice on the Definition of the Relevant Market for the Purpose of Community Competition Law, 1997 O.J. (C372) 5 available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31997Y1209%2801%29 (last accessed on 23/10/2019).
[620] The degree of substitutability between products from a customer's perspective. See A. J. Padilla "The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control" (2001) *Areport for DG Enterprise A/4, European Commission* (available at http://ec.europa.eu/DocsRoom/documents/2658/attachments/1/translations/en/renditions/pdf (last accessed on 29/04/2019) at 8.
[621] The ability of suppliers to switch production sufficiently quickly and at low cost. See A. J. Padilla "The Role of Supply-Side Substitution in the Definition of the Relevant Market in Merger Control" at 8.
[622] Van Bael & Bellis, *Competition Law of the European Community* (2021) at 119.
[623] The Notice at point 7.
[624] The Notice at point 8.

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market that is both broad and leaves much room for discretion. Although this may create some uncertainty for the firms in question, it will allow the European Competition Commission to take various factors into account when defining the relevant market by looking at both the relevant product market and the geographical boundaries of the market which is of particular importance given the size of the single EU market.

3.2.3. South Africa

The hypothetical monopolist test has been recognised in South African competition law for purposes of identifying and defining the relevant market.[625] As pointed out by Sutherland and Kemp there are five factors which will generally be taken into account when determining the effect of price increases in terms of this test.[626] These factors will include:[627]

a) the historical data of pricing relationships and trade patterns;

b) the extra costs that will be incurred by consumers in switching to a substitute and by suppliers in entering the market or increasing output;

c) any absolute barriers to substitution;

d) information on consumer convenience; and

e) preference and survey responses of consumers and suppliers as to their probable responses to price increases.

What is also important to note is that the South African competition authorities have been cognisant of the problems associated with tests such as the cellophane fallacy.[628] This is of particular relevance given the fact, as discussed below, that dominance in South Africa is established by reference to a particular firm's market share above all else. This

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[625] *South African Raisins (Pty) Ltd v SAD Holdings Ltd 04/IR/Oct/1995, Patensie Sitrus Beherend Beperk v Competition Commission 16/CAC/Apr02 16-17*, and *Medicross Helthcare Group (Pty) Ltd & Another v The Competition Commission* 55/CAC/Sept05 at 30. Also see Econex *Techniques for defining relevant markets and analyzing competition in the South African private hospital sector* (2014) available at http://www.compcom.co.za/wp-content/uploads/2014/09/Annexure-1-EconexMarketDefinition30June2014.pdf (last accessed on 23/10/2019) at 2 - 3 Boshoff "Why Define Markets in Competition Cases?" (2013) Stellenbosch Economic Working Papers: 10/13 at 7 – 15.
[626] Sutherland and Kemp at 7-20(1).
[627] Sutherland and Kemp at 7-20(1) – 7-21.
[628] *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 at par 15 – 17. Also see Boshoff "Why Define Markets in Competition Cases?" (2013) at 9 – 15.

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accordingly necessitates caution when determining the relevant market in complaints concerning abuse of dominance.[629]

3.2.4. Market Shares

Once the relevant market has been identified and defined, the market share of the firm in question needs to be established.[630] As pointed out by Sutherland and Kemp there is no single test for calculating a firm's market share but rather, market share will always be a question of fact taking the relevant circumstances of the particular case into account.[631] Some of the factors that may be taken into account will include a firm's direct sales values to consumers; its production capacity within the relevant market; its capacity of supply within the relevant market; the effect of imports on the market in question; and a vertical integrated firm's internal production capacity.[632] In addition to these factors, various other factors which may be relevant to the defined market may also be taken into account which are usually industry dependent and may include factors such as fleet size in the transport sector, reserves in the mining sector or a firm's output.[633]

3.3. Does the Entity in question possess Market Power?

3.3.1. Establishing Market Power in the United States

In the US no particular method exists for determining whether the firm in question does in fact possess market power as the courts differ in their approaches in this regard. Despite this, market share has generally been used as a method of providing an indication as to whether or not the firm in question possesses market power.[634] This

[629] Sutherland and Kemp at 7-23. Also see Kelly, Unterhalter, Goodman, Smith & Youens *Principles of Competition law in South Africa* (2016) at 120.
[630] See Bode & Scharifi "Market Shares and Dominant Market Positions in the Case of Emissions Trading" (2007) *Carbon and Climate Law Review* 103 at 116 and L. Kaplow "Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments (2011) *Journal of Competition Law and Economics* 243 at 251.
[631] Sutherland and Kemp at 7-24.
[632] UK Office of Fair Trading "Competition Law Guideline: Assessment of Market Power" at par 4.8 and World Intellectual Property Organisation ""Guidelines on the Definition of the Relevant Market available at https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr131en.pdf (last accessed on 24/10/2019).
[633] Sutherland and Kemp at 7-25. Also see L. Kaplow "Market Definition" (2013) Harvard Law School Discussion Paper No. 745 available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_745.pdf (last accessed on 23/10/2019) at 15.
[634] See Bode & Scharifi "Market Shares and Dominant Market Positions in the Case of Emissions Trading" (2007) *Carbon and Climate Law Review* 103 at 116.

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approach was highlighted in *United States v Aluminium Co. of America (Alcoa)*[635] in which the court held that where a firm held 90% of supply it "*is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three is not*".[636] Although these statements have been used as a guideline for establishing market power, Assaf and Facey indicate that it has generally been accepted that market shares in excess of 70% will usually create a presumption of dominance[637] and market shares in excess of 50% may, under certain circumstances, be sufficient for the establishment of dominance.[638] The process of focusing solely on market shares as a means of establishing dominance has however come under severe criticism from various commentators.[639] Notably Gellhorn and Kovacic argue that, instead of relying solely on market share as a determinant of market power, an enquiry which evaluates market share together with the ease of access to the market, the availability of substitute goods and any other factor which may be relevant to the matter at hand, should be considered.[640]

An alternative method that has been used in the US for establishing market power has been to evaluate whether or not the firm in question has enjoyed large profit margins. This approach has however also been criticised as it becomes difficult to differentiate between profits that are the result of a firm's dominant position or profits that are solely economic in nature.[641] As observed by Hylton, the method of accounting used may also be a factor for a firm evidencing excess profit margins.[642] Excessive profits are however only regarded as an indication of market power as a result of an excessive profits-to-sales ratio, that is, as a consequence of prices having been set far higher than their manufacturing costs. [643] A firm may also be inclined to enjoy higher profits where that firm has taken a great deal of risk in its market and has benefited from such risks. What

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[635] *United States v Aluminum Co. of America* 148 F.2d 214 (1945).
[636] *United States v Aluminum Co. of America* at par 424.
[637] *United States v United Shoe Machinery Corp* 110 F.Supp 295 (D.Mass 1953).
[638] Assaf & Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", at 536.
[639] Assaf & Facey "Monopolization and Abuse of Dominance in Canada, the United Sates, and the European Union: A Survey", at 536. Also see Gellhorn & Kovacic, *Antitrust Law and Economics in a Nutshell* at 96.
[640] Gellhorn & Kovacic, *Antitrust Law and Economics in a Nutshell* (1994) at 97.
[641] Hylton, *Antitrust Law Economic Theory and Common Law Evolution* (2003) at 231.
[642] Hylton, *Antitrust Law Economic Theory and Common Law Evolution* (2003) at 232.
[643] Fisher "On the Misuse of Accounting Rates of Return to Infer Monopoly Profits" (1983) *The American Economic Review* 82 at 85.

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becomes clear is that profit margins, except for maybe in a few exceptional cases, cannot in all instances be an accurate measure of a firm's market power.

Given the shortcomings of the above methods, Hylton indicates that economists have since proposed a new method for the establishment of dominance. This new method focuses on a firm's ability to raise prices without being constrained by competitors.[644] This new test was first embodied in the *1992 Merger Guidelines* and subsequently included in the *2010 Merger Guideline.*[645] In terms of the guidelines, once the relevant market has been defined, it will need to be determined whether a "small non-transitory" price increase (usually around five percent) will cause a substantial shift of buyers away from that firm's product and push them to buy substitute goods.[646] In order to evaluate the potential response of buyers, the Merger Guidelines indicate that the following factors will be taken into account:[647]

a) evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;

b) evidence that a seller bases business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;

c) the influence of downstream competition faced by buyers in their output markets; and

d) the timing and costs of switching products

This approach however, has failed to find widespread acceptance by the US courts in the establishment of dominance but has nonetheless remained an integral part of evaluating the effect on competition in the realm of horizontal mergers.[648]

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[644] Hylton *Antitrust Law: Economic Theory and Common Law Evolution* (2003) at 232.
[645] Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (Issued 1992, revised 1997) available at https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf (last accessed on 23/10/2019) and Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission (2010).
[646] Gellhorn & Kovacic, *Antitrust Law and Economics in a Nutshell* at 110. See the SSNIP test at par 4.1.2 of the 2010 Merger Guidelines.
[647] Horizontal Merger Guidelines, Department of Justice and Federal Trade Commission, section 1.11.
[648] Gellhorn & Kovacic, *Antitrust Law and Economics in a Nutshell* at 113.

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3.3.2. Establishing Market Power in the EU

As discussed previously, in the EU a firm will be dominant where it possesses "substantial" market power. But how is substantial market power identified and measured? Monti indicates that there are two generally accepted methods for measuring market power.[649] The first method is the "direct method" based on whether or not a firm's prices are above marginal cost which follows directly from the approach adopted in the US and has been discussed at length above.[650] The second is an "indirect method" which takes into account various factors such as the market shares of the firm in question, the market shares of competitors, and the barriers to entry into the market and the powers of consumers or buyers (countervailing power).[651] This indirect method of establishing market power appears to have been endorsed as the preferred method for establishing market power by both the European Competition Commission and by European courts.[652]

Each of the factors that are considered to establish whether a firm has market power will be discussed below:

a) Market Share

The first step in this indirect enquiry will be to establish the market share of the firm in question. Both this indirect method and the initial enquiry into market share have been confirmed in the matter of *Hoffman La Roche v Commission* where the ECJ held that:

"The existence of a dominant position may derive from several factors which, taken separately, are not determinative but among these factors a highly important one is the existence of very large market shares."[653]

Although the Court recognises that a large market share in itself may not be evidence of a dominant position, it does however stress the importance of a large market share in establishing dominance. But what measure of market share will be indicative of

[649] Monti "The Concept of Dominance" at 3.
[650] See par 3.3.1 above. A firm will be considered dominant where it can set its prices above the competitive level but still remain profitable.
[651] Monti "The Concept of Dominance" at 3.
[652] Dethmers & Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law" (2006) *European Law Review* 537, at 541. Also see *Hoffman La Roche v Commission* (1979) ECR 461.
[653] *Hoffman La Roche v Commission* at par 39 – 40.

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dominance in the EU? In the matter of *Hilti AG v Commission*[654] the European Court of Justice[655] held that a market share between 70% and 80% was in itself a clear indication of the existence of a dominant position. However, in the matter of *Akzo v Commission*[656]the court held that a rebuttable presumption of dominance exists where market shares exceed 50%. This approach, however, has come under criticism because the general onus rests on the Commission to prove dominance, but in terms of this approach to establishing dominance based on market share, the onus shifts to the firm in question to prove that it is in fact not dominant. In matters where a firm's market share is between 40% and 50%, the ECJ held that market share may indicate a dominant position, but that further economic factors would need to be taken into account in order to make an accurate finding of dominance.[657] In matters where market share is less than 40%, it has generally been accepted that market power cannot be assumed unless exceptional circumstances exist.[658]

What becomes clear is that the establishment of dominance should not solely rest on a firm's market share. Instead, the weight placed on firm's market share should rather be assessed on a case-to-case basis taking into account the market shares of competitors and other relevant economic factors which may be present in the relevant market. This approached has been endorsed by the ECJ in *Hoffman La Roche* where the court stated:

"A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, as far as production, supply and demand is concerned."[659]

b) Barriers to Entry or Expansion

One of the additional economic factors that should be taken into consideration together with market share, is the barriers to entry and expansion within the particular market. Barriers to entry can be defined in two ways: the first defines barriers to entry as the

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654 (1991) ECR II – 1439 at par 92.
655 Hereinafter referred to as the "ECJ".
656 (1991) ECR I – 3359 at par 60.
657 *United Brands v Commission* at pars 108 – 110.
658 *British Airways v The Commission* (2003) ECR II – 5917; Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ No. C 165 0f 11 July 2002 available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF (last accessed on 24/10/2019) at par 75.
659 *Hoffman La Roche v Commission* at par 40.

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factors which make entry into the market very costly.[660] The second defines entry barriers as the costs which must be borne by a firm that seeks to enter the market but which is not borne by firms already in the market.[661] It is submitted that both these definitions should find application in trying to establish whether barriers to entry and expansion exist. The simplest way for competitors to meet an increase in price by a firm would be to increase their output in that particular market. However, where, due to the existence of certain barriers, competitors and smaller firms are unable to increase their output to meet price increases, Monti points out that a presumption of dominance may be created against the firm in question.[662] This principle again met with approval by the ECJ in the *Hoffman La Roche*-case where the court held:

"an undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of supply which it stands for, without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share, is by virtue of that share in a position of strength."[663]

In an attempt to create certainty and simplify the process of establishing whether or not barriers to entry or expansion exist, the *European Commission's Discussion Paper on the Application of Article 82*[664] has listed the following factors that should be taken into account when determining whether or not barriers to entry or expansion exist:

a) Legal Barriers: These may include Government concessions, licenses, legislated monopolies, patents and other intellectual property rights.[665] The fact that a firm may benefit from such rights may be an indication of dominance.[666]

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[660] Monti "The Concept of Dominance" at 35.
[661] Stigler "The Organization of Industry" at 67. Also see D. E. Lazaroff "Entry Barriers and Contemporay Antitrust Litigation" (2006) *Business Law Journal* 1 at 2.
[662] 662 Monti "The Concept of Dominance" at 35 – 36.
[663] *Hoffman La Roche v Commission* at par 41.
[664] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses at par 4.2.2.
[665] Holders intellectual property rights are more likely to engage in abuse conduct by refusing to grant licences to use their intellectual property, excessive pricing for the use thereof, or by delaying comeptitor's entry into the market. See Stakheyeva *Intellectual Property and Comeptition Law: Understanding the Interplay* (2018) at 4.
[666] *Decca Navigator Systems v Commission*, OJ No. L 43 of 15 February 1989 at 27.

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b) Capacity Constraints: These will include large capital investments that will need to be made in order to enter or expand within the market and that cannot be recovered by exiting the market.

c) Economies of Scale and Scope: The capacity for large scale production and distribution may give an alleged dominant firm a position of dominance over smaller producers given the fact that such a firm could spread its fixed costs over a larger output or a greater range of products with the ultimate effect of reducing its average unit costs. This creates a situation where smaller producers may not be able to enter or expand in a market due to higher average unit costs. This will place these smaller competitors in a position where they will be unable to compete with their competitors due to them being forced to charge higher prices.

d) Absolute Cost Advantages: Where a firm has preferential access to essential facilities, natural resources, research and development advantages or capital advantages, this may be an indication of dominance as other firms would not be able to compete effectively in the market.

e) Privileged Access to Supply: A firm may be either vertically integrated or have sufficient control over the supply of inputs making it difficult or costly for competitors to compete.

f) Highly Developed Distribution and Sales Networks: These confer significant commercial advantages to a firm over its competitors.

g) The Established Position of the Incumbent Firms on the Market: Attributes such as customer loyalty and long-standing relationships with suppliers and customers may create a situation which hinders a competitor's ability to compete.

h) Other Strategic Barriers to Entry: These may include barriers that make it difficult or expensive for consumers to switch suppliers, for example situations where a customer has trained its staff to use a particular product, or situations where rival products offer lower value due to smaller customer bases.

There is however a further factor that should be considered in addition to the above factors. This additional factor deals with the product offered by competitors to the firm in question as well as the ability of consumers to switch to these products. Dethmers and Dodoo remark that if a situation exists where the product offered by competitors is inferior

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to the product of the firm in question, this may be the cause of the firm in question not being able to compete in the relevant market.[667] The dominant position would thus be due to the incumbent firm offering a superior product and owing its position in the market to this product superiority.[668] It would also be important to establish whether or not consumers view the products of competitors as suitable substitutes of the product of the firm in question.[669]

c) Countervailing Buyer Power

As mentioned previously, one of the requirements for dominance is the ability of the firm in question to act independently of its consumers.[670] However, a situation might arise where the consumers of the firm in question possess the power to influence the terms and conditions on which they purchase the products from such firm. In circumstances where consumers can be shown to possess this power, it may be difficult to prove that the firm in question does in fact possess market power. In order to establish the extent of consumers' countervailing power, the economic power that consumers possess will need to be measured against the economic power of the firm in question.[671]

3.3.3. Establishing Market Power in South Africa

The means of establishing dominance in South Africa differs substantially from the approaches followed in the US and EU due to the fact that the Competition Act codifies the specific process to be followed in establishing whether or not the firm in question is in fact dominant. Accordingly, Section 7 of the Act provides as follows:

"A firm will be dominant in a market if –

(a) It has at least 45% of that market;

(b) It has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or

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[667] Dethmers & Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law" at 543.
[668] Ibid.
[669] Dethmers & Dodoo, "The Abuse of Hoffman-La Roche: the Meaning of Dominance under EC Competition Law" at 544.
[670] *Hoffman La Roche v Commission* at par 38.
[671] See *SIV and Others v Commission* (1991) ECR II – 1403.

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(c) It has less than 35% of that market, but has market power."

Section 7 has been formulated to address the current structure of the South African market as well as using its features to simplify the process of establishing dominance. In terms of section 7(a), where a firm's market share can be shown to exceed 45% of the market, that firm will automatically be deemed to be dominant in that market. Thus, per se dominance is enshrined within the Act.[672] This view has further been confirmed by the Competition Tribunal and the Competition Appeal Court.[673] Where the market share of the firm in question exceeds 35% but is less than 45%, a rebuttable presumption of dominance is created.[674] The onus then shifts on to the firm in question to prove that it does not possess market power within the relevant market in order to avoid a finding of dominance being made against it.[675] Finally, where the market share of the firm in question does not exceed 35%, that firm will be presumed to *not* be dominant within the relevant market.[676] The onus will then rest on the Competition Commission to prove that the firm in question *does* in fact possess market power in the relevant market for that firm to be regarded as dominant for purposes of the Act.[677]

Kelly *et al* remark that the South African approach to establishing dominance enshrines an approach based solely on the structure of the particular market. Once these structural factors have been determined, namely market share, the enquiry ends.[678] It is however submitted that whether this was intended in the design of the Act or not, there are a

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[672] see Kelly, Unterhalter, Goodman, Smith & Youens *Principles of Competition law in South Africa* (2016) at 121.
[673] *Patensie Sitrus Beherend Beperk v Competition Commission* at 26: where the court held that into section 7, a market share of 70% created a irrebuttable presumption of dominance; *The Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01, at par 48: where it was held that because SAA's market share exceeded 45% it was presumed to have market power in terms of section 7(a). Also see Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 245.
[674] Sutherland and Kemp at 7-11. Also see Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 245 and D. Rudman & S. Ostrovsky "Dominance Test: a Superfluous Hurdle?" (2010) available at http://www.compcom.co.za/wp-content/uploads/2014/09/article-dominance-test.pdf (last accessed on 24/10/2019) at 2 & 4.
[675] Neuhoff, Govender, Versfeld & Dingley *A Practical Guide to the South African Competition Act* (2006), at 108. Also see Rudman & Ostrovsky "Dominance Test: a Superfluous Hurdle?" (2010) at 2 & 4.
[676] Sutherland and Kemp at 7-11. Also see Lesofe & Nontombana "A Review of Abuse of Dominance Provisions of the Competition Act – is it necessary?" Available at http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf (date of last access 14/12/2017) at 14 and D. Rudman & S. Ostrovsky "Dominance Test: a Superfluous Hurdle?" (2010) at 2 & 4.
[677] Neuhoff, Govender, Versfeld & Dingley *A Practical Guide to the South African Competition Act,* at 108.
[678] see Kelly, Unterhalter, Goodman, Smith & Youens *Principles of Competition law in South Africa* (2016) at 122.

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variety of other factors that should be taken into account, which too possess the potential to rebut a finding of dominance such as the barriers to entry and the countervailing buyer power present in a particular market, as discussed above. An approach of this rigid nature as captured in section 7 certainly does appear to increase the risk for false positives of dominance.

4. Abuse of Dominance in South Africa: A Case Analysis

Notably, the possession of dominance as determined in accordance with section 7 of the Act is not in itself conclusive proof of an abuse of dominance. The various forms of abusive conduct contained in section 8 and 9 of the Act (prior to their amendments) require that certain elements be met prior to a conclusive finding of abusive conduct being made. Some of the allegations of abusive conduct that have been evaluated by the Tribunal and CAC will therefore be examined below with the aim of determining whether or not the low thresholds for establishment of dominance contained in section 7 have aided authorities in proving allegations of dominance. In the context of the overall theme of this thesis, an attempt will be made to determine if section 7 has been formulated and used as means of achieving a political agenda at the expense of the attainment and maintenance of effective competition.

4.1. Nationwide Poles v Sasol Oil

In the matter of *Nationwide Poles CC v Sasol Oil (Pty) Ltd*[679], the complainant was a small producer of treated wooden poles located in the Eastern Cape, who primarily supplied wine producers in the Western Cape.[680] These treated wooden poles required two primary inputs, namely wooden poles that were obtained from various sawmills and a preservative wax-additive, creosote, of which Sasol Oil was the primary supplier.[681] The complainant initially lodged a complaint of collusion and price discrimination with the Commission in April 2003 but the Commission found insufficient evidence of a contravention of the Act and issued a notice of non-referral during November 2003.[682]

[679] *National Poles CC v Sasol Oil (Pty) Ltd* 72/CR/Dec03 (hereinafter referred to as *National Poles*).
[680] *Nationwide Poles* at par 1.
[681] *Nationwide Poles* at par 1.
[682] *Nationwide Poles* at par 5.

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The complainant then proceeded to approach the Tribunal directly in accordance with section 51 of the Act.[683]

The nature of the complaint against Sasol Oil was that the complainant was being charged a higher price for creosote than its biggest competitor, which was a much larger firm than the complainant. The reason for the difference in the price charged was due to Sasol Oil's pricing schedule which allowed for discounts on the base price of creosote based on the historical volumes purchased by a particular firm (bulk discounts).[684] This afforded large buyers a discount in the region of 10 – 15% on the base price and ultimately lead to the complainant incurring an additional 3 - 4% increase in its cost structure due its historical purchasing volumes not being sufficient enough for it to qualify for these discounts. The complainant accordingly alleged that Sasol Oil's conduct in this regard amounted to price discrimination by a dominant firm as prohibited in terms of the then section 9 of the Act.[685]

The Tribunal was first tasked with determining whether in fact Sasol Oil could be regarded as a dominant firm in accordance with section 7 of the Act. This would require, as an initial step, that the relevant market be established in order to determine Sasol Oil's market share. Three different markets were proposed: Nationwide Poles sought a very narrow definition of the market that would limit the market solely to wax-additive creosote known as SAK K and of which Sasol Oil was the only producer in South Africa. The second proposed market was that of creosote in which there were two producers, namely Sasol Oil as the producer of SAK K and Suprachem, a division of Mittal Steel, as the producer of SAK 100. The final market proposed by Sasol Oil was the market for wood

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[683] Section 51 (1) states *"If the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint to the Competition Tribunal, subject to its rules of procedures"*.

[684] Sasol Oil would estimate how much creosote a customer would buy over the next year by looking at their historical purchasing patterns over a three month period which is then annualised and from which Sasol Oil will determine in which category the particular purchaser would fall and subsequent price that they would be charged.

[685] *Nationwide Poles* at par 5. At the time of adjudication, section 9(1) provided as follows:
"An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if –
(a) it is likely to have the effect of substantially preventing or lessening competition;
(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and
(c) it involves discriminating between those purchasers in terms of –
(i) the price charged for the goods or services;
(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;
(iii) the provision of services in respect of the goods or services; or
(iv) payment for services provided in respect of the goods or services.

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preservatives which also included another product known as copper-chrome-arsenate (CCA) as well as several other products that were used on a limited basis.[686] The Tribunal rejected Nationwide Pole's argument for a narrow market encompassing only wax additive creosote on the basis that it would render Sasol Oil an effective monopoly in the market and further rejected Sasol Oil's argument for a wide market encompassing the wood preservative market as a whole on the basis that it did not provide sufficient evidence that CCA was an effective alternative to creosote products for the treatment of wooden poles. This led the Tribunal to conclude that the relevant market was the creosote market of which Sasol Oil consistently enjoyed a market share in excess of 50%.[687] The Tribunal accordingly found that Sasol Oil was in fact a per se dominant firm within the market by virtue of its market share exceeding the 45% threshold as provided for in section 7 of the Act.[688]

In dealing with the issue of price discrimination, it was held that in order for the conduct to amount to prohibited conduct in terms of section 9 of the Act, the Tribunal would need to be satisfied that the conduct complained of is likely to have the effect of substantially preventing or lessening competition; the transactions in respect of which price discrimination are alleged must be equivalent transactions; and lastly, the discriminatory conduct must relate to price, discounts provided, services provided, or to payment for those services.[689] To answer these questions, the Tribunal was tasked with interpreting section 9 of the Act.[690]

In so doing, the Tribunal was of the view that because the Act sought to specifically prohibit price discrimination as a separate part of its abuse of dominance provisions, it was clearly the legislative intent of section 9 to maintain an accessible and competitive market structure that would accommodate new entrants into the market and enable them to effectively compete against larger and more well-established firms within the market.[691]

[686] *Nationwide Poles* at par 27 – 31.
[687] *Nationwide Poles* at par 56 – 57.
[688] *Nationwide Poles* at par 56.
[689] Section 9(a) – (c), also see *Nationwide Poles* at par 72.
[690] The *Nationwide Poles* case has been regarded as a seminal case in South African competition law as it was the first time that the Tribunal was tasked with interpreting section 9 especially against the various goals of the Act as contained in the Preamble and section 2.
[691] In arriving at this conclusion, the Tribunal relied heavily on the enactment of Robinson-Patman Act in the United States which was enacted solely to prohibit the conduct of price discrimination. The Tribunal was of the view that this clearly was indicative of the fact that price discrimination was a particular species of anti-competitive conduct. See *Nationwide Poles* at par 78 – 81.

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The Tribunal relied heavily on the fact that because the promotion of small business was a specific aim of the Act[692] and because of the Tribunal's perceived distinctness of conduct that amounts to price discrimination, the often repeated mantra of "protect competition, not competitors" found no application in these circumstances.[693]

Sasol Oil however preferred an interpretation of section 9 that required that the actual harm to consumer welfare would need to be proved in order for it to be guilty of prohibited price discrimination. The Tribunal rejected this interpretation on the basis that it was of the view that the legislature clearly intended that complainants under section 9 would almost always be small firms who would not be able to show any harm to consumer welfare through increased prices or reduced output, but would nonetheless need some remedy against a firm which would seek to exclude them from the market or hamper their ability to compete in the market.[694] The Tribunal accordingly held that the necessary threshold for a firm to be guilty of price discrimination in terms of section 9(1)(a) was much lower than the other forms of prohibited conduct in that a complainant would not be required to prove any form of competitive harm occasioned by the alleged price discrimination and would only need to show competitive relevance to its complaint.[695] This lead the Tribunal to conclude that Sasol Oil's pricing structure was in fact a contravention of section 9(1)(a).[696]

The matter was subsequently appealed by Sasol Oil.[697] On appeal the CAC disagreed with several important contentions made by the Tribunal. First, the CAC rejected the Tribunal's argument that in cases of price discrimination the complainant would only need to prove the elements of price discrimination as contained in section 9. It held that the complainant is required to place evidence before the Tribunal that the conduct in question will have the likely effect of substantially lessening or preventing competition within the market.[698] The CAC further rejected the Tribunal's disregard for consumer welfare in

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[692] See section 2(e) of the Act which provides that one of the aims of the Act is "to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy".
[693] See *Nationwide Poles* at par 85 – 87.
[694] *Nationwide Poles* at par 101.
[695] *Nationwide Poles* at par 102 & 103.
[696] *Nationwide Poles* at par 125 – 126.
[697] See *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/April05.
[698] The argument advanced by counsel on behalf of Sasol Oil was that the same wording has been used in both section 9 as well as in the merger regulation portion of the Act in section 12 and 12A. It would accordingly be illogical to assume that the legislature intended the same words namely, *"… likely substantially prevent or lessen competition"* would have two different means within the Act. The CAC relied

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matters of price discrimination and reiterated that "consumer welfare is of paramount importance in the context of competition law".[699] Lastly, although the CAC did not disagree with the Tribunal on the importance of protecting small firms and their access into the market, the CAC did however confirm the notion that "competition law does not protect the competitor, it protects competition".[700] In light of the fact that Nationwide Poles failed to adduce any evidence that Sasol Oil's pricing policy was likely to substantially lessen or prevent competition within the market, the CAC overturned the Tribunal's decision and dismissed the complaint.[701]

4.2. Nationwide Poles, A Lesson to be Learnt

There are several criticisms that can be levied against the manner in which the Tribunal adjudicated the *Nationwide Poles* matter. First, a legitimate question could be asked as to whether it was proper to have regarded Sasol Oil as a dominant firm to begin with. As discussed above, Sasol Oil sought for the relevant market to be defined as the wood preservative market which included both creosote and CCA, which contained a variety of different producers, while the Tribunal ruled that the relevant market was the creosote market in which there were only two producers, namely Sasol Oil and Suprachem.[702] But Sutherland and Kemp observe that it would appear from the CAC's decision as well as from the decision of the Tribunal itself, that the Tribunal may have misdirected itself in arriving at this conclusion.[703] According to the hypothetical monopolist test,[704] where it is shown that the hypothetical monopolist would not be able to control the price of the relevant product and remain profitable within the relevant geographic region or focal market, the test will then be repeated including the next best substitute until the hypothetical monopolist will not be able to control the price and remain profitable.[705] The CAC's ruling seems to point to the fact that this test was entirely ignored by the Tribunal.

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on the decision of *Mondi Ltd/Kohler Cores & Tubes v Competition Commission* (2003) 1 CPLR 25 (CAC) where the CAC held that *"The test is not whether a merger necessarily prevents or lessens competition but whether it is likely substantially to so prevent or lessen competition… the tribunal cannot base its decision upon speculation of a kind which cannot be attributed to any evidential foundation placed before the Tribunal… it makes a predictive judgment, based on the evidence which has been placed before it.* See *Sasol Oil (Pty) Ltd v Nationwide Poles* at 38.

[699] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 40.

[700] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 40.

[701] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 41.

[702] See previous discussion at paragraphs 3.3.1 and 3.3.2.

[703] Sutherland and Kemp at 7-108 – 109.

[704] Sutherland and Kemp at 7-19.

[705] Sutherland and Kemp at 7-20.

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The CAC also stated that Suprachem was a significant supplier of creosote and had even been successful in attracting customers away from Sasol Oil.[706] The reason for this loss in market share was due to the fact that Sasol Oil's product, SAK K, had a higher input cost than Suprachem's product due to the addition of the wax additive. Due to SAK K's higher cost, both Sasol Oil's and Suprachem's products were sold in sufficiently high volumes to constrain Sasol Oil's ability to unduly raise prices of its product.[707] The CAC also appeared to be more accepting of the fact that CCA was a viable alternative to creosote and some of Sasol Oil's customers had switched from SAK K to CCA as a consequence of Sasol Oil's pricing structure.[708]

In particular the Tribunal's decision in *Nationwide Poles* appears to highlight several of the problems associated with the Act's political approach to competition regulation and specifically in matters dealing with abuse of dominance. The low threshold for dominance aims the abuse of dominance provisions of the Act at the incumbent large "white owned" firms in the market. Importantly, this case highlights the dangers associated with an obsession with market structure and particularly the structural factor of market share. As stated previously and in accordance with section 7 of the Act, where a firm's market share exceeds 45%, that firm is irrebuttably presumed to possess market power and is regarded as *per se* dominant in the market.[709] But the *Nationwide Poles* matter appears to highlight just how unreliable a measure, or at least indicator, of dominance and market power, market shares can be as a determinative measure in all instances. Both the United States and the European Union have long held that very large market shares are usually indicative of dominance.[710] However, as the ECJ stated in the *Hoffman La Roche* matter, a large market share cannot always be a reliable indicator of dominance and dominance will always be a question of fact taking into account the various other structural factors that may exist in the particular market.[711] More specifically, European authorities will also consider the various other characteristics of a particular market including its barriers to

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[706] See *Sasol Oil (Pty) Ltd v Nationwide Poles CC* at 23.
[707] See *Sasol Oil (Pty) Ltd v Nationwide Poles CC* at 23.
[708] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 32 – 33.
[709] See section 7.
[710] See the US decisions of *United States v United Shoe Machinery Corp* 110 F.Supp 295 (D.Mass 1953) and *United States v Aluminum Co. of America*148 F.2d 214 (1945) and EU decisions of *Hilti AG v Commission* (1991) ECR II – 1439 and *Akzo v Commission* (1991) ECR I – 3359. Both US and EU authorities have accepted that exceptionally large market shares are indicative of dominance
[711] See *Hoffman La Roche v Commission* at par 40 and DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses at par 4.2.2.

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entry to the particular market, the countervailing power of consumers as well as the availability of substitute goods when making determinations of dominance and market power.[712]

Both of these jurisdictions equate dominance with possession of substantial market power and thereby having the ability to raise prices above the competitive level.[713] However, it would appear as though such power was lacking in the *Nationwide Pole*s matter due to there being no evidence of Sasol Oil being able to control prices. It further appears that even the Tribunal conceded that Sasol Oil lacked some level of market power as the Tribunal held that *"Sasol would not be able to exercise market power in the pricing of creosote if the boundaries of the relevant market extended beyond the creosote market."*[714] The Tribunal's finding of dominance appears to be predicated on the mistaken belief that no alternative products existed that Nationwide Poles could use. It was however common cause that Nationwide merely *preferred* Sasol Oil's product over Suprachem's creosote due to its wax additive and the other alternative preservative agents.[715]

As the CAC correctly pointed out, the Tribunal appeared to ignore the evidence placed before it that Sasol Oil had been losing market share to Suprachem and CCA as a direct consequence of the higher price of its creosote.[716] This higher price was not occasioned through Sasol exercising its alleged market power but as a direct consequence of its higher input costs resulting from the addition of the wax addictive and the manner in which it was impregnated into the wooden poles.[717] Now one can only assume that if Sasol Oil were to further increase its prices above the competitive level, the only logical conclusion is that Sasol will then lose further market share to its competitors. Under these circumstances, it appears that it would be very difficult to justify a finding that Sasol Oil does in fact possess substantial market power in both the creosote and wood preservative markets. Even though the CAC does not go as far as stating it, it becomes apparent from the CAC's ruling that both the creosote and the wood preservative markets

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[712] See DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses.
[713] See Monti, *EC Competition Law* (2008) at 125.
[714] *Nationwide Poles* at par 71.
[715] *Nationwide Poles* at par 29.
[716] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 24.
[717] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 25.

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appear to be highly competitive markets with price playing a determining role in a particular firm's choice of product. Herein lies the present problem. From the evidence placed before the Tribunal and the CAC, it appears that although Sasol Oil possessed a sufficiently large market share for a determination of dominance to made in accordance with section 7, it seems that *de facto* Sasol Oil nevertheless lacked substantial market power, a necessary component for dominance within the market.

When looking at the history of the development of the South African competition landscape and the specific political goals listed in the Act, it becomes easy to understand why the Act places such a large emphasis on market shares for the establishment of dominance. Many firms with extremely large market shares that exist today possess those market shares as part of the discriminatory legacy of apartheid as well as through the creation of various state sponsored monopolies.[718] It is clear, as reaffirmed by the preamble and purpose provisions of the Act as discussed in Chapter 3[719], that the abuse of dominance provisions of the Act are aimed squarely at the traditionally "white owned" firms, which by virtue of their large market shares, are presumed to be dominant in their respective markets. While this assumption may prove correct in most circumstances, there will no doubt be exceptions to the rule. The *Nationwide Poles* matter appears to support this notion. Although Sasol Oil possessed a relatively large market share in both the creosote and wood preservative markets, its declining market share appears to evidence the fact that Sasol Oil would be unable to raise the price of its product without risking the loss of further market share to its competitors. It would appear further as though the Tribunal did not properly consider the numerous criticisms against the cellophane fallacy when establishing the relevant market.[720] Instead, the Tribunal fell into the same trap as the US Supreme Court in the *Du Pont* matter.[721] *Nationwide Poles* should then serve as a cautionary tale for both competition authorities as well as the

[718] Many large firms that exist in South Africa today owe their large market shares to the structural impediments created by apartheid policies as well as through the creation of various state owned entreprised for example Mittal Steel, previously ISCOR, Eskom, SAA and Telkom. See Lesofe & Nontombana *A Review of Dominance Provisions of the Competition Act – Is it Necessary?* Available at http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf (lasted accessed on 31/10/2017). As see *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another* 13/CR/FEB04 at par 75 where the Tribunal held "the acquisition of market share by pro-competitive means through to past or present governmental support and subsidy, may result in single firm domination of markets.
[719] See Chapter 3 par 3.1.
[720] See Monti, *EC Competition Law* (2008) at 151.
[721] See Monti, *EC Competition Law* (2008) at 151. Also see previous discussions at paragraph 3.2.1.

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legislature that section 7 in its present form may lead to a situation where a firm is declared dominant solely by virtue of its market share but, due to the nature of the particular market and the specific circumstances that exist therein, such a firm may actually lack the necessary substantial market power to be considered truly dominant within such market. These factors may constrain a firm's ability to act independently of its competitors and may ironically defeat the Act's own definition of market power.

The second criticism against *Nationwide Poles* is that this case appears to highlight the potential dangers that exist in including both pure competition and political goals within the aims of the Act and potential difficulties that competition authorities may have in trying to reconcile these different goals with one another. As discussed earlier, the Tribunal adopted an interpretation of section 9 that favoured the promotion and protection of small firms at the expense of the promotion and protection of consumer welfare.[722] In arriving at its decision, the Tribunal placed considerable weight on section 2(e) of the Act which seeks to promote the equitable opportunity of small and medium businesses to participate in the economy. This reliance on section 2(e) led the Tribunal to conclude that because price discrimination had been dealt with as a separate species of abuse of dominance distinct from the wide ambit of section 8 and given the different wording used in section 9, it was clearly the sole aim of section 9 to protect these small competitors at the expense of the other goals that the Act sought to achieve.[723] This over-reliance on the singular goal listed in section 2(e), however appears to place the Act in conflict with itself. If this interpretation were to be accepted as correct, the potential exists that each and every section of the Act may be subject to its own interpretation and subject to a different goal listed in section 2. Furthermore, the possibility that any particular section could be incorrectly interpreted, and that the wrong goal could be attributed to it, would become a reality. This would also place a heavy burden on competition authorities moving forward as they would now need to first interpret every portion of the Act on its own merits. This then needlessly fragments the process of competition regulation. Although there are a variety of goals that the Act seeks to achieve, there is little evidence to support the Tribunal's view that certain goals apply to particular sections of the Act. Instead, it is submitted that the Act should be interpreted as a whole. But the problem still remains

[722] See *Nationwide Poles* par 85 – 90.
[723] See *Nationwide Poles* at par 79 & 81.

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how these often-conflicting objectives of the Act are to be weighed up against one another.

4.3. Market Structure versus Consumer Welfare

It appears as though this obsession with market structure and market shares has, since the decision in *Nationwide Poles,* dominated the thinking of both the Commission and the Tribunal when evaluating cases of abuse of dominance. In the matter of *Harmony Gold Mining Company Ltd and Another v Mittal Steel South Africa Ltd and Another*[724] two mining companies alleged that Mittal Steel, a steel producer, had imposed an excessive price for its flat steel products in the domestic market in contravention of section 8(a).[725] In support of these of allegations, the complainants relied on a series of comparisons of prices in several different markets.[726] The Tribunal held that is the fundamental task of competition regulators to promote and defend competitive market structures and to guard against conduct on the part of market participants which seeks to undermine the promise of those competitive structures to deliver quality goods and services at competitive prices.[727] What is particularly interesting to note from the Tribunal's decision is that it labelled Mittal Steel a “”super dominant firm” – a term that at the time was foreign to our law.[728] In arriving at this decision, the Tribunal again placed a lot of emphasis on the structure of the particular market.[729] The Tribunal ruled that because Mittal's market share in various markets exceeded 80%, Mittal was *“an uncontested firm in an incontestable market”* in that it was not constrained by a price ceiling or the pricing practices of its competitors.[730] Although it would be difficult to argue against Mittal's dominance in this particular case, it is submitted that the Tribunal had over-stepped the mandate granted

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[724] 13/CR/FEB04.
[725] This is one of the very few excessive pricing cases that has been decided the Tribunal. It is also interesting to note that the Commission elected not to refer the matter to the Tribunal and the matter was litigated before the Tribunal by the complainants themselves.
[726] These included prices charged by other producers worldwide, Mittal's production costs, the prices Mittal charged its customers and the various rebates afforded to certain clients, as well as the price Mittal charged various of its export customers. *Mittal Steel* at par 32.
[727] *Mittal Steel* at par 74.
[728] See *Mittal Steel* at para. 108. The term super dominance derives its existence from the United Kingdom. See *Napp Pharmaceutical Holdings Ltd & Others v Director General of Fair Trading* [2002] CAT 1.
[729] *Mittal Steel* at par 66.
[730] *Mittal Steel* at par 108 – 110.

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to it by the Act in naming Mittal "a super dominant firm". Evidence of this can be seen in the CAC's subsequent decision.[731]

The CAC was critical of the Tribunal placing so much emphasis on structural factors, and specifically of the so-called "structural test" applied by the Tribunal.[732] In terms of this test, the Tribunal held the following:[733]

"In summary then our approach is to follow the schema of the Act and the standard approach to allegations of abuse of dominance which, as we have seen, derives dominance from specified market shares and the possession of market power. Following this approach, it reasonably holds that the power to price 'excessively' is the preserve of firms of overwhelming size relative to the market in which they are located and which are, in addition, markets characterised by unusually high entry barriers. That is, the market share enjoyed by the firm in question should approximate 100% and there should be no realistic prospect of entry – in other words the market should be both uncontested and incontestable."

The Tribunal went further in stating that:[734]

"It is our view that section 8(a) is precisely intended to apply to those rare markets that are uncontested (monopolised or "super-dominated"), incontestable (subject to insurmountable entry barriers) and unregulated (not subject to price regulation)."

The CAC rejected the notion that in order for there to be a finding of excessive pricing, the market in question must be "uncontested" and "incontestable" and that the firm in question must be super dominant, as this interpretation was not supported by the Act. Instead the CAC reiterated the wording of section 8(a) read together with the definition of excessive pricing contained in section 1.[735] In this regard, the CAC held that in order for a finding of excessive pricing to be made, a determination would need to be made on the following: the actual price of the good that is alleged to be priced excessively; its economic value; the difference between the price charged and its economic value and whether the difference in such values can be regarded as reasonable; and whether the

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[731] See *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* 70/CAC/Apr07.
[732] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 81.
[733] *Mittal Steel* at par 96.
[734] *Mittal Steel* at par 106.
[735] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 32.

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charging of this excessive price is detrimental to consumers.[736] The CAC accordingly held that the Tribunal "misconstrued its powers and came to a decision that cannot be justified by the words of the Act".[737] The CAC in determining the appropriate order held that:

"In summary, the dominance of Mittal read together with its case in answer to respondent's case, as pleaded, raised a prima facie presumption of a contravention of s 8 (a). The Tribunal was therefore required to analyse the evidence to determine whether Mittal's justification rebutted this presumption sufficiently for it to conclude, on the probabilities, that no breach of s 8(a), as alleged, had been committed. That analysis does not require further evidence but rather an examination of the evidence in terms of the statutory framework as set out in this judgment."[738]

The CAC accordingly held that the matter should be remitted back to the Tribunal for the hearing of further *viva voce* evidence and for a determination, by the assessment of the evidence already presented to the Tribunal, as to whether Mittal contravened section 8(a) of the Act.[739]

The CAC's decision in *Mittal Steel* again highlights the dangers of adopting a purely structural approach to allegations of abuse of dominance. Above all else, it should serve as a reminder that abuses cannot simply be inferred because of the structure of the market in question. Instead, such a finding needs to be supported by evidence that proves that abusive conduct actually occurred. Notwithstanding the CAC's criticisms of the Tribunal's approach in *Mittal Steel*, the Tribunal has however persisted with its structuralist approach to cases concerning abuse of dominance. In the matter of *The Competition Commission v South African Airways (Pty) Ltd*[740] several complaints were laid against SAA, including that it had abused its dominant position by engaging in exclusionary conduct by firstly, concluding agreements with various travel agents in terms of which they would receive commissions on an incremental basis and secondly, through its reward scheme known as "Explorer" in terms of which it would reward employees of

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[736] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 48 – 55.
[737] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 56.
[738] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 81.
[739] *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 84.
[740] 18/CR/Mar01(Hereinafter referred to as *SAA*).

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travel agents for bookings placed with SAA.[741] SAA attempted to argue that it would not be sufficient to merely prove that it had engaged in exclusionary conduct in terms of section 8(d) but that the Commission would have to prove that the conduct was in fact exclusionary.[742] This argument was however rejected by the Tribunal on the basis that the language of section 8 did not support this interpretation as it would create a "middle ground" contravention somewhere in between a rule of reason and *per se* offence.[743] It held that the language of section 8 meant that it would not be necessary for the Commission to prove that conduct did in fact have an exclusionary effect and thereby harm competition within the relevant market.[744] In arriving at this decision, the Tribunal held that there was "no need to make a finding that there was actual harm to consumers, despite the lack of direct evidence on this point".[745]

On appeal the CAC confirmed several of the rulings of the Tribunal.[746] Firstly, the CAC confirmed that where a firm's market share exceeded 45% of the relevant market that firm would be irrefutably presumed dominant for purposes of the Act and there would be no further need to engage in an enquiry to actually establish whether the firm in question did in fact possess market power.[747] Secondly, the CAC held that in order to establish an anti-competitive effect for purposes of section 8, an exclusionary act would need to be significant in that it forecloses the market to rivals. This can be established either through evidence of actual competitive harm or evidence that the exclusionary conduct has the potential to foreclose the market to rivals.[748] The CAC further held that from the inclusion of the various goals of the Act set out in section 2, it was evident that the Act is primarily concerned with the protection of the competitive process rather than the protection of competitors.[749]

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[741] *SAA* at par 13 – 25.
[742] *SAA* at par 103.
[743] *SAA* at par 104. Also see Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 168.
[744] See *SAA* at par 104 – 105 & 129. Also see *The Competition Commission v Patensie Sitrus Beherend Beperk* 37/CR/Jun01 at par 95 where the Tribunal held that in terms of section 8(d), the complainant would not need to prove that the act complained of had an exclusionary effect. Accordingly, all that would need to be proved is that section 8(d) has in fact been contravened by a dominant firm and thereafter the exclusionary effect of the act would be presumed.
[745] See *SAA* at par 242. See Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* at 159.
[746] See *South African Airways (Pty) Ltd v Comair Limited & Another* 92/CAC/Mar10.
[747] *South African Airways (Pty) Ltd v Comair Limited & Another* at par 68 & 73.
[748] *South African Airways (Pty) Ltd v Comair Limited & Another* at par 112.
[749] *South African Airways (Pty) Ltd v Comair Limited & Another* at par 136.

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One final decision to consider is the decision of *The Competition Commission v Sasol Chemical Industries Ltd.*[750] In this matter an allegation was made against Sasol Chemical Industries (SCI) that it was charging an excessive price in contravention of section 8(a), in the markets of purified propylene and polypropylene. In hearing the matter, the Tribunal was mindful of the CAC's criticisms of its structuralist approach as adopted in the *Mittal Steel* case.[751] In attempting to arrive at an "economic value" for the price of the products in question, the Tribunal took into account a variety of economic data which included a price-cost test, an export price comparison as well as the prices charged by other firms in other geographic markets.[752] The Tribunal further looked at the various structural factors that existed in the present market, such as the high barriers of entry, and held that because SCI's dominance was a *"by-product of years of considerable state support"* and *"not the result of years of risk taking and innovation on its part in those markets"*[753], SCI had considerable market power and dominance within the markets in question.[754] The Tribunal accordingly held that on the economic evidence placed before it, particularly SCI's low input costs, the prices charged by SCI for both propylene and polypropylene bore no reasonable relation to the actual economic value of these products.[755] Its dominance allowed SCI to maintain excessive prices through the exercise of its market power which had the effect of depriving the local market of the opportunity for innovation and development in the manufacture of downstream plastic goods.[756] The Tribunal further held that the ultimate effect of SCI's conduct was to harm consumer welfare.[757]

This matter too was subsequently appealed.[758] SCI's argument centred around the fact the Tribunal erred in its interpretation of what it meant by the term "economic value" as laid down in *Mittal Steel*.[759] SCI accordingly contended that the "notional competitive

[750] 48/CR/Aug10, hereinafter referred to as *"Sasol Chemicals"*. Due to the voluminous nature of the Tribunal's decision and given the large amount of economic evidence presented at the hearing, further reference will be made to the Tribunals executive summary available at www.comptrib.co.za/assets/UPLOADS/SCI-EXECUTIVE-SUMMARY-FINAL-05-June-2014-011502.pdf (last accessed on 07/11/17) (hereinafter referred to as the Tribunal's Executive Summary).
[751] The Tribunal's Executive Summary at par 9.
[752] The Tribunal's Executive Summary at par 13 – 15.
[753] The Tribunal's Executive Summary at par 27.
[754] The Tribunal's Executive Summary at par 21 – 27.
[755] The Tribunal's Executive Summary at par 28.
[756] The Tribunal's Executive Summary at par 31.
[757] The Tribunal's Executive Summary at par 30 - 33.
[758] *Sasol Chemical Industries Ltd v The Competition Commission* (131/CAC/Jun14).
[759] See *Mittal Steel* at par 40 where the Tribunal held that what the legislature intended by the term economic value is the notional price of the goods or services under assumed conditions of long-run

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price" is based on the costs of the notional competitor. The costs of the dominant firm can accordingly not be used as a benchmark and can only be used to the extent that they reflect the costs of the notional competitor.[760] For this reason, because SCI enjoyed a special cost advantage in the production of the products in question, its input costs would not be the same as those of the notional competitor and would need to be adjusted upwards in accordance with the principles laid down in *Mittal Steel*.[761] The CAC criticised the Tribunal's decision and held that it was confusing and exhibited a piecemeal reading of case law.[762] The CAC held that the ultimate determination of economic value would have to be based on the price at which SCI purchased its feedstock and not on a hypothetical case.[763] The CAC further criticised the Tribunal's emphasis on innovation particularly on the basis that the Tribunal seemed to express the view that the ownership of intellectual property obtained through innovation would entitle the owner thereof to charge a higher price for its product that bears no reasonable relation to its economic value.[764]

5. Conclusion

The debate on the relevance of consumer welfare in instances of single firm exclusionary conduct has long dominated the thinking of competition law scholars. It is precisely this argument that lead to the development of the Chicago Theory during the 1980's.[765] Many scholars believed that antitrust regulation under the Harvard Theory had become so interventionist and so concerned with protecting smaller firms, that conduct which should be regarded as ordinary business transactions were now being prohibited.[766] These arguments have only gathered steam with several American authors criticising the Federal Trade Commission's belief that it is unnecessary to prove any anti-competitive effects of exclusionary conduct in favour of the argument that many forms of exclusionary

competitive equilibrium. Also see para 43 where the Tribunal held that "economic value is a notional objective competitive market standard, not one derived from circumstances peculiar to the particular firm".

[760] *Sasol Chemical Industries Ltd v The Competition Commission* at par 44.

[761] *Sasol Chemical Industries Ltd v The Competition Commission* at par 102.

[762] *Sasol Chemical Industries Ltd v The Competition Commission* at par 99 – 102.

[763] *Sasol Chemical Industries Ltd v The Competition Commission* at par 115.

[764] *Sasol Chemical Industries Ltd v The Competition Commission* at par 172 & 173. Also see World Intellectual Property Organisation "Guidelines on the Definition of the Relevant Market" at 4.

[765] See Bork (1966) and previous discussions in Chapter 2 at paragraph 3.

[766] Fox, "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" (2002) *Antitrust Law Journal* 371 at 377 (hereinafter referred to as Fox, "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect""). Also see previous discussions on this point in chapter 2 at paragraph 3.

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conduct, even that of dominant firms, will very rarely have an adverse effect on competition.[767] But these arguments have not fallen on deaf ears. The decision in *California Dental* appears to represent a prime example in this change of philosophy regarding the way allegations of abuse dominance should be both viewed and approached.[768]

The European Union has however remained uniform in its approach to competition regulation, preferring an approach that protects competitive market structures by protecting smaller market participants from the actions of dominant firms.[769] It follows that European authorities appear to be steadfast in their belief that if they can successfully protect smaller market participants from foreclosure by larger dominant competitors and thereby protect the competitive process, it will ultimately be to the benefit of both these smaller firms and consumers.[770] But, as can be seen from the statements of the then Competition Commissioner Mario Monti back in 2001, there does appear to be some sort of recognition within the European Competition Commission of the importance of protecting consumers and not competitors.[771] However, given the nature of the European Union and the role competition law plays in maintaining a common market between its various member states as well as Monti's statements that the elimination of competitors from the market leads to consumer harm,[772] it is unlikely that the EU will abandon its structuralist approach to allegations of abuse of dominance any time soon.

Both the European and US markets are much larger, more established and more developed than the South African market. The European market does however have one striking similarity to the South African market. As pointed out by Fox, both of these markets have several key markets (telecommunications and energy to name but a few) dominated by effective monopolies that have attained their privileged position within the

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[767] See Muris "The FTC and the Law of Monopolization", (2000) *Antitrust Law Journa*l 693. Also see Fox "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" at 377. Also see previous discussions in Chapter 2 at paragraph 3 and 4.
[768] See previous discussions on *California Dental Association v FTC*, 526 U.S. 756 (1999) and by Pirano (1991) in Chapter 2 at paragraph 7.
[769] D. Hildebrand "The European School in EC Competition Law" (2002) W*orld Competition Law & Economics Review* 7 at 8.
[770] Fox "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" at 395.
[771] See Monti "The Future for Competition Policy in the European Union", address at Merchants Taylor's Hall London (9 July 2001), available at http://europa.eu/rapid/press-release_SPEECH-01-340_en.htm?locale=en (last accessed 13/11/2017). Also see [771] *Sasol Oil (Pty) Ltd v Nationwide Poles* at 40 and [771] *South African Airways (Pty) Ltd v Comair Limited & Another* at par 136.
[772] See Monti "The Future for Competition Policy in the European Union" at 392.

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market either through their establishment as state owned entities, or through several decades of being the recipients of substantial state assistance.[773] The argument can be made that the very motive for these firms to abuse their dominance within the market is to protect this position of privilege.[774] The structural elements of these markets have however rendered some of these firms immune from competition for substantial periods of time. This competitive immunity has led to these firms enjoying sustained economic success without the need of having to adopt any business strategies or seeking innovations which would ordinarily make them more competitive within their markets than their competitors. Fox has further argued that the structural impediments that exist in these markets and the market power they confer on the firms in question have negated the corrective nature of ordinary market forces.[775] The belief appears to be that the only solution to this problem is through substantial regulatory intervention by competition authorities with the aim of curtailing the market power of these dominant firms in order to try and correct these imbalances.[776]

This argument may explain why competition authorities in these two markets have adopted a generally hostile attitude towards dominant firms. But one must always bear in mind that when it comes to South Africa, its history of discriminatory and exclusionary practices along racial lines has particularly played a significant role in the development of competition law and particularly in matters of abuse of dominance. While the European Union and many developing nations have adopted competition legislation in support of the liberalisation of their markets and as a means to maintain a level of regulation in an ever-increasing deregulated free-market, Lewis indicates that South Africa by contrast has long enjoyed a liberalised free market economy, which has shifted the goal of competition law to breaking down barriers to entry by addressing the market's structural problems.[777] In adjudicating allegations of abuse of dominance, history has shown that

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[773] See Fox "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" at 393.
[774] See Lewis "Administrability and business certainty in abuse of dominance enforcement: an economist's review of the South African record", Paper for 5th Annual Conference on Competition Law, Economics and Policy, University of Johannesburg (4 & 5 October 2011) available at http://compcom.co.za.www15.cpt4.host-h.net/wp-content/uploads/2014/09/Administrability-bus-certainty-in-abuse-30092011.pdf (last accessed 09/11/2017).
[775] See Fox "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" at 375.
[776] See Fox "What is Harm to Competition – Exclusionary Practices and Anti-competitive Effect" at 378.
[777] See Lewis' speech entitled "Competition Law and Policy in Bad Times" available at https://www.comptrib.co.za/assets/Uploads/Speeches/lewis14.pdf (last accessed 17/09/2018) particularly see he his comments where he goes on to state that "South African competition law was as much, if not

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both the Tribunal and the CAC have largely been accepting of employing Chicago and Post-Chicago economics in arriving at their decisions. However, it would appear from the decisions discussed above, that the overriding factor when arriving at a decision that a firm has abused its dominant position is the particular firm's ability to foreclose its rivals or potential rivals in light of the structural factors that exist in the particular market. Coupled with the fact that market power will always be assumed in circumstances where a firm's market share exceeds 45% and very little weight, if any, is attributed to consumer harm and welfare in determinations of abuse of dominance, the South African legislature has clearly favoured an approach to abuse of dominance akin to that of the Harvard theory of competition regulation.

But the question remains whether this structuralist approach so focussed on market structure will aid in the attainment and maintenance of effective competition in the South African market? Certainly, history has so far shown that this will in fact not be the case. The CAC overturning the decisions of *Nationwide Poles* and *Mittal Steel*, if anything, highlight the potential problems that this structuralist approach presents. The Sasol Chemicals matter also highlights how a firm cannot be prosecuted simply because it is dominant and has efficient business practices. This matter further highlights the importance of comparing "apples with apples". The problem, it would appear, is forcing authorities to try and achieve the political goals listed in the Act together with its pure competition goals. The matters discussed herein illustrate the pained relationship that exists between these two different sets of goals and highlights just how easy it can be to use political goals to potentially manipulate the provisions of the Act for the furtherance of a political agenda. The matters discussed herein also at least highlight how political goals should give way to pure competition especially in the attainment and maintenance of effective competition within the South African market. However, as will be discussed in chapter 7, it seems that the amendments to the abuse of dominance provisions by the 2019 Competition Amendment Act have been formulated with the specific purpose of strengthening the Act's ability to achieve its political goals at the expense of its pure competition goals.

more, driven by the imperative to confront long standing concentrations of economic power, as it was to support liberalization."

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Chapter 6 Merger Regulation

1. Introduction

The regulation of mergers plays a particularly important role in competition regulation worldwide. Sutherland and Kemp remark that, unlike the regulation of collusion, abuse of dominance and other prohibited practices which deal with the actual anti-competitive effects of certain forms of conduct, merger regulation is tasked with proactively preventing corporate structures that may have a potentially detrimental effect on the structure of the market if a merger were permitted to proceed.[778] In this way, competition authorities are required to "peer into their crystal ball" prior to the merger being implemented and to try to determine the post-merger effect that a merger may have on competition.[779]

This chapter will examine the merger regulation provisions contained in the Act and how the inclusion of political goals in the merger evaluation process can potentially hamper merger regulation and compromise its pure competition objectives. Accordingly, for purposes of contextualisation, the chapter will briefly examine how the Act defines the concept of "a merger" and consider the notification procedures contained in the Act. It will deal more extensively with merger evaluation and the substantive issues which form part of the evaluation process, and specifically the public interest component of merger evaluation contained in the Act. A variety of cases that have been decided by the Tribunal and the CAC will also be examined with the purpose of determining how the political goals contained in the Act have influenced the manner in which mergers are evaluated and approved. Specific attention will be paid to the conditions imposed on mergers to determine whether these conditions address legitimate public interest concerns or whether they have been imposed on mergers for the sake of furthering political agendas.

2. What is a merger?

[778] Sutherland and Kemp at 8-3. Also see Lewis "The Competition Act 1998-Merger Regulation" (1999) *ICM Mergers and Acquisitions Conference* (24 November 1999) available at http://www.comptrib.co.za/assets/Uploads/Speeches/lewis9.pdf (last accessed on 12/12/2018), Schwartz "Politics as Usual: The History of European Community Merger Control" (1993) *Yale Journal of International Law* 607, Stewart "Merger Regulation in the United States" (1978) *Management International Review* 43, and Lévêque & Shelanski *Merger Remedies in American and European Union Competition Law* (2003).
[779] See Lévêque & Shelanski *Merger Remedies in American and European Union Competition Law* (2003) at 71.

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Merger regulation is dealt with in Chapter 3 of the Competition Act. Section 12 of the Act defines a "merger" as follows:

"(1) (a) For purposes of this Act, 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.

(b) a merger contemplated in paragraph (a) may be achieved in any manner, including through –

(i) purchase or lease of the shares, an interest or assets of the other firm in question; or

(ii) amalgamation or other combination with the other firm in question.

When evaluating whether or not a particular transaction can be regarded as a merger for purposes of the Act, it is clear from both the definition of a merger contained in section 12 and the remainder of the wording in the section, that the concept of "control" is central to a particular transaction being regarded as a merger. Section 12(2) defines "control" to mean:

(2) A person controls a firm if that person –

(a) beneficially owns more than one half of the issued share capital of the firm;

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

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

(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section (1)(3)(a) of the Companies Act;

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

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(f) in the case of a close corporation, owns the majority of members' interests 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 paragraph (a) to (f).[780]"

Notably the Competition Act's definition of a merger is extremely broad. Sutherland and Kemp remark that the purpose of this broad definition is clearly to provide a "catch-all" provision which would subject a wide variety of different transactions and ownership structures to the merger provisions of the Act without the need of first having to engage in a complicated enquiry to establish if the transaction in question amounts to a merger.[781] Sutherland and Kemp further point out that this wide definition appears to create some degree of uncertainty and inconsistency in the manner in which authorities interpret section 12 and the concept of a merger.[782] In the matter of *Distillers Corporation (South Africa) Limited v Bulmer (SA) Pty Ltd* the Tribunal held that the question of whether a particular transaction can be regarded as a merger is only a preliminary enquiry and that "*the wheat should only be separated from the chaff when a substantive enquiry into the merger is launched."*[783] However, on appeal the CAC held *"… the Act was designed to ensure that the competition authorities examine the widest possible range of potential merger transactions to examine whether competition was impaired and this purpose provides a strong pro-pointer in favour of a broad interpretation to section 12 of the Act."*[784]

In the matter of *Gold Fields Ltd v Harmony Gold Mining Co Ltd*[785] it was remarked that:

"Previous decisions of the Tribunal have demonstrated sensitivity to the prospect of merging parties structuring transactions with the specific intent of evading regulatory

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[780] See the matter of *Gold Fields Ltd and Another v Harmony Gold Mining Co Ltd and Others* 43/CAC/Nov04 where the CAC held that where two shareholders openly expressed the intention to vote together and thereby exercise more than 50% of the available voting rights in the particular firm would prove sufficient for meeting the threshold of control as contained in section 12(2)(g) of the Act.
[781] See Sutherland and Kemp at 8-12.
[782] See Sutherland and Kemp at 8-17.
[783] 94/FN/Nov00 101/FN/Dec00 at par 18 – 19.
[784] see *Distillers Corporation (South Africa) Limited v Bulmer(SA) Pty Ltd* 2002 2 SA 346 (CAC) at par 358.
[785] 86/FN/Oct04.

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oversight and, in this way, undermining the objectives and administration of the Act. This has underpinned – appropriately in my view - an expansive view of control, a perspective endorsed by the Competition Appeal Court. I believe that this decision has been approached from this perspective and am confident that it in no way represents a relaxation of the Tribunal's commitment to ensure that the procedures of the Act are respected so as to enable effective regulation of merger activity. However, I am also of the view that this transaction has served to highlight a second danger and that is that the management of target companies may well seek to use the provisions of the Competition Act to chill hostile mergers, in effect to prevent their own shareholders from exercising the rights that attach to their share in the ownership of the company in question. Hostile mergers – red of tooth and claw though they may be – are an important part of the very competitive process that we are mandated to defend and to promote. I am, accordingly, confident that this decision does not fall prey to entreaties that may be designed to protect incumbent managers from the wishes of their owners."[786]

The problem however with the current formulation of section 12 and the inconsistency in the manner in which it has been interpreted, according to Sutherland and Kemp, is that it creates the potential for an over-inclusive regulatory model requiring that a vast array of transactions be notified to competition authorities despite the transactions presenting no competition issues worthy of regulation in terms of the Act.[787]

As alluded, section 12 further places the concept of "control" at the centre of a transaction being regarded as a merger for purposes of the Act. The Act has however provided no formal definition of the term "control" but, as indicated above, only provides a number of instances in section 12(2) when a person would generally be regarded as controlling a firm. The Tribunal has however held that section 12(2) captures the most instances of situations which indicate the nature of the concept of control, but it is by no means a closed list of examples. Instead, section 12(2) should rather be used as an interpretive tool for establishing the existence of control.[788] The Tribunal has since adopted the view that the instances of control listed in section 12(2) constitute "bright lines" and that once

[786] *Gold Fields Ltd v Harmony Gold Mining Co Ltd* per Lewis at par 4.
[787] Sutherland and Kemp at 8-12 – 8-13.
[788] *Bulmer SA (Pty) Ltd v Distillers Corp (SA) Ltd* at par 14. Also see Sutherland and Kemp at 8-14.

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a firm crosses these bright lines the transaction will constitute a merger that will require notification.[789]

In particular Sutherland and Kemp have favoured an interpretation of the concept of "control" that places "material influence" as provided for in section 12(2)(g) at the centre of the concept.[790] In this respect, although Sutherland and Kemp accept the notion of "bright lines" they prefer the view that these "bright lines" merely create the presumption of a firm acquiring control over another, but that this presumption should remain rebuttable with the attainment of "material influence" remaining the most essential element for control.[791]

3. Merger Notification Procedures

Section 11 of the Act states that the Minister of Trade, Industry and Competition in consultation with the Commission, must determine a lower and a higher threshold for the combined annual turnover or asset value, or a lower and a higher threshold for the combination of annual turnover and asset value in the Republic of the merging firms for the purposes of merger classification.[792] The Act defines three categories of mergers: "small mergers" are mergers with a value below or equal to the lower threshold determined by the Minister, "intermediate mergers" are mergers with a value between the lower and higher determined thresholds, and "large mergers" are mergers with a value at or higher than the higher determined threshold.[793] The current merger thresholds were first made effective on the 1st of April 2009[794] and were subsequently amended on the 15th of September 2017.[795] According to this amended regulation which took effect on the 1st of October 2017, the lower threshold will be reached where the combined annual

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789 See *Ethos Private Equity Fund IV/Tsebo Outsourcing Group (Pty) Ltd* 30/LM/Jun03 at par 16. Also see Sutherland and Kemp at 8-15.
790 Sutherland and Kemp at 8-15.
791 Sutherland and Kemp at 8-17.
792 Section 11(1).
793 Section 11(5)(a) – (c).
794 See GN 216 of 6 March 2009: *Determination of merger thresholds and method of calculation*, Government Gazette No. 31957). The notice further sets out the manner in which annual turnover and asset values are to be determined. The manner in which these values are determined are not important for the scope of this thesis but for the sake of clarity these values will generally be determined in accordance with generally accepted accounting practices.
795 See Government Gazette No. 41125 of 15 September 2017.

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turnover from the Republic of acquiring[796] and transferred[797] firms equals or exceeds R600 million, or the combined assets in the Republic of the acquiring and transferred firms equals or exceeds R600 million and, the annual turnover or assets of the transferred firm in the Republic exceeds R100 million.[798] The upper threshold will be reached where the combined turnover of the acquiring and transferred firm exceeds or equals R6.6 billion or the combined assets of the acquiring and transferred firms exceeds or equals R6.6 billion and, the annual turnover or assets of the transferred firm exceeds or equals R190 million.[799]

The importance of the classification of mergers becomes clear when one has regard to the notification procedures contained in the Act. As was discussed previously, merger notification and particularly merger control, are features that have been absent from previous legislation regulating competition in South Africa.[800] The notification and potential adjudication of a particular merger will largely depend on whether the merger in question can be defined as a small, intermediate or large in nature.

As observed by Sutherland and Kemp, merger notification remains the "centrepiece" of merger regulation in terms of the Act.[801] The importance of notification in merger regulation was highlighted in the matter of *Competition Commission v Edgars Consolidated Stores Ltd*[802] where the Tribunal remarked that: *"The Competition Appeal Court in Distell observed that in terms of our Act the obligation to notify will be broadly construed – this is because in our law notification is essential to jurisdiction, and not as in some other pre-notification regimes, independent of it. For this reason we will err on*

[796] Section 1 of the Act defines the "acquiring firm" as a firm:
a) That as result of a transaction in any circumstances set out in section 12, would directly or indirectly acquire, or establish direct or indirect control over, the whole or part of the business of another firm;
b) That has a direct or indirect control over the whole or part of the business of a firm contemplated in paragraph (a); or
c) The whole or part of the business is directly or indirectly controlled by a firm contemplated in paragraph (a) or (b).

[797] The "transferred firm" was defined in GG 22025 of February 2001 which later amended by GG 22280 of May 2001, which set out the previous thresholds for merger classification, as:
a) A firm, or the business or assets of a firm that as a result of a transaction in any circumstances set out in section 12, would become directly or indirectly controlled by an acquiring firm; and
b) Any other firm, or the business or assets of a firm, the whole or part of whose business is directly or indirectly controlled by a firm contemplated in paragraph (a).

[798] See section 2 of GN 40902 of 2017.
[799] See section 3 of GN 40902 of 2017.
[800] See previous discussions in Chapter 3 paragraphs 1 and 2.
[801] Sutherland and Kemp at 9-11.
[802] 95/FN/Dec02.

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the side of notification in interpreting whether a transaction constitutes a merger in terms of the Act."[803]

Sutherland and Kemp remark that although it remains unclear what is meant by the term "*notification is essential to jurisdiction"*, it seems to point to the fact that the Tribunal's jurisdiction to adjudicate a merger remains dependent on the merger being notified to the Commission.[804] In the case of small mergers, notification of the merger by the merging parties to the Commission is not a requirement for the implementation of the merger. The parties do not have to notify the small merger to the Commission but may choose to do so voluntarily. If they decide not to notify the merger to the Commission it will not bar the merger from being implemented.[805] However, the drawback is that where the Commission is of the view that a small merger (of which it becomes aware despite the absence of notification) may substantially prevent or lessen competition or where it cannot be justified on public interest grounds, the Commission may then oblige the merging parties to notify a small merger.[806] Should the parties fail to notify the merger within the stipulated time periods the parties may be subject to an administrative fine.[807] Furthermore, should a small merger be implemented in circumstances where the merger has been refused, the small merger will be subject to the same sanctions as those applicable to intermediate and large mergers, namely administrative fines in terms of section 59 or divestiture in terms of section 60.[808]

In the case of intermediate and large mergers, a duty is placed on the merging firms to notify the Commission of the proposed merger and such mergers cannot be implemented without first being approved with or without conditions.[809] The Act is silent on the issue of when exactly notification of the merger should be given but the CAC has endorsed the view that a merger should be notified as soon as the merger is proposed.[810] The Act is also unique in that requires *both* the acquiring and the acquired firms to provide notice of

[803] *Competition Commission v Edgars Consolidated Stores Ltd* at par 74.
[804] Sutherland and Kemp at 9-12.
[805] Sutherland and Kemp at 9-12.
[806] Section 13(4).
[807] Section 59(1)(d)(i).
[808] Sutherland and Kemp at 9-13. In terms of section 60(1(a) of the Act, divesture would require a party to a merger to sell any shares, interest or assets it has required to pursuant to the merger.
[809] Section13A(1) & (3).
[810] See the decision of *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 43/CAC/Nov04 where the CAC expressed the view that *"The test therefore is not what the contract purports to arrange but what constitutes the intention of the parties to the agreements in question".* Therefore, even the intention to merge will be sufficient to trigger the notification provisions of the Act.

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the merger to any registered trade union that represents a substantial number of the firms' employees or, in the event that no such registered trade union exists, notice must be given directly to those firms' employees or their designated representatives.[811] The purpose of this notification is to provide employees with the necessary information to enable them to make representations to the Commission or the Tribunal if they so wish and to allow employees to effectively participate in the merger process.[812] It is submitted that this requirement appears to be largely due to the fact that employment is a listed public interest ground in the Act and this requirement gives practical effect to this public interest concern. The Tribunal has endorsed the view that in order to give proper effect to this provision, notice as contemplated in section 13A must be given to the affected employees prior to the merger being notified to the Commission.[813]

Once the merger has been notified to the Commission, the merger must be investigated by the Commission and in the case of large mergers, adjudicated upon by the Tribunal. Intermediate mergers must be considered by the Commission. The Commission is required to approve, approve with conditions or prohibit the merger within 20 business days of all the notifications requirements being met but, the Commission may extend this period for a single period not exceeding 40 days.[814] Where the Commission fails to deliver a certificate approving or prohibiting the merger within the stipulated time periods, the merger must be regarded as having been approved.[815] In the case of large mergers, the Commission must refer the notification of the merger to the Tribunal and the Minister of Trade and Industry to allow the Minister to make a determination on whether he or she wishes to participate in the merger proceedings. However, such participation will be strictly limited to making representations on the public interest grounds listed in section

[811] Section 13A(2)(a) – (b).
[812] See *Unilever PLC v Competition Commission* 55/LM/Sep01 at par 40. Also see the Competition Commission's Practitioner update entitled "Notification of merger transactions in terms of section12A of the Competition Act No, 89 of 1998" (2017) available at http://www.compcom.co.za/wp-content/uploads/2014/09/Practitioner-Update-2017.pdf (last accessed on 24/10/2019) and the Competition Commission *Background Note to the Public Interest Guideline* (2015) available at http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Background-Note-to-Public-Interest-Guideline-210115.pdf (last accessed on 24/10/2019) at 13.
[813] See the decisions of *Unilever Plc v The Commission* 55/LM/Sep01 and *Telkom SA Ltd/TPI Investments (Pty) Ltd* 81/LM/Mar06. Also see Oxenham "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty"(2013) *US-China Law Review* 211 at 218. Also see Fox & Trebilcock *The Design of Competition Law Institutions: Global Norms, Local Choices* (2013) at 274.
[814] Section 14(1)(a) – (b).
[815] Section 14(2).

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12A(3).[816] Within 40 days of the notification requirements being met, the Commission must provide the Tribunal and the Minister with its recommendation on whether it believes that the merger should be approved, approved with conditions or prohibited. The Commission can apply to the Tribunal for an extension of the period, but the Tribunal may not grant an extension in excess of 15 days at a time.[817] The Tribunal is also empowered to reconsider any mergers that have been approved or prohibited by the Commission and the CAC is further empowered to reconsider decisions of the Tribunal.[818]

4. Merger Approval

4.1. A Merger's effect on competition

Chapter 3 of the Act and the merger approval provisions contained therein have been subject to substantial amendment in the Competition Amendment Act. These amendments will be discussed in detail in Chapter 7. However, for purposes of this Chapter, the provisions of section 12A will be discussed prior to their amendment for relevance to the mergers discussed later in the chapter.

When assessing a merger prior to the enactment of the Amendment Act, section 12A required that several substantive issues need to be considered by the Commission and the Tribunal. Section 12A(1) provided that when considering a merger, the Commission or Tribunal must initially determine whether such merger will likely have the effect of substantially preventing or lessening competition (the so-called "SLC test") by assessing a variety of factors set out in section 12A(2). As pointed out by Nzero, this requires establishing the relevant market and then establishing the extent of competition in such relevant market and thereupon attempting to establish (or rather predict) the level of competition post-merger.[819] The purpose of such an evaluation is to determine whether the merger may result in any anti-competitive effects as well as whether the merger will present any merger-specific benefits to the market.[820] Due to the fact that the possible

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[816] Section 14A(1)(a) and section 18(1).
[817] Section 14A(2).
[818] In terms of the then section 17(1), any party to a merger or party to whom notice was required to be given in terms of section 13A(2) may apply to the CAC to reconsider any decision of the Tribunal within 20 days after notice of the Tribunal's decision has been given in terms of section 16.
[819] Nzero *Corporate Restructuring in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* LLD Thesis, University of Pretoria (2013) at 285.
[820] Nzero *Corporate Restructuring in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* at 287.

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anti-competitive effects and benefits of a merger will need to be weighed up against one another, the section further provided that where a merger will have the likely effect of lessening or preventing competition, then the Commission or Tribunal was tasked to determine if the merger could be justified as a consequence of any technological, efficiency or other pro-competitive gain that was likely, or had the potential, to result from the merger being allowed, the effect of which would outweigh any lessening or prevention of competition. Alternatively, it must be considered whether the merger could be justified on substantial public interest grounds taking into account the factors listed in section 12A(3).[821] Lastly, the Act is unique in that authorities will also be required to determine if the merger could or could not be justified on substantial public interest grounds taking into account the factors set out in section 12A(3) as indicated below.[822]

In terms of section 12A(2), when determining the potential anti-competitive effects of a merger, the Commission or Tribunal must assess the strength of competition in the relevant market and the probability that firms in the market would behave in a competitive or collusive manner taking into account the following factors:[823]

a) the actual and potential level of competition from imports;

b) any barriers to entry into the market, including tariffs and regulatory barriers;

c) the level and trends of concentration in the market, as well as whether there is a history of collusion in such market;

d) the degree of countervailing power[824] in the market;

e) the market's dynamic characteristics, including growth, innovation and product differentiation;

f) the nature and extent of vertical integration in the market;

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821 Section 12A(1)(a)(i) – (ii).
822 Section 12A(1)(b).
823 Section 12A(2)(a) – (h).
824 Countervailing power can be defined as "the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers." See the European Horizontal Merger Guidelines OJ (2004) C 31/5 at par 64.

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g) whether the business, or any part thereof, of a party to the merger or proposed merger has failed or is likely to fail (the so-called "failing firm defence"); and

h) whether the merger will result in the removal of an effective competitor from the market.

Sutherland and Kemp point out that these factors have largely been imported from Australian and Canadian law but that the list should not be regarded as exhaustive.[825] They further point out that in practice, the relevant competition authority will be free to consider any factor that it may deem relevant and that the weight afforded to these factors will be solely dependent on the prevailing circumstances of each individual case.[826]

It will also be important to consider whether the merger in question is horizontal, vertical or conglomerate in nature as it impacts on the possible anti-competitiveness of the merger.[827] Horizontal mergers involve firms that are in direct competition with one other. The merging of two firms in a horizontal relationship can substantially affect the structure of a market, either through the merged firm obtaining an extremely large market share or by the merged entity being freed from the competitive restraints that an effective competitor would subject it to.[828] A vertical merger involves a situation where a firm may acquire another firm that competes in a different stage of the value chain. For example, a producer of a particular product may acquire the downstream distribution network that exists for the product in question, or a distributer may acquire the upstream producer. These vertical mergers may have the effect of potentially foreclosing rivals in the upstream or downstream markets, as well as raising the barriers of entry and expansion into the particular market.[829] However, regardless of the nature of a particular merger, a horizontal merger may be affected by the vertical relationships of firms in a particular market and vertical mergers may have the potential to affect competition between

[825] Sutherland and Kemp, at 10-8. Also see the section 50(3) of the Australian Trade Practices Act 1974 and section 50(3) of the Canadian Competition Act 1985. The acceptance of these factors in merger regulation is particularly important within the scope of this thesis. This will be discussed at greater length in the next chapter.
[826] Sutherland and Kemp at 10-8.
[827] Sutherland and Kemp at 10-8.
[828] See Sutherland and Kemp at 10-11 and the EC Horizontal Merger Guidelines at par 25.
[829] Sutherland and Kemp at 10-52. Also see the Australian Competition and Consumer Commission Merger Guidelines (1999) at par 5.148 – 5.160.

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horizontal competitors.[830] The ultimate question will always remain what effect that merger will have on competition as a whole.

Conglomerate mergers on the other hand, involve mergers between firms whose products are in no way related to the products manufactured and/or supplied by one another, either horizontally or vertically.[831] Generally speaking, these mergers can very rarely be regarded as anti-competitive. However, Sutherland and Kemp observe there are a few situations that may lead to anti-competitive consequences in conglomerate mergers.[832] These may include that a firm which has market power in one market may post-merger be able to leverage that market power in the new market; the new merged entity may tie or bundle[833] a product produced by one of the merged entities with products produced by another; and the merger may result in the formation of a powerful new firm that possesses vast capital resources that may make it difficult for other firms to compete.[834]

To simplify, in order for a conglomerate merger to be considered anti-competitive, Areeda and Hovenkamp indicate that the following requirements must be met:

a) the structure of the market must be altered to such an extent that the market can no longer be regarded as competitive;

b) the merged firm must be a new entrant to the market or be seen as a potential new entrant to the extent that it will influence the decisions of the current market participants;

[830] Sutherland and Kemp at 10-9 & 10-52.
[831] Sutherland and Kemp at 10-67 and Areeda & Hovenkamp *Antitrust Law* (2004) at 1100b.
[832] Sutherland and Kemp at 10-68.
[833] Tying occurs when a firm only sells a particular product together with another product while bundling refers a situation where a package of two or more products is sold at discount. See Evans & Salinger "Why Do Firms Bundle and Tie? Evidence from Competitive Markets and Implications for Tying Law" (2005) *Yale Law on Regulation* 37 at 38. Also see Nalebuff "Bundling, Tying, and Portfolio Effects: Part I, Conceptual Issues" U.K. Department of Trade & Industry, DTI Economics Paper No. 1 (2003) available at https://www.immagic.com/eLibrary/ARCHIVES/GENERAL/UK_DTI/T030207D.pdf (last accessed on 24/10/2019) where he remarks that "Perhaps the most obvious reason to bundle two products is that this leads to a cost saving or quality improvement or both.".
[834] Alistair Lindsay argues that this will only be the case where finance is relevant to the market in question, where incumbent and potential competitors do not have the same capital resources, and the particular nature of the market in questions makes it difficult for firms to raise external finance. See Lindsay "The EC Merger Regulation: Substantive Issues" (2003) at par 3-41.

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c) there must be no other potential or perceived potential or other new entrants to the market that can effectively compete with the merged firm; and

d) the continued presence of the merged firm in the market or the perceived threat of it entering the market must have the potential to adversely affect competition in that market.[835]

4.2. The efficiency defence

As stated above, section 12A(1)(a)(i) provided that a merger which may have the potential of substantially altering the competitive environment and structure of a market may still be justified by pro-efficiency gains or technological gains which may result from such merger where these effects potentially outweigh its anti-competitive effects.

Generally, the nature of an anti-competitive merger makes it quite unlikely that there could be any sort of pro-competitive gain that could justify the approval of the merger. It could be argued that if such a glaring benefit was presented by the merger, then the merger should never have been regarded as anti-competitive in the first place. Nevertheless, this justification was successfully raised in the matter of *Trident Steel (Pty) Ltd and Dorbyl Limited.*[836] In this matter Trident Steel sought to acquire three divisions of Baldwin Steel, a subsidiary of Dorbyl Limited. Both the merging firms were large scale suppliers of "Improved Surface Finish Steel" (ISF), a high-grade surface quality steel used largely in the automotive industry, requiring the use of sophisticated and specialised machinery for its manufacture. Both firms were also large-scale producers of "Non-Improved Surface Finish Steel" (non-ISF), a lower quality steel that is used in various different industries. Trident and Baldwin each possessed a market share of 35% of the ISF market which meant that the new merged entity's market share of the ISF market would be at least 70% with the remaining 30% of the market being made up largely by imports.[837] The Tribunal's primary concern was that should the merger be permitted to proceed, no domestic competitors existed to constrain the substantial market power that this new merged firm would possess, leaving such task solely up to imports. It would also be extremely difficult for a new competitor to enter the ISF market due to the

[835] See Areeda & Hovenkamp *Antitrust Law* (2004) at par 1131 – 1132.
[836] 89/LM/Oct00.
[837] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 14, 16 & 21.

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sophisticated technology used in its manufacture and the substantial capital investment needed for its establishment.[838]

This meant that the Tribunal had to determine whether or not imports would present effective enough competition to enable them to constrain the prices of the new merged entity. On the evidence presented and collected by the Tribunal, it appeared that this would be highly unlikely due to a variety of factors. Firstly, the very nature of these imported products meant they could not be regarded as directly substitutable for the ISF steel used in the automotive industry. ISF steel is used largely for the manufacture of the outer panels of motor vehicles. Imports would usually come in the form of fully assembled motor vehicles; "semi-knock down form" - which would be comprised of certain already manufactured vehicle body panels; and "complete-knock down form" where all the components of a vehicle would be supplied with these components merely being assembled locally.[839] Secondly, customer preference played an import role in this enquiry. Several of the large vehicle manufacturers in South Africa, including BMW, Toyota, Nissan and VW, all provided the Tribunal with evidence to the effect that steel prices alone were not a significant factor in their decisions to import components and that such a decision would usually be as a consequence of local engineering requirements and the unavailability of local supply.[840] This pointed to the inability of imports to act as an effective constraint of market power.[841] Thirdly, due to the extremely high tariffs imposed on the importation of steel products, the substantial logistic and warehousing costs that a firm would incur by importing ISF steel together with the benefits a manufacturer would stand to lose from the Motor Industry Development Programme[842],

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[838] See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 15. The Tribunal was aware of the fact that Macsteel had both the necessary access to capital as well as a plant with the necessary technology capable of producing ISF steel but the Tribunal ultimately ruled that is remained extremely unlikely that Macsteel would enter the ISF market.

[839] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 20 – 21.

[840] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 22 – 24.

[841] In coming to this determination, the Tribunal relied on a variety of foreign literature on the issue. The Tribunal accepted Areeda's view that market can only be regarded as international where foreign firms would be counted as competitors in the market. The Tribunal further accepted the view that because barriers usually exist which restrict the entry of imports into the market, the rivalry between domestic producers would be the only effective constraint on a firm's ability to exert its market power. See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 30 – 32. Also see Areeda, Hovenkamp, Solow *Antitrust Law* (1995) at 247, Sakakibara and Porter "Competing at Home to Win Abroad, Evidence from Japanese Industry, an Empirical Study" (2001) *Review of Economics and Statistics* 310.

[842] The MIDP was implemented in 1995 and replaced in 2012 by the Automotive Productive and Development Programme. The programme was aimed at increasing the international competitiveness of the local vehicle manufacturing market by offering participants in the scheme import duty rebates calculated on their levels of exports.

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it meant that the costs of importing ISF steel would be prohibitively high. Lastly, because of the volatility of the Rand in international trade, currency fluctuations had the potential to vastly increase a firm's costs of production should the value of the Rand decrease against the value of other major world currencies.[843]

For these reasons, the Tribunal ruled that the relevant market was the local ISF market which was subject to some minor competition from imports and as a consequence thereof, the merger had the potential of substantially lessening competition in the market should it be permitted.[844] The Tribunal then had to consider whether there were any technological, efficiency or pro-competitive gains in terms of the (then) section 16(1)(a)(i)[845] that outweighed the anti-competitive effects of the merger. In consideration of this so-called "efficiency defence", the Tribunal identified several issues that would need to be addressed.[846] The first issue concerned who bears the onus of proving the efficiency defence. The Tribunal held that the onus rested on the merging parties to establish the defence. This was due to the fact that merger analysis required that a large merger such as the one in question, be evaluated prior to it being implemented. Information about potential post-merger efficiencies would usually fall outside the knowledge of competition authorities making it very difficult for them to make a determination on the potential merger specific efficiencies without input from the merging entities.[847] Secondly, the Tribunal had to determine what sort of efficiency gains would be acceptable to successfully establish the efficiency defence. It indicated that the rationale and nature of a merger imply that there will be some sort of efficiency gained as a result of the merger otherwise there would be little desire to merge in the first place. The Tribunal further indicated that these efficiencies are not always capable of being measured in purely economic terms and would require some other means of being measured.[848]

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[843] See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 35 – 38.
[844] See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 38 & 40.
[845] Section 16 of the original Competition Act was subsequently substituted by section 12A in the Competition Second Amendment Act 39 of 2000 which replaced the merger regulation provisions of the Act contained in chapter 3 in its entirety. For the sake of consistency with the text of the case in question, reference will be made to the old section 16.
[846] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 49.
[847] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 51.
[848] See *FTC v Proctor And Gamble* 386 U.S. 568 (1967).

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The Tribunal indicated that efficiencies resulting from a merger could either be dynamic, pecuniary or of a production nature. It pointed out that efficiencies of a dynamic nature are efficiencies associated with innovation which generally benefit the whole market. Pecuniary efficiencies are those efficiencies occasioned through tax reductions or savings secured through greater bargaining power with suppliers. Production efficiencies relate to a broad concept including product and plant level efficiencies resulting from the implementation of new production techniques, transfer of knowhow, plant efficiencies, avoidance of capital expenditure and specialisations.[849] The Tribunal ultimately held that the question would not be capable of being limited to a closed list of efficiencies and would always be a question of fact dependent on the circumstances of the case concerned.[850]

The next issue to be determined was how to weigh up the potential efficiency gains of a merger against its anti-competitive effects. The Tribunal indicated that this can be done in two ways: firstly, through a formalistic approach in terms of which the deadweight losses[851] of the efficiency gains and anti-competitive effects are calculated through a formula. It stated that the problem with this approach however is that losses and gains are not always capable of being measured by the same units. The second approach is a discretionary approach which relies solely on the discretion of the adjudicator. Ultimately, the Tribunal held that a flexible approach should be favoured over any singular approach.[852]

Next, the Tribunal attempted to determine whether the efficiency gains would need to be passed onto consumers. The question of whether a consumer welfare standard or total welfare standard should be followed appears to remain unsettled.[853] Lastly it had to be

[849] See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 55 & 56. Also see Sanderson "Efficiency Analysis in Canadian Merger Cases" (1997) *Antitrust Law Journal* 623, at 625. Also see Brodley "Proof of Efficiencies in Mergers and Joint Ventures" (1996) *Antitrust Law Journal* 575.
[850] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 61 – 62.
[851] Deadweight loss refers to the loss in total surplus that occurs when the economy produces at an inefficient quantity. See Mankiw *Principles of Microeconomics* (2018) at 163. Also see Smart "Taxation and Deadweight Loss in a System of Intergovernmental Transfers" (1998) *The Canadian Journal of Economics* 189 at 191.
[852] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 63 – 67.
[853] See *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 63 – 67. Also see Canadian authorities seem to prefer a total welfare approach which requires an increase in both consumer and supplier surplus while American authorities appear to prefer a consumer welfare approach in terms of which the efficiencies gains should be "passed through" to consumers, usually in the form of lower prices. See the decisions of *FTC v University Health Inc* 938 F2d 1206,1223 (11th circuit 1991) and *FTC v Staples Inc* 970 F. Supp 1066,1090 (D.D.C 1991).

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determined if the efficiency gains of the merger would be merger specific or if they could be attained through some other legal arrangement. The Tribunal indicated that the aim of the Act appears to point to these gains having to be merger specific.[854]

The Tribunal then turned its attention to examining the actual text of the then section 16 (and subsequent section 12A) of the Act. The Tribunal concluded that given the context within which the words "technological gain", "efficiencies" and "pro-competitive gain" are used, especially against the backdrop of the stated aim of the Act to "promote efficiency, adaptability and development"[855], implies that the efficiency gains created by the merger would need to be dynamic and productive in nature to justifiably invoke the efficiency defence.[856] In order to establish this efficiency defence, the Tribunal proposed a test in terms of which, if it can be shown that efficiencies are of a dynamic nature and can be verified in quantitative or qualitative manner, then the "pass-through" effects to consumers will be of less importance. On the other hand, where the efficiencies are of a less dynamic nature then there should be real evidence of the benefits of the merger being passed through to consumers.[857]

In arriving at its decision, the Tribunal relied heavily on jurisprudence from the United States, EU and especially Canada.[858] This is due to the fact that the relevant section of the Act appears to have been imported directly from the Canadian Competition Act.[859] While the efficiency defence has largely failed to find support from US authorities and the acceptance of same in the EU appears to remain a fairly open question, only South Africa and Canada have codified an efficiency defence in merger regulation.[860] The test proposed by *Trident Steel* however appears to have become outdated with authors such as Sutherland and Kemp who argue that the test established by this matter is in need of

[854] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 77.
[855] Section 2(a).
[856] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 79.
[857] *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 81.
[858] The Tribunal examined the decisions of *Research v Hillsdown Holdings (Canada) Ltd.*, [1992] 41 C.P.R. 3d 289, *TC v Staples, Inc 970 F.Supp 1066*, *United States v Philadelphia National Bank* 74 U.S. 321, 371 (1963), *FTC v Proctor And Gamble* USSC 91; 386 U.S. 568 (1967), as well as Kattan "Efficiencies and Merger Analysis" (1994) *Antitrust Law Journal* 513 and Organisation for Economic Co-operation and Development (OECD) "Competition Policy and Efficiency claims in Horizontal Agreements" OECD Policy Round Table (1996) available at http://www.oecd.org/competition/mergers/2379526.pdf (last accessed on 06/05/2019).
[859] See section 96.
[860] See Sutherland and Kemp at 10-84.

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review.[861] The reason for this is because when deciding *Trident Steel*, the Tribunal relied on the prevailing Canadian jurisprudence[862] which has since become outdated as a result of the subsequent decision of the Canadian Competition Tribunal and Court of Appeal in the *Superior Propane*-matter.[863] This new approach, also known as the "balancing weights approach", requires that, when determining if a merger can be justified in terms of the efficiency defence, the potential benefits that producers may enjoy must be measured against the potential loss to consumers.[864] However, the difference with this approach, in comparison to the one proposed by the Tribunal, is that the gains of the producer cannot be equally measured against the loss of consumers. Sufficient weight will then need to be given to the loss to consumers in an attempt to balance the scales between consumer loss and producer gain.[865] If the loss to consumers can only be justified by this different weighting, the merger cannot be permitted to proceed.[866]

In terms of *Trident Steel* the efficiency defence can only be successfully invoked where the merger will result in benefits that are real or dynamic in their nature and these benefits must be merger specific. Sutherland and Kemp however argue that this defence should be examined within the confines of the principles determined in *Superior Propane*.[867] While this approach may simplify the process of measuring potential pro-efficiency gains of a merger[868], the question will always need to be examined within the confines of the

[861] Sutherland and Kemp, at 10-85.
[862] See the matter of *Research v Hillsdown Holdings (Canada) Ltd.*, [1992] 41 C.P.R. 3d 289 as well as OECD "Competition Policy and Efficiency claims in Horizontal Agreements" at 19 – 20.
[863] See *Commissioner of Competition v Superior Propane Inc* (2002) 18 CPR 4th 417 and *Commissioner of Competition v Superior Propane Inc* (2003) 3 FC 529.
[864] Sutherland and Kemp, at 10-84. Also see *Commissioner of Competition v Superior Propane Inc* (2002) 18 CPR 4th 417 and *Commissioner of Competition v Superior Propane Inc* (2003) 3 FC 529.
[865] The extent of the weight attached to this weighting will always be a question of fact taking all relevant circumstances into account. See *Commissioner of Competition v Superior Propane Inc* (2002) 18 CPR 4th 417 at paragraph 110 where the Canadian Competition Tribunal held that "the correct weight should be established by society or should reflect social attitudes towards equity among different income classes. There may be several sources from which the proper weighting can be inferred…".
[866] Sutherland and Kemp at 10-84.
[867] Sutherland and Kemp, at 10-86.
[868] It must however be kept in mind that this approach is also not free from potential short comings. These include whether or not all consumers can be treated equally or whether a distinction should be drawn between consumers, the impossibility of determining whether consumers or producers are more deserving of surplus, the exercise of market power may have effects on interrelated markets, the question of whether it should at least be shown that the merger will not create a monopoly, the question of whether a merger involving producers of luxury goods, in which poorer segments of the population have no benefit, be justified on the basis that producers stand to benefit from the merger. See Sutherland and Kemp at 10-84 to 10-85.

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Act and its purposes. The Tribunal was however mindful of the purposes of the Act as set out in section 2 when arriving at its decision in *Trident Steel*.[869]

It is submitted that this added element of complexity poses the potential for distorting merger regulation in South Africa. Take for example a situation that presents substantial efficiencies for the merging entities which has the potential of substantial pass-through benefits for consumers. The only caveat to this merger is that it will result in large scale job losses. With the promotion of employment being one of the stated aims of the Act,[870] being at the forefront of economic policy in South Africa,[871] and being a listed public interest ground to be considered during mergers, it is hard to imagine such a merger being permitted on the efficiency defence alone. Even the Tribunal in *Trident Steel* was cognisant of this conflict between efficiency and employment, being of the view that if the efficiency obtained was occasioned by and as a result of job losses, it would be difficult to invoke the efficiency defence.

A second scenario worth considering would be a merger that has the potential of substantial benefits for one or more firms owned by previously disadvantaged individuals at the expense of consumer welfare. In such a case two very different competing aims of the Act would be placed in conflict with one another.[872] Competition authorities would be hard pressed to determine which aim should be prioritised in favour of the other which also leaves the door open to a ruling being made which may not be in the best interests of competition. Only time will tell if such a situation will ever arise but for the time being it would appear as though the efficiency defence, although not well received internationally, will remain a substantial part of South African competition law and will remain susceptible to contamination by political goals outside the ordinary scope of competition law.

4.3. The role of public interest concerns in merger regulation

The single most unique feature of South African merger regulation is its public interest component. As indicated, section 12A required that when determining whether or not a particular merger can or cannot be justified on public interest grounds, competition authorities must consider the likely effect that the merger will have on a particular

[869] 869 *Trident Steel (Pty) Ltd and Dorbyl Limited* at par 79.
[870] Section 2(c).
[871] See GEAR and RDP discussed in chapter 3 at paragraph 2 & 3.
[872] Section 2 (c) and 2(a).

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industrial sector or region, employment, the ability of small businesses or firms owned or controlled by historically disadvantaged individuals to compete in the market post-merger, and the ability of national industries to compete in international markets.[873] Public interest considerations, much like the efficiency defence, can be used to justify an otherwise anti-competitive merger. However, as pointed out by Nzero, public interest considerations can also serve as a ground for prohibiting an otherwise pro-competitive merger.[874] The Act was however unclear as to what extent public interest considerations should play a role in the approval or rejection of a particular merger.

Initially, the interpretation of public interest concerns was largely left up to the Tribunal and the CAC. Public interest concerns have been at the forefront of merger approval in a variety of mergers assessed by these entities. But it also appears that the concerns listed in the Act may not always be reconcilable with one another and may in certain circumstances be juxtaposed. This issue was *inter alia* addressed in the matter of *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd*[875] the Tribunal was called upon to evaluate a large merger in the alcoholic beverages industry. This industry, like many other large industries in South Africa, was the benefactor of various forms of state assistance and intervention which directly lead to each segment of the market being dominated by a particular firm.[876] During the merger evaluation, several trade unions, particularly the Food and Allied Workers Union (FAWU) and the National Union of Food Beverage Wine Spirts and Allied Workers Union (NUFBWSAWU), intervened in the merger proceedings due to concerns that job losses occasioned by the merger would be so great that these losses would have an adverse effect on employment as a whole and thereby would justify the prohibition of the merger on substantial public interest grounds.[877]

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[873] Section 12A(3)(a)-(d).
[874] See Nzero *Corporate Restructuring in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* (2014) at 289.
[875] 08/LM/Feb02.
[876] In 1979, a market allocation agreement was entered into in terms of which SAB Breweries agreed to sacrifice its wine and spirits interests in exchange for an effective monopoly of the beer industry (SAB held about 95% of the local beer market at the time of the transaction). All spirit and wine production and distribution thereof was thereafter concentrated in the two merging entities. See *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* at par 30 – 32.
[877] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* at par 213.

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The merging firms however relied on subsections (a) and (d) and asserted that the merger would be good for the industry as whole and would result in the creation of an internationally competitive firm.[878] This left the Tribunal with the task of reconciling two seemingly competing public interest concerns. To address this problem, the Tribunal developed the following approach: Firstly, each public interest concern would need to be viewed in isolation to determine whether such concern can be regarded as substantial. Assuming this answer was in the affirmative, it would then need to be determined if these competing public interest concerns could be reconciled with one another and if not, these grounds would need to be weighed up against one another.[879]

While competing public interest concerns will need to be weighed up against one another, the question remains how pure competition concerns and public interest concerns are to be weighed against one another? The question has also arisen as to whether it is necessary for an otherwise pro-competitive merger to display positive public interest benefits in order for such a merger to meet approval in terms of the Act. This was precisely the issue that arose in the matter of *Harmony Gold Mining Company Limited/Gold Fields Limited*[880] where Gold Fields argued for an interpretation of section 12A in terms of which a merger that does not raise any competition concerns or any negative public interest concerns, would still need to be prohibited in the absence of any evidence that the merger could be justified on public interest grounds.[881] The Tribunal ultimately rejected this interpretation. In arriving at its decision, the Tribunal looked at the very nature of merger evaluation in terms of the Act. The Act requires that first an assessment must be made into whether or not the merger has the potential of having a substantial negative impact on competition. Regardless of the outcome of this enquiry, it must then be established if the merger can either be justified or prohibited on one of the public interest grounds listed in section 12A.[882] This way, a merger that fails on competition grounds could still be justified on public interest grounds and a merger that passes the competition test could still be refused on public interest grounds.[883] The Tribunal further held that if the legislative intent for the introduction of public interest

[878] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* at par 212.
[879] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* at par 217.
[880] 93/LM/Nov04 (hereinafter referred to as "*Harmony*").
[881] *Harmony* at par 34.
[882] *Harmony* at par 41 – 43.
[883] *Harmony* at par 45.

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grounds was to create a process for merger regulation along the lines suggested by Gold Fields, then merger regulation would have been structured in such a manner that the public interest enquiry would be conducted first and only thereafter would an evaluation of the competitive effect of the merger be undertaken.[884] If this were the intended purpose of the Act, it would follow that where a merger cannot be justified on public interest grounds, there would be little need to engage in a complicated and protracted evaluation to determine the competitive effects of the merger. Lastly, the Tribunal rejected this interpretation on the policy of the Act itself. It indicated that Gold Field's interpretation of section 12A would require that the mergers would need to be viewed as so inherently harmful that even where a merger would not result in any negative effect on competition it would still need to be assumed that the merger should be prevented.[885] The Tribunal ultimately ruled that where a merger can be shown to have no negative effect on competition, it can only be prohibited where it is shown to have a substantial negative impact on public interest.[886]

5. Public Interest in Context

Harmony provided clarity to the question on the relationship between competition and the public interest considerations listed in the Act. While the effect that a merger will have on competition remains the principal concern, public interest concerns remain an important part of merger regulation. It was then clear that positive public interest concerns are not necessary in order to have a merger approved, but that public interest concerns still have the potential to alter the approval of an otherwise pro-competitive merger. But to what extent should these various concerns be considered? What constitutes a sufficient public interest concern to warrant a deviation in the approval or rejection of a merger? In examining these questions, various landmark merger decisions will be reviewed.

5.1. Metropolitan and Momentum Merger

In the merger of *Metropolitan Holdings Limited and Momentum Holdings Limited*[887] Metropolitan sought to acquire 100% of the issued share capital of Momentum. While both merging parties were active in the long-term insurance industry, the rationale behind

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[884] *Harmony* at par 55.
[885] *Harmony* at par 59.
[886] *Harmony* at par 61.
[887] 41/LM/Jul10. Hereinafter referred to as *Metropolitan & Momentum*.

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the transaction was that Metropolitan primarily targeted low to middle income households whilst Momentum primarily target upper-income households. The proposed merged entity thus sought to reap the benefits of cost synergies and economies of scale that could be achieved through the pooling of the merging firms' resources and their complimentary target markets.[888] The Tribunal indicated the relevant markets that would be affected by the merger were the long-term insurance market, the medical aid market, retirement fund administration market, asset management market and the rentable office and retail space markets. The Tribunal further indicated that the merged entities market share in the long-term insurance, medical aid and retirement fund administration markets would be between 20 – 30% and the merged entity would have a significantly smaller market share in the remaining markets (in some cases less than 10%). The Tribunal was accordingly satisfied that because the merged entity would face significant competition from the other well-established firms in the relevant markets, the merger would be unlikely to prevent or lessen competition in any of these markets.[889]

The merger did however raise one public interest concern, namely the effect that the merger would have on employment. The merging parties conceded that the merger was expected to result in the retrenchment of about 1 000 employees of the merged entity (about 6.4% of the merged entities' total work force).[890] While the merging parties were prepared to make certain concessions to mitigate the effect of these retrenchments and further have these concessions imposed as conditions to the merger, the National Education Health and Allied Workers Union (NEHAWU) sought for the merger to be refused on the basis that those retrenchments could not be justified by the merging parties.[891]

The Tribunal accepted its previous ruling in *Harmony* that a merger does not need to be affirmatively justified on public interest grounds. However, in the context of the present matter, the Tribunal held that once it can be shown that a merger should not be justified *prima facie* on a substantial public interest ground, the merging parties would then be required to present evidence to rebut this presumption.[892] Accordingly, the merging

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[888] *Metropolitan & Momentum* at par 5 – 6.
[889] *Metropolitan & Momentum* at par 60.
[890] *Metropolitan & Momentum* at par 62.
[891] *Metropolitan & Momentum* at par 63.
[892] *Metropolitan & Momentum* at par 68.

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parties would be required to show that a rational process has been followed to arrive at the determination of the number of jobs to be lost and that the public interest in preventing employment loss is balanced by an equally weighted countervailing public interest recognised by the Act which would justify these job losses.[893] The Tribunal however ruled that the merging parties failed this test on both fronts. Firstly, they failed to show that a rational process had been followed in arriving at the number of employees that may be retrenched as a consequence of the merger. Secondly, there was no countervailing public interest concern which sought to outweigh the negative effect the merger would have on employment.[894] The Tribunal's reasoning in this regard was largely due to the fact that these retrenchments were aimed at improving efficiencies. However, no evidence was presented that showed that these new efficiencies would have resulted in reduced premiums for customers. Instead, it appeared that the benefits occasioned by these retrenchments would rather be passed on to shareholders exclusively and were used as a means of justifying the rationale for the merger in order to ensure that shareholders approved the transaction in the first place.[895]

The Tribunal accordingly ruled that although the merger presented no real possibility of a prevention or lessening of competition within the identified markets, its potential to have an adverse effect on employment required addressing. For this reason, the merger was approved subject to a moratorium on all merger related retrenchments for a period of two years, excluding employees in senior management positions.[896]

5.2. Wal-Mart and Massmart Merger

In the merger between Wal-Mart and Massmart,[897] Wal-Mart, which is the largest retailer in the world, headquartered in the US and traded on the New York Stock Exchange with operations in 15 countries, sought to acquire a controlling interest in Massmart Holdings, a South African company traded on the Johannesburg Stock Exchange with operations

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[893] *Metropolitan & Momentum* at par 70.
[894] *Metropolitan & Momentum* at par 100.
[895] *Metropolitan & Momentum* at par 97.
[896] The rationale behind this condition was firstly that senior managers would be the mostly likely to find reemployment should they be retrenched, and secondly because their salaries were generally high and disproportionate to their numbers, the merged entity could still achieve substantial cost savings on this class of employees alone. See *Metropolitan & Momentum* at par 113.
[897] See *Walmart Stores Inc & Massmart Holdings Limited* 73/LM/Dec10.

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all throughout Africa.[898] Massmart consisted of four divisions servicing both the retail and wholesale markets in a variety of consumer markets. Wal-Mart had no presence in South Africa save for a controlling interest, through its UK subsidiary ASDA, in International Produce Limited, whose business entailed the acquisition of fresh fruit and produce solely for the export market.[899]

The Commission in its initial evaluation of the merger, determined that the merger would have no adverse effect on competition. The Commission also considered various public interest considerations which included the effect the merger would have on suppliers as well as the effect that the merger would have on employment and employees' rights to freedom of association and the acceptance of unionised labour.[900] The Commission thereafter initially recommended to the Tribunal that the merger should be approved unconditionally. However, several parties including the South African Commercial Catering and Allied Workers Union (SACCAWU), the Congress of South African Trade Unions (COSATU), FAWU, the National Union of Metal Workers in South Africa (NUMSA), the South African Small Medium and Micro Enterprises Forum (SMMEF), the South African Clothing and Textile Workers Union (SACTWU), the then Minister of Economic Development, the then Minister of Trade and Industry as well as the Minister of Agriculture, Forestry and Fisheries, all sought to intervene in the merger.[901] Interestingly, following the Commission's engagements with the intervening parties and considering the evidence of their witnesses, the Commission changed its recommendation to state that the merger should only be approved with conditions.[902]

One of the concerns raised by the intervening parties was the possibility of retrenchments resulting as a consequence of the merger. At first glance though this concern appears to have been without basis. It was never in dispute that Wal-Mart had no established presence in South Africa. It would be difficult to envisage large scale redundancies

[898] The rationale behind the transaction was Walmart's desire to enter the South African and Sub-Saharan African markets. Given the Walmart's reputation as a global leader in the retail industry, Massmart believed that the merger would allow it to pursue its expansion ambitions more aggressively and with greater confidence. Massmart also believed that by having access to Walmart's methodologies and technologies, it would ultimately be capable of operating more efficiently. *Walmart Stores Inc & Massmart Holdings Limited* at par 15.
[899] *Walmart Stores Inc & Massmart Holdings Limited* at par 5
[900] *Walmart Stores Inc & Massmart Holdings Limited* at par 22.
[901] *Walmart Stores Inc & Massmart Holdings Limited* at par 18.
[902] *Walmart Stores Inc & Massmart Holdings Limited* at par 25.

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resulting as a consequence of the merger, bearing in mind that Wal-Mart would for all intended purposes be acquiring Massmart as a going concern. The Tribunal also correctly acknowledged that the merger presented a greater possibility of having positive effects on employment given the fact that Wal-Mart sought to aggressively expand within the South African and African markets.[903] It further appeared that the concerns regarding retrenchments were largely unfounded given the fact that the merging parties had already resolved to give an undertaking on future retrenchments.[904] Continuing on the issue of retrenchments, several of the intervening unions sought that the Tribunal impose a condition on the merging parties that a group of employees previously retrenched by Massmart be reinstated following the merger alternatively, they be given preference for any employment opportunities arising post-merger.[905] Notably, Massmart had, prior to the merger, retrenched about 503 employees from one of its stores in Nelspruit as well as from several of its regional distribution centres. The unions argued that these retrenchments had been done in anticipation of the merger.[906] The Tribunal ultimately held that the burden rested on the unions to prove that these retrenchments were in fact merger specific. In support of their claims, the unions merely sought to rely on the coincidence of the timing of the proposed merger and the retrenchments while the explanations provided by Massmart for the retrenchments indicated that the retrenchments were in fact not merger specific.[907]

A further concern raised by the unions was what the new merged entities' attitude to collective bargaining would be. In support of these concerns, the unions relied on the fact that Wal-Mart's US based workforce, which represented about two-thirds of Wal-Mart's global workforce, was largely un-unionized. The unions also sought to lead evidence detailing a variety of alleged labour abuses committed by Wal-Mart in the US.[908] In order to address these concerns, the merging entities provided the Tribunal with two separate undertakings in terms of which the new merged entity undertook to abide by existing labour agreements and further undertook not to challenge SACCAWU as the largest

[903] The Tribunal was however cognisant of the fact that Walmart's growth strategies did envisage greater expansion into Africa which could potentially lead to the employment benefits that the merger presented being enjoyed outside of South Africa. See *Walmart Stores Inc & Massmart Holdings Limited* at par 40.
[904] *Walmart Stores Inc & Massmart Holdings Limited* at par 42 – 43.
[905] *Walmart Stores Inc & Massmart Holdings Limited* at par 49.
[906] *Walmart Stores Inc & Massmart Holdings Limited* at par 45.
[907] *Walmart Stores Inc & Massmart Holdings Limited* at par 51, 53, 54 and 58.
[908] *Walmart Stores Inc & Massmart Holdings Limited* at par 60

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representative union for a period of not less than 3 years (as determined by the Tribunal).[909] These demands however did not appear sufficient to SACCAWU who, amongst their various other demands, appeared intent on requiring that the merger be approved subject to the imposition of a closed shop agreement[910] to collective bargaining and the further condition that the merged entity be required to engage in collective bargaining at a more centralised level. The rationale behind these demands appeared to be due to the fact that Massmart had traditionally engaged in collective bargaining on a per-division basis which led to division-based wage determinations as opposed to group based determinations.[911]

The Tribunal was however satisfied that the previous undertakings given by the merged entities were sufficient and was reluctant to grant the conditions as demanded by the intervening unions for two reasons: Firstly, Massmart's attitude to collective bargaining predated the proposed merger and there was no evidence that this attitude was developed in consultation with Wal-Mart. The Tribunal was careful to point out that its role in merger regulation when it pertained to the public interest concerns in question, was the protection of existing rights and not the creation of new rights.[912] Secondly, the Tribunal was cautious of setting a precedent in terms of which competition authorities would be empowered to intervene to a greater extent in collective bargaining when dealing with merger regulation.[913] Labour matters, generally speaking, fall far outside the scope of both the Tribunal and the Commission's mandates due to the fact that these concerns fall within the ambit of the Labour Relations Act (LRA)[914] and the institutions established in terms thereof. It further appears that there is little justification from the text of the Act itself that would justify a widening of the scope of the mandate of competition institutions to intervene in issues of collective bargaining in merger regulation.

The last concern raised by the intervening parties, particularly the then Minister of Economic Development, the then Minister of Trade and Industry as well as the Minister

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[909] *Walmart Stores Inc & Massmart Holdings Limited* at par 59.
[910] A closed shop agreement is a form of union security agreement under which the employer agrees to hire union members only, and employees must remain members of the union at all times in order to remain employed. See section 26 of the Labour Relations Act 66 of 1995.
[911] *Walmart Stores Inc & Massmart Holdings Limited* at par 66.
[912] *Walmart Stores Inc & Massmart Holdings Limited* at par 67 – 68.
[913] *Walmart Stores Inc & Massmart Holdings Limited* at par 69 – 70.
[914] 66 of 1995.

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of Agriculture, Forestry and Fisheries and SACTWU[915], was the effect that the merger would have on the level of local procurement of the merged entity. The argument went that the only way the merged entity could penetrate new markets and take market share away from established incumbents, would be to reduce prices which, it was contended, could only be achieved by shifting procurement away from local producers in favour of low cost foreign producers.[916] The intervening Ministers lead expert evidence that if the new merged entity were to change its procurement patterns by just 1%, this would result in the loss of 4 000 jobs in the local supply chain. The Tribunal however rejected this evidence on the basis that it was based solely on assumption with little evidence to support the claim, and secondly, the evidence failed to take into account the effect that lower consumer prices would have on employment in general.[917] The Tribunal further reasoned that it would appear likely that local suppliers faced with new competition from imports would also seek to reduce their prices which would ultimately create a greater degree of competition in the retail market. In determining whether or not to impose any condition on the merger with regards to local procurement, the Tribunal held that any potential job losses in the supply chain would need to be weighed up against the interests of consumers and the potential of greater employment within the new merged entity. The Tribunal held that the evidence presented to it seemed to suggest that the merger would ultimately benefit low-income customers the most through a reduction in prices.[918]

Notwithstanding the fact that there appeared to be very little evidence supporting the intervening parties' view that the merger would have an overall negative effect on local procurement, the intervening parties sought for the merger to be approved subject to the condition that the merged entity maintain its current level of local procurement for a defined period of time.[919] This argument was however flawed from the start for a variety of reasons. Firstly, it is submitted that it would be very difficult to determine what products

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[915] These interventions were largely founded on the belief that the merger presented major risks to the economy as they believe the merger would result in a decline in local manufacturing and production and would ultimately have an adverse effect on employment.
[916] *Walmart Stores Inc & Massmart Holdings Limited* at par 73.
[917] The Ministers' expert witness, James Hodge, an economist from Genesis Analytics, conceded that a mere 5% reduction of the merged entities prices had the potential of creating 20 000 jobs. See *Walmart Stores Inc & Massmart Holdings Limited* at par 88.
[918] *Walmart Stores Inc & Massmart Holdings Limited* at par 99.
[919] There did not appear to much consensus between the intervening parties as to the length of this condition with SACTWU arguing for 5 years and SMME arguing for 3 years. See *Walmart Stores Inc & Massmart Holdings Limited* at par 102 and 108.

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could be regarded as locally produced due to a variety of different inputs from a variety of different suppliers going into any one particular product as well as certain suppliers only acting as intermediaries in the supply chain with the actual point of origin of a particular product often being unclear.[920] Secondly, the merging parties argued that should such a condition be imposed on the merged entity, only the merged entity would be subject to such restriction while other market participants would be free to procure foreign origin products at will and at any level they deemed appropriate. The Tribunal agreed with this argument stating that the reason for the imposition of conditions in merger regulation would be to dilute the new merged firms market power.[921] However, given the fact that the merged entity could not be considered to be a dominant firm (particularly in respect of textiles, the relevance of which will be discussed in greater detail later in this chapter)[922] no rationale existed for the imposition of a condition to this effect. Such condition would only seek to dilute the ability of the merged entities to lower prices which would ultimately be to the detriment of consumers. The Tribunal remained of the view that the commitment given by the merging parties to invest R100 million over a three period in local supplier development particularly SMMEs would be more than sufficient to address the intervening parties' concerns.[923]

The merger was accordingly approved by the Tribunal subject to the following conditions:[924]

a) a moratorium on retrenchments for period of two years' post implementation of the merger;

b) the 503 employees previously retrenched by Massmart being given preference for reemployment;

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[920] SACTWU presented the argument that any product where more than 50% of its value was made up of local content should be regarded as a product of local origin. The tribunal however held that *"Deeming something 100% local, even when its domestic manufacturing content may be much lower, would start to dilute the very concern one was starting to mitigate through the proposed condition. Relying on suppliers to verify local content may also lead to problems, as suppliers, knowing of the condition, and wanting to supply Massmart, would have an incentive to falsify the information to ensure that they were deemed to supply a product of local origin."* See *Walmart Stores Inc & Massmart Holdings Limited* par at 106.
[921] *Walmart Stores Inc & Massmart Holdings Limited* at par 111.
[922] *Walmart Stores Inc & Massmart Holdings Limited* at par 73.
[923] *Walmart Stores Inc & Massmart Holdings Limited* at par 119 – 121.
[924] *Walmart Stores Inc & Massmart Holdings Limited* at par 122

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c) the merged entity honouring existing labour agreements; and

d) the merged entity investing R100 million in supplier development with a three-year period from the date of implementation of the merger.

The Tribunal's decision to approve the merger however did not go unchallenged. The various intervening Ministers sought to have the Tribunal's decision reviewed on the basis that the Tribunal failed to compel the merging parties to discover documents that they believed would have been material to the Tribunal's decision. Additionally, these Ministers were of the view that the Tribunal adhered too strictly to its scheduling commitments which they also believed did not provide the intervening parties with sufficient time to adequately ventilate their concerns.[925]

The nature of the review is not strictly relevant for the purposes of this study hence the focus will be on the appeal lodged by SACCAWU simultaneously with the review application.[926] The basis of the appeal was founded on a criticism of the normative approach adopted by the Tribunal in interpreting the Act.[927] SACCAWU criticised the fact that the Tribunal favoured a consumer welfare approach and argued that the Act is more concerned with market power and the way in which a firm that possesses market power can disrupt the competition equilibrium in the entire market. SACCAWU argued that through the inclusion of section 12A and more particularly subsections (1) and (3), the inclusion of public interest concerns created a "*legislative commitment to a competitive process which seeks to correct socio-economic disadvantages and distortion which arose as a result of South Africa's discriminatory past*."[928] This, according to SACCAWU , should have extended to the Tribunal's enquiry to consider a variety of factors that go beyond ordinary competition considerations and instead the Tribunal should have examined the merger against the following factors:

a) The effect that an increase in import competition would have on local suppliers, especially SMMEs, as well employment;

[925] *The CAC's Decision* at par 28.
[926] See *Minister of Economic Development and Others v The Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union v Wal-Mart Stores Inc.* (110/CAC/Jun11 and 110/CAC/Jun11.) ("hereinafter referred to as the "*the CAC's Decision"*)
[927] See *the CAC's Decision* at par 91.
[928] *The CAC's Decision* at par 93.

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b) Whether the barriers of entry into the market would be raised;

c) Whether the merger would result in an increasingly concentrated market due to the failure of smaller retailers and their suppliers;

d) The extent to which consumers' countervailing power would be increased and the effect this would have on SMMEs;

e) Whether the merger would result in decreased innovation, growth and product differentiation due to a contraction in market diversity; and

f) The removal of effective competition from the market.[929]

In this regard, it was argued that the Tribunal's established approach of relegating public interest concerns to an enquiry that is secondary in its nature to pure competition concerns, should be disregarded *in favour of a tiered approach to merger regulation in terms of which pure competition concerns and substantial public interests concerns are placed on an equal footing*.[930] The CAC noted that although the wording of section 12A as well as the goals contained within section 2 and the Preamble of the Act, seemed to lend themselves to an inquiry of this nature, the Act ultimately required an "*exercise of proportionality*" in terms of which the potentially competing pure competition goal of consumer welfare need to be measured against public interest concerns.[931] In evaluating the Tribunal's decision to approve the merger subject to the concessions made by the merging parties, the CAC ruled that insufficient evidence was placed before the Tribunal to evidence any harm to public interest which outweighed the benefits to consumer welfare that the merger presented.[932]

On the issue of employment rights, SACCAWU contended that the merging parties had provided the Tribunal with no firm commitments in respect of employment and labour rights and that there appeared to be scope for the merged entity to downgrade the terms and conditions of employees' working conditions without violating the applicable labour laws.[933] The CAC however was of the view that various employment and collective

[929] See *the CAC's Decision* at par 94.
[930] See *the CAC's Decision* at pars 96 & 97. Author's emphasis.
[931] *The CAC's Decision* at par 100. Author's emphasis.
[932] *The CAC's Decision* at par 121.
[933] SACCAWU relied on reports compiled by James Hodge, Kenneth Jacobs of University of California and Annette Bernhardt of the National Employment Law Project in the United States which the union believed

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bargaining rights which the unions sought to protect through the imposition of further conditions to the merger, were enshrined in the Labour Relations Act which encompassed a variety of rights for both employees and employers. It therefore fell outside the scope of competition law to protect interests that are guaranteed and protected through other pieces of legislation and the disputes stand to be resolved through the exercising of collective bargaining.[934] SACCAWU further persisted with the view that the 574 employees (up from the previous 503 as alleged in the Tribunal matter[935]) that had been retrenched by Massmart prior to the implementation of the merger had clearly been done in anticipation of the merger. The CAC however disagreed with the Tribunal's reasoning in this regard[936] and its reliance on its decision on the *Metropolitan Holdings Limited and Momentum Holdings Limite*d matter. The CAC held that although the merging parties contended that the decisions to affect the retrenchments was taken as far back as 2002, the fact that these retrenchments occurred shortly before the merger was implemented placed an onus on the merging parties to justify that the retrenchments were not undertaken in anticipation of the merger.[937] Nonetheless, the CAC indicated that there was little evidence to sustain the view that these retrenchments could be regarded as being merger specific.

On the issue of the effect that the merger would have on SMMEs in the supply chain, the CAC stated:

"that there is insufficient evidence to refuse the approval of the merger does not mean that the case made out by the intervening parties stands to be rejected completely and hence the concerns raised regarding the effect of the merger on small and medium sized producers and employment have no justification. The fact that conditions were imposed by the Tribunal, no matter the criticism, of its reasoning, is reflective of this concern, manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by

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pointed a history of labour abuses and a "structural systematic underpayment" by Wal-Mart which, SACCAWU believed, was clear evidence of the fact that these practices would be imported into the merged entity. See *the CAC's Decision* at pars 124 – 130.

[934] *The CAC's Decision* at par 136.

[935] See *Walmart Stores Inc & Massmart Holdings Limited* at par 45.

[936] *Walmart Stores Inc & Massmart Holdings Limited* at pars 51, 53, 54 and 58.

[937] *The CAC's Decision* at par 142.

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globalisation. But the public interest concerns set out in S12A demands that this court gives tangible effect to the legislative ambition."[938]

The CAC held that there was little evidence to justify the argument that a shift in the merged entities procurement patterns away from local producers in favour of imported goods as a result of Wal-Mart's access to and bargaining power in global markets, would result in harm to these local producers that would outweigh the ultimate benefit to consumers occasioned as a consequence of lower prices. However, although the CAC accepted that imposing local content requirements or quotas were both difficult and impractical, it indicated that a proper assessment of the conditions proposed by the parties need to be conducted.[939] The CAC accordingly ruled that the order of the Tribunal pertaining to the merged entity's supplier development programme be amended as follows:

"The merged entity must commission a study to determine the most appropriate means together with the mechanism by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby. The study shall be conducted by three experts, one to be appointed by SACCAWU, another by the Ministers and the other by the merged entity. These experts must be appointed within one month of the delivery of this judgment. The study must be completed within three months of this judgment. The report shall then be made available to the merging and intervening parties who shall have a further month after the submission thereof, to submit any affidavit evidence which they wish to place before this Court, of which account must be taken of the formulation of the condition as to the programme to be established for the development of the local South African suppliers. In particular the study shall canvass the best means by which South African small and medium sized suppliers can participate in Wal-Marts global value chain training programmes that might be established to train local South African suppliers on how to conduct business with the merged entity and Wal-Mart and the costs which would reasonable be incurred in so far as the development of such programmes is concerned. The costs of this study will be paid for by the merging parties.[940]

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[938] *The CAC's Decision* at par 154.
[939] *The CAC's Decision* at par 164 – 165.
[940] See *the CAC's Decision*, amended order at par 2.1.4.

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5.3. SABMiller and AB-InBev Merger

Following the various mergers assessed by the Tribunal as discussed earlier in this chapter, our attention must now turn to one of the Tribunal's more recent decisions in the large merger between Anheuser-Busch InBev SA/NV ("AB InBev") and SABMiller plc ("SAB").[941] Much like the merger between Wal-Mart and Massmart, this merger saw the world's largest brewer, AB InBev, seeking to acquire a South African firm. The major difference in this merger was that, unlike Massmart which had a relatively small market share when compared to other retailers, SAB dominated about 90% of the local beer market and in itself was a "global leviathan" in the brewing industry given the fact that at the time of its acquisition by AB InBev, SAB represented the second largest brewer globally.[942] Given the size of the merging entities and the extent of their global footprints, the merger required notification in a vast number of countries including the US and the EU. In view of the extent of SAB's dominance of the local beer market (as highlighted in *Distillers Corporation*[943]) there was little overlap between the businesses of AB InBev and SAB in the South African market while in various other jurisdictions there was significant overlap which led to both merging firms being required to dispose of a variety of their smaller subsidiaries.[944] Ultimately, the merger did find approval or conditional approval in all other markets where the merger was subject to notification to competition authorities.[945]

This merger is also unique when compared to the mergers previously discussed in this chapter due to the fact that although this merger presented substantial public interest concerns, it also presented various pure competition concerns requiring adjudication from the authorities. In the Commission's assessment of the merger, the Commission identified the following concerns:[946]

a) the Commission was concerned that because of SAB's existing 26.5% shareholding in Distell Holdings Limited ("Distell"), the dominant player in the cider market in

[941] See *Anheuser-Busch InBev SA/NV & SABMiller plc* 211/LM/Jan16 (hereinafter referred to as *"AB InBev & SAB"*).
[942] *AB InBev & SAB* at par 2.
[943] See *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* at par 27.
[944] *AB InBev & SAB* at par 10 – 18.
[945] *AB InBev & SAB* at par 4.
[946] *AB InBev & SAB*, "Annexure A – Conditions" to the Tribunal's Decision and Reasons at par 2.3.1 – 2.3.10.

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South Africa, and because of AB InBev's already large portfolio of products in the flavoured alcoholic beverage ("FAB") market, the merger created a platform in terms of which the exchange of competitively sensitive[947] information could be facilitated between the merged entity and Distell. This presented the merged entity and Distell with a unique opportunity to engage in collusive conduct with the aim of eliminating competition between themselves and fixing prices in the cider market;

b) there was further cause for concern about collusion in the soft drink bottling industry due to the fact that SAB, through its subsidiary ABI, had wide ranging bottling arrangements with the Coca Cola Company and AB InBev, through its subsidiary Ambev, had wide ranging bottling agreements with PepsiCo Inc., the Coca Cola Company's largest international competitor. The transaction would again lay the platform for the exchange of competitively sensitive information in the soft drink bottling market;

c) SAB, through its subsidiary Coleus Packaging (Pty) Ltd, was the dominant producer and supplier of tin plate crowns, a major component in beverage can construction, which presented the possibility that the merger may be used to foreclose downstream rivals of the new merged entity who require tin plate metal crowns;

d) SAB is a large-scale purchaser of locally manufactured inputs including glass bottles, cans, ends, crowns, paper labels, kegs and the raw materials necessary for the production of beer including malted barley, hops and other grains. The Commission feared that the merger may result in the local suppliers of these inputs being foreclosed in light of the fact that AB InBev may invest in its own inputs or resort to imports thereby terminating agreements with SAB's current suppliers;

e) Small-scale beer producers rely heavily on SAB, as the only domestic supplier of hops and malt, for acquisition of inputs necessary in the production of their beer. The Commission feared that the proposed transaction may have an adverse effect on the security of the supply of hops and malt to these small-scale producers which would leave them with no alternative but to turn to imports. The Commission

[947] The Commission defined competitively sensitive information to include information relating to pricing, margin information in respect products and/or clients, cost information for particular products, client information as well as strategies applicable to specific clients, and overall business strategies. See *AB InBev & SAB*, "Annexure A – Conditions" to the Tribunal's Decision and Reasons at par 1.1.20.

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however established that this would prove economically unfeasible to these small-scale producers.

f) the Commission was of the opinion that the proposed merger would have an adverse effect on the local supply of apple juice concentrate, an important input in the FAB market[948];

g) the Commission was concerned that given the size of the merged entity, there was a reasonable probability that it would require additional cold storage and refrigeration space. The concern was that through the merged entities far superior bargaining power, it would be able to foreclose third party competitors and smaller beer producers from this essential facility;

h) the Commission feared that the merger may have a negative impact on agreements with owner-drivers due to the termination or variation of the agreements previously concluded between them and SAB;

i) the Commission feared that the merger would result in the dilution of shares held by black participants in the Zenzele BEE Scheme[949]; and

j) the Commission further raised the public interest concern of potential job losses arising from the merger. The Commission's concerns in this regard were two-fold: Firstly, the Commission was concerned with job losses as a consequence of merger related redundancies. Secondly, the Commission was concerned that AB InBev would terminate its existing distribution agreement with DGB (Pty) Ltd[950] which would result in the retrenchment of DGB's existing workforce.

[948] To prevent the merged entity increasing its production of cider to such an extent that local production of apple juice concentrate could no longer meet demand, the condition was imposed in terms of which a local procurement target was imposed on the merged firm and if its needs exceeded this target, it would be required to procure the excess from imports.
[949] The Zenele Scheme was introduced by SAB as a broad-based black economic empowerment scheme in terms of which SAB sought to benefit black employees through the SAB Zenele Employee Trust, black owners of liquor and soft-drink retailers through SAB Zenele Holdings, and the broader South African Society through SAB Foundation. The Zenele Scheme constituted 8.45% of SAB's issued share capital.
[950] Unlike SAB and Heineken, AB InBev had no manufacturing presence in South Africa pre-merger. AB InBev instead made use of the services of DGB to distribute its products in the South African market.

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To address the concerns raised by the Commission, the merging parties were prepared to make several concessions[951] that would be imposed as conditions to the merger's approval. When examining these concessions, the Tribunal was unconvinced that the merger would lead to any lessening or preventing of competition in the beer market. This was largely due to the fact that because SAB had to divest from several of its international brands to meet regulatory requirements in several other markets, the merged entity would have a smaller market share post-merger than the pre-merger SAB did. In the cider market, SAB had undertaken to divest its shareholding in Distell. The Tribunal was of the view that this, if anything, would increase and renew competition in the cider market post-merger on the assumption that the new merged entity would begin to bring some its international brands to the market that were not previously present in South Africa. Regardless of whether this would happen or not, SAB's divesture from Distell would lay the framework necessary for this to happen.[952]

Heineken too, as SAB's primary competitor in the clear beer market in South Africa, raised concern with the size of the merged entities' new portfolio and its ability to exclude Heineken from the market.[953] This argument was ultimately rejected by the Tribunal. As discussed above, the divesture of various international brands would result in a loss of market share of about 1.5% for the merged entity while the acquisition of AB InBev's existing market share would only yield an increase in market share of 0.1%. After taking into account that the divested brands had failed to make significant inroads into the market despite being afforded access to SAB's vast distribution network, the Tribunal was of the view that ownership of international brands could not be regarded as indicators of these brands' potential success in the South African market.[954] Heineken sought for the Tribunal to impose a code of conduct on the merged entity to dissuade it from engaging in exclusive conduct but the Tribunal held, and rightly so:

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[951] These concessions included SAB divesting its shareholding in Distell, agreeing to foreclose the apple concentrate market to rivals, fridge space concessions to rivals, as well as guaranteeing supply of can crowns to rivals. See *AB InBev & SAB* at par 22 & 48 – 52.
[952] See *AB InBev & SAB*, at par 22 – 23.
[953] *AB InBev & SAB* at par 77.
[954] See *AB InBev & SAB*, at par 80. The Tribunal was also quick to point out that the entry of new brands had just as much potential of eroding the market shares of SAB's existing brands as it did for rival brands.

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"where pre-merger the target is already super dominant and its dominance has been enduring and uncontested, merger specific concerns are unpersuasive."[955]

In turning to the various public interest concerns raised by the merger, the Tribunal was particularly concerned with the new merged entities' ability to foreclose smaller rivals from essential facilities and thereby limit the opportunity of small and medium sized firms as well as those owned by historically disadvantaged individuals to effectively compete in the market. It indicated that both SAB and AB InBev were extensively vertically integrated firms throughout the entire value chain. The merger would give the new merged firm unprecedented bargaining power both locally and internationally. There was a fear that because of this bargaining power, the new merged firm would shift its purchasing away from local suppliers in favour of imported products. In the same breath, the concern also existed that the merged firm would buy up all available local supply and thereby force smaller suppliers to source imported and more expensive inputs.[956] To address some of these concerns, extensive engagement occurred between the merging parties and Government which resulted in several agreements being concluded which all parties concerned sought to have imposed as conditions to the merger. One of these concessions involved the creation of the AB InBev Investment Fund into which the merged entity planned to invest R1 billion: 61% of these funds would be used for agricultural development[957], 20% for enterprise development and 19% for benefit of South African society of a whole.[958] The Tribunal was however concerned with whether it was within its jurisdiction to impose a condition aimed strictly at purely societal benefits due to that fact that it fell outside the public interest concerns listed in the Act and presented the possibility of jurisdictional overlaps.[959] The Tribunal thus held it was limited to imposing conditions relating to the public interest grounds listed in the Act. However, the Tribunal was of the view that section 12A(3) should be interpreted widely. In this

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[955] *AB InBev & SAB*, at par 81.
[956] *AB InBev & SAB* at par 26.
[957] The two biggest inputs in the production of beer are barley and hops. South Africa however is a nett importer of these inputs. The hope was that through this additional investment, the merged entity would be able to source all its needs locally while also creating excess supply for the export market.
[958] This fund would be created in addition to the R1.1 billion that the merged entity had undertaken to invest in South Africa during the 5 years post-merger which would be spent in the achievement of its transformative and investment objectives. See *AB InBev & SAB*, at par 31 – 32.
[959] *AB InBev & SAB* at par 35 – 36. The Tribunal was particularly concerned to it being forced to enforce conditions that have juristic consequences and thereby needlessly exposing the merged firm to administrative fines.

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regard, in order for the Tribunal to impose a condition that appeared to be wider in its applications than the public interest concerns specifically listed in the section, it stated that evidence would need to be presented to justify such a condition.[960] In this matter, the Tribunal was prepared to impose the condition in light of the fact that the merging parties conceded to the imposition of same, but cautioned that this should not serve as a precedent for the imposition of similar conditions in future cases.[961]

The composition of the board of this AB InBev Investment fund and the manner in which it would be administered however came under scrutiny from various small business and black business forums. In terms of the agreement reached between merging parties and Government, the board would comprise of six members, three appointed by Government and three appointed by the merged firm. Two concerns were raised. Firstly, the SMME Forum argued that there was a governance weakness due to the lack of representation for small and black businesses on the board.[962] The Tribunal rejected this argument due to the fact that there exists a variety of different small business organisations representing a variety of different views. Giving representation to all these views would prove impractical. Furthermore, it indicated that the board should not be composed in manner that would create a conflict of interest between the interests of the members of the board and those of the beneficiaries of the Fund.[963] Secondly, both the Agency for New Black Agenda[964] and the Black Business Forum[965] argued that the beneficiaries of the Fund should be restricted to black emerging and commercial farmers. This argument was also rejected by the Tribunal on the basis that whilst the need to achieve equality is enshrined in the Constitution, no evidence was led to support the view that the Fund would fail to achieve this objective in its present form.[966] In fact, the Tribunal pointed out that the Fund had already been constructed in such a way as to heavily favour black entrants but, the limitation of the Fund solely on racial grounds would remove the board's discretion to assist qualifying beneficiaries.[967] This had the potential of limiting the Fund's ability to

[960] See *AB InBev & SAB*, at par 38.
[961] *AB InBev & SAB*, at par 38.
[962] *AB InBev & SAB*, at par 87.
[963] *AB InBev & SAB*, at par 88
[964] The Agency for the New Black Agenda (ANA) is an NGO that advances the position that race, and not class or any such factor, is a primary and defining determinant of South Africa's political economy.
[965] The Black Business forum is a non-profit organisation that aims to address challenges faced by many black-owned businesses across South Africa.
[966] *AB InBev & SAB*, at par 88.
[967] *AB InBev & SAB*, at par 88.

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effectively achieve its goal of supply chain development in favour of black empowerment objectives, the achievement of which, in Tribunal's view, were not hampered by the Fund's present construction.[968] The Tribunal accordingly refused to amend the conditions pertaining to the Fund.

The final issue worth considering was the effect the merger would have on employment. As with all the mergers previously discussed, Government was concerned with the merger resulting in retrenchments due to merger related redundancies. While the nature of the merger did not pose the risk of merger related retrenchments, the merging parties appear to have been pressured into agreeing to the imposition of a condition placing a "perpetual moratorium" on merger related retrenchments. The Tribunal however rejected this condition as being overly broad and disproportionate.[969] In arriving at this determination, the Tribunal argued that retrenchments for operational reasons must be distinguished from merger specific retrenchments as it is only merger specific retrenchments that fall within the public interest component of the Act. As time passes, it becomes less likely that retrenchments can be regarded as being merger specific. The condition in its present form would always place the onus on the merged firm to prove that any retrenchments were not as a result of the merger.[970] According to the Tribunal, this position could not be justified. The Tribunal therefore amended the condition to the effect that the onus would be placed on the merging parties to prove that any retrenchments conducted in the first five years post-merger were not merger specific and after this period, the onus would be shifted to the employees to prove that retrenchments were indeed merger related.[971]

A further employment issue was the fate of employees involved in the Zenzele Employee Share Scheme. FAWU took issue with the fact that the shares forming part of the scheme had been given to employees by way of a loan to be repaid through dividends with the loan maturing in 2020. FAWU sought for the vesting of these shares in the employees to be accelerated. Both the Commission and the Tribunal held the view that this issue was not merger specific and that the matter should rather be resolved outside the merger

[968] *AB InBev & SAB*, at par 89 – 90.
[969] *AB InBev & SAB*, at par 40.
[970] *AB InBev & SAB* at par 43.
[971] *AB InBev & SAB*, at par 42 – 43.

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approval process through the collective bargaining mechanisms available to the parties.[972]

The merger was subsequently approved by the Tribunal subject to various conditions including conditions pertaining retrenchments, the establishment and management of the Investment Fund, as well as several of the key issues raised before the Tribunal. The conditions were extensive and voluminous and will not be discussed as part of this thesis. Nonetheless these conditions were aimed at addressing the various competition and public interest concerns raised by the merger.[973]

6. Comparing the *Metropolitan*, *Massmart* and *SAB* Mergers

While some of the mergers discussed in this chapter dealt with the interpretation of the public interest requirement of the Act, the *Metropolitan*, *Massmart* and *SAB* cases represent the first time that "legitimate" public interest concerns were raised in a merger which required evaluation by the both the Commission and the Tribunal. In all three of these mergers, both the Commission and the Tribunal deemed it necessary to impose conditions to the mergers in order to address these concerns. Notably also, in all three mergers the effect that the mergers would have on employment took centre stage.

What has become clear is that for a merger to be approved in terms of the Act, it will need to satisfy both competition and public interest concerns. The oddity of the Act, at least technically speaking, is that a merger that does not fall foul on competition concerns can still be refused on public interest grounds and *vice versa*. Both the Metropolitan and Massmart mergers presented no real pure competition concerns meriting the rejection of the merger. However, in *Metropolitan*, the fact that the merger would result in the loss of 1 000 jobs as a consequence of merger related redundancies of the combined 15 725 total workforce, was deemed sufficient enough to warrant a substantial public interest concern in terms of section 12A. But does a loss of 6% of the merged entities total workforce warrant intervention?[974] Obviously, given the extent of unemployment in South Africa, the preservation of employment and creation of employment should be at the forefront of the objectives of industrial policy. Whether this objective is achievable through

[972] *AB InBev & SAB* at par 44 – 47.
[973] See *AB InBev & SAB*, *"Annexure A – Conditions"*.
[974] See *Metropolitan & Momentum* at par 79.

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competition policy however remains debatable. Although there is little doubt that the intended retrenchments were merger-specific, they were the direct result of a duplication of functions being performed by certain employees. The condition imposed by the Tribunal sought to protect these jobs in keeping with the public interest theme of section 12A. The Tribunal's reasoning for imposing the condition was that the savings that would result from these retrenchments would not be to the benefit of consumers but rather to the benefit of shareholders. While the writer can agree with the Tribunal's reasoning, one does not necessarily agree with the underlying principle. In effect, the Tribunal's decision translated into a degree of inefficiency being imposed on the merger notwithstanding the fact that the merger was envisaged as a means of creating efficiencies in the two merging parties' businesses. This condition does not take into account a situation where competitors would seek to lower the costs of their products through internal cost cutting measures or efficiency initiatives. If the merged entity sought to retrench workers as a measure to reduce its costs and thereby reduce the prices of its products, there is little doubt that the affected employees would raise the argument that these retrenchments were now merger related. Would the merged entity now fall foul of competition law and the condition imposed on the merger? Although such a situation never arose, the possibility still exists that a similar situation may arise in future mergers subject to similar conditions. How this will be dealt with still remains to be seen but it is clear that conditions of this nature certainly have the potential to create needless complications.

What is also odd in both the decisions of *Massmart* and *SAB* is that, although the mergers presented no reasonable prospect of merger related redundancies, the merging parties felt compelled to negotiate moratoriums on retrenchments and the Tribunal deemed it appropriate to institute conditions to this effect. It appears that imposing conditions to this effect does little to serve the public interest concerns listed in the Act given the absence of any evidence that merger would have an adverse public interest effect. It is conceded that these conditions would address the public interest concern of employment where the risk of merger-related retrenchments ran high, but when no adverse effect on employment is envisaged as a consequence of the merger, why impose the condition in the first place? Although the operation of these conditions were limited to two and five years respectively, they appear to have done nothing more than place an additional burden on the new merged entity. It is evident that Government and organised labour

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were all too eager to use the Act and its public interest component to impose stays on merger related retrenchments, particularly in *SAB*. The Tribunal however correctly pointed out that this would not be feasible but still sought to impose a condition of non-retrenchment for a period of five years. What these conditions mean for both firms are that for the period of the respective conditions imposed on them, these firms are under an added burden to first show that any retrenchments they plan to undertake are not merger related. Given the nature of the South African labour market, there can be little doubt that if retrenchments had followed during the years that the conditions were in operation, labour unions would have sought to have argued that these retrenchments were merger related, regardless of the cause or need for such measures.

It is trite that competition authorities' role when dealing with the public interest concern of employment is strictly limited to the specific effects that a particular merger may have on employment. Competition authorities are limited to the merger specific aspects of retrenchments, but they are not empowered to intervene on the procedural and substantive issues pertaining to retrenchments as these falls solely within the ambit of the Labour Relations Act 66 of 1995 and the institutions established in terms thereof.[975] But the conditions imposed by the Tribunal appear to have added an extra layer to such proceedings. When looking at it from a practical point of view, if retrenchments were to be undertaken during the years subject to these conditions, it would seem that the merged firms would first need to satisfy competition authorities that these retrenchments were in fact not merger related and only thereafter could any procedural and substantive issues relating the retrenchments themselves be dealt with. The Tribunal also appears to have left the door open in the *SAB* matter to further uncertainty. The Tribunal stated that the onus of proving that any retrenchments that occurred after the five-year moratorium were in fact merger related would shift to the affected employees.[976] In essence this means that the merged firm would forever have to deal first with this issue when planning any sort of retrenchment. It can be argued that it will be very difficult to prove that retrenchments occurring five years after the implementation of the merger are in fact merger specific but, nonetheless this seems to add an unnecessary complication to the process. The conditions imposed in *Massmart* and *SAB* mergers are both puzzling.

[975] See *Walmart Stores Inc & Massmart Holdings Limited* at par 57 .and *AB InBev & SAB* at par 43.
[976] *AB InBev & SAB* at par 43.

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Neither merger presented any substantial effect on employment post-merger yet in both cases the merging entities were almost "bullied" into agreeing to conditions aimed at addressing this concern. While the preservation of employment is undeniably an important public interest concern, especially in the context of the South African market, it is nevertheless submitted that section 12A should not be used as a means of forcing a Government agenda on merging firms under the auspices of competition public interest concerns.

Despite the Tribunal ruling that the *Massmart* merger was unlikely to have any adverse effect on employment post-merger, what became of primary concern in this matter was how the merger would affect labour rights and particularly how the merger would affect unionised labour post-merger. Notwithstanding the fact that the Commission's and Tribunal's role in the evaluation of public interest concerns are secondary to other pieces of legislation specifically enacted to address these specific issues (such as the LRA)[977], Staples, Holland and Rossouw argue that some of the conditions imposed by the Tribunal in this matter extend beyond the competition authorities public interest mandate.[978] The reason for this simple, although employment is a listed public interest concern to consider during merger regulation, the wording of the Act does appear to support the notion that this should extend to organised labour arrangements and general labour relations. Both the Tribunal and the CAC appear to have accepted that their employment public interest mandate is strictly limited to the merger specific effects on employment.[979] Despite this, Government and organised labour, in some cases with the assistance of the Commission, appeared intent on using the public interest component of the Act to force conditions on merging parties that have little, if not nothing, to do with competition. The majority of the conditions that the unions sought to have imposed related to collective bargaining arrangements and particularly the imposition of a closed shop agreement[980] (a collective bargaining arrangement that did not previously exist within Massmart) in the new merged entity.[981] Although the Tribunal and CAC were quick to point out the inherent danger that

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[977] See *Shell South Africa (Pty) Ltd v Tepco Petroleum (Pty) Ltd* 66/LM/Oct01.

[978] See Staples, Holland & Rossouw "Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd" (2013) *South African Mercantile Law Journal* 94 at 98 (hereinafter referred to as ". Staples, Holland & Rossouw "Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd").

[979] See Walmart Stores Inc & Massmart Holdings Limited at par 69 – 70 *The CAC's Decision* at par 142.

[980] A closed shop agreement is a form of union security agreement under which the employer agrees to hire union members only, and employees must remain members of the union at all times in order to remain employed. See section 26 of the Labour Relations Act 66 of 1995.

[981] *Walmart Stores Inc & Massmart Holdings Limited* at par 66.

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imposing themselves on labour and collective bargaining issues could present for merger regulation moving forward, the Tribunal still imposed a condition requiring the merged entity to recognise SACCAWU as the largest representative union for a period of three years.[982] This condition clearly falls outside of the ambit of the public interest concerns provided for in the Act. Not only this, but empowering SACCAWU with rights that it did not possess prior to the merger which, frankly, failed to serve any legitimate public or competitive interest.

There however appears to be an added unintended consequence that entrenching a single trade union with an effective monopoly over the employees of the merged firm could have.[983] Staples, Holland and Rossouw argue that this can result in the labour union exercising its bargaining power to the extent that wages are increased above the competitive level which would then lead to an increase in the employer's costs.[984] The only way that an employer would be able to offset these costs would be to increase its prices and thereby reduce the firms competitiveness or, the firm would have no alternative but to reduce its labour costs through jobs cuts.[985] This would ultimately prove counterproductive from both a competition and industrial policy standpoint. Needless to say, this condition appears to have a greater potential of having a negative impact on both competition as well as the greater public interest of employment. The *SAB* decision also lends itself to a conclusion that the Tribunal may have realised the error in its ways in imposing this condition. Here the Tribunal refused the demand by FAWU to accelerate the vesting of shares in Zanzele Employee Share Scheme maintaining that the issue remained one to be determined through collective bargaining and not through the public interest component of the Act.[986] This is further supported by the wording of the Act in terms of section 3 which excludes collective bargaining and collective agreements from

[982] *Walmart Stores Inc & Massmart Holdings Limited* at 68 -69 and *The CAC's Decision* at par 136.
[983] Staples, Holland & Rossouw "Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd" at 102.
[984] Staples, Holland & Rossouw "Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd" at 102 – 103.
[985] Staples, Holland & Rossouw also argue that the condition may prove to be impracticable given the fact that a trade unions representation can quickly change within an organisation. As an example, they point to the rapid decline of representation of the National Union of Mineworkers (NUM) in the mining industry. How can a firm be forced to recognise a trade union and afford it the rights attaching to its recognition while employees themselves may elect not to be represented by such a union? How such an issue would be resolved remains unclear but it is clear that such issue should and would need to be resolved in accordance with the applicable labour laws. Staples, Holland & Rossouw "Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd" at 104 – 106.
[986] *Walmart Stores Inc & Massmart Holdings Limited* at par 45 – 46.

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the application of the Act.[987] While this is certainly not the same concern as was raised in *Massmart*, the process of collective bargaining and *not* a public interest concern listed in the Act, remained at its core.

A final condition worth considering is the one in which the merged entities in *Massmart* and *SAB* set aside substantial amounts of money for the establishment of local supplier development funds.[988] When looking at the fund established in *SAB*, one of the aims of this fund appears to show legitimate promise. As discussed above, 61% of the fund was to be used for agricultural development. The two biggest inputs in the production of beer are hops and barley, of which South Africa is a nett importer.[989] The fund was aimed at growing local supply to a point where it was sufficient to meet local needs with any surplus then being available for export. Hops particularly is seen as a global commodity and until recently had seen massive annual increases in both global demand and price due to the proliferation of boutique "craft brewers" worldwide.[990] This portion of the fund seeks to benefit any qualifying enterprise, importantly, both large and small as well as black and white owned. The potential is accordingly there for this condition to benefit both competition and public interest concerns through the creation of a reliable local supply chain with the potential of also being able to satisfy international markets. Whether the fund will actually have this intended effect remains to be seen. This will undoubtedly have a positive effect on employment.

In *Massmart* however, the fund established post-merger was slightly different in its construction. This fund was specifically designed to mitigate against the merged entity migrating from local suppliers in favour of imports and also as a means of developing black-owned and controlled SMMEs to enable them to be absorbed into Wal-Mart's global supply chain. While the intention of the fund appears admirable, it remains to be seen

[987] Section 3(1)(a) and (b) provides as follows:
"This Act applies to all economic activity within, or having an effect within, the Republic, except –
(a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);
(b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995;"
[988] See *Walmart Stores Inc & Massmart Holdings Limited* at par 119 – 121 and *Walmart Stores Inc & Massmart Holdings Limited* at par 32.
[989] *Walmart Stores Inc & Massmart Holdings Limited* at par 33.
[990] See Prera, Fortenbery, and Marsh. 2016. "Risk Management: Hedging Potential for U.S. Breweries". Proceedings of the NCCC-134 Conference on Applied Commodity Price Analysis, Forecasting, and Market Risk Management, St. Louis, Missouri 19 April 2016 [http://www.farmdoc.illinois.edu/nccc134 (last accessed on 07/08/2018]. The price of hops has increased from roughly $1.5 per pound in 1994 to an average of $8 - $10 per pound in 2006 with some scarce varieties compounding as much as $30 per pound.

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whether this will lead to effective results. Mandiriza, Sithebe and Viljoen[991], attempt to ascertain the effect that the fund has had on employment within the merged firms local supply chain. They conclude that as at December 2015, the fund has succeeded in creating over 1 500 jobs in a variety of industries including manufacturing, textiles and agricultural.[992] While the fund's effect on employment, although small, appears to have been positive, the working paper by Mandiriza, Sithebe and Viljoen appears to be very narrow in the picture it tries to paint. The study does not to take into account whether or not these local suppliers can be regarded as internationally competitive and whether goods are being sourced from them to be sold in Wal-Mart's global operations.[993] A major part of Wal-Mart's success internationally can be attributed to its superior supply chain management process.[994] This has also had a positive effect on consumer prices. In evaluating the merger, concern was raised about the potential job losses that a shift away from local procurement would cause. This was however countered with evidence to show that a reduction in prices had a far greater potential to result in both positive effects for consumers as well as on employment within the merged entity and the market as a whole. These benefits would substantially outweigh any negative effects that a change in procurement could have on employment in the supply chain.[995] It should therefore be established whether these products that were being acquired from firms assisted through the fund can be regarded as being competitively priced or, is the merged entity simply being forced to support these firms, to the detriment of consumers, solely to avoid falling foul of the public interest provisions of the Act? Unless there is a legitimate economic interest that warrants the support of these local suppliers, it is submitted that the fund cannot be regarded as a complete public interest success.

While the actual effect that section 12A of the Act will have on competition remains to be seen, what is clear is that the inclusion of public interest concerns in merger regulation

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[991] Mandiriza, Sithebe & Viljoen "An Ex-Post Review of the Wal-mart/Massmart Merger", The Competition Commission (Working Paper CC2016/03), available at http://www.compcom.co.za/wp-content/uploads/2016/11/CC201603-Mandiriza-T-Sithebe-T-and-Viljoen-M-2016-An-expost-evaluation-of-the-Walmart-Massmart-merger.pdf (last accessed on 08/08/2018)(hereinafter referred to as Mandiriza, Sithebe & Viljoen "An Ex-Post Review of the Wal-mart/Massmart Merger").
[992] Mandiriza, Sithebe & Viljoen "An Ex-Post Review of the Wal-mart/Massmart Merger" at 13. The fund had distributed almost R79 million to 34 SMME's.
[993] The working paper established that the only products to be adopted into Wal-Mart's international were two wine brands that formed part of its developing wine brand programme. See Mandiriza, Sithebe & Viljoen "An Ex-Post Review of the Wal-mart/Massmart Merger" at 13.
[994] *Walmart Stores Inc & Massmart Holdings Limited* at par 15.
[995] *Walmart Stores Inc & Massmart Holdings Limited* at par 114 – 118.

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has resulted in an added level of complexity to merger regulation. Whether competition law has the ability to address social and structural issues through the inclusion of such provisions remains to be seen. The inclusion of public interest concerns nevertheless gives effect to the Act's political goals. The *Momentum*, *Massmart* and *SAB* mergers however highlight that the political goals contained within the public interest provisions in merger regulation retain the potential to adversely affect the attainment of effective competition during the merger approval process. This calls into question if public interest concerns, and by extension political goals, truly have a place in merger regulation.

7. The Commission's Guidelines on Public Interest Grounds in Merger Regulation

The various cases discussed previously in this chapter have each played an important role in the development of a methodology regarding how public interest concerns should be considered in merger proceedings. Following from these decisions, the Commission has since published its own set of guidelines for the assessment of the public interest concerns in merger regulation.[996] The stated purpose of these guidelines is 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"*.[997]

The *Public Interest Guidelines* lay down the following general approach to be followed in evaluating public interest concerns:[998]

a) determine the likely effect that the merger will have on the listed public interest grounds;

b) determine whether such effect is merger specific;

c) determine if this effect can be regarded as substantial;

[996] See The Competition Commission of South Africa "Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998" (31 May 2016), Economic Development Department Notice 309 of 2016, Government Gazette Vol. 612 2 June 2016 No.40039 (hereinafter referred to as the Public Interest Guidelines).
[997] The Guidelines, the preface at pg. 1.
[998] The Guidelines, at par 6.1.1 – 6.1.5.

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d) determine whether the positive or negative effects on public interest justify the merger be approved with or without conditions; and

e) consider possible remedies to address any substantial negative public interest effects.

The *Public Interest Guidelines* address each of these respective points as they would pertain to each of the public interest grounds listed in section 12A(3). However, focus will be on the specific factors listed by the Commission that it will consider when determining if the effect of the merger on public interest can be regarded as substantial, namely: [999]

a) the importance and strategic nature of the relevant products to the sector or region and of that region or sector to the broader economy;

b) the importance to that region or sector of identified projects and upliftment programmes undertaken by the firms in question;

c) the extent of the effects on the sector and the entire value chain;

d) whether the region or sector in question involves or influences any constitutionally entrenched rights;

e) whether the merger impedes or contributes towards any public policy goals that are relevant to that sector or region; and/or

f) the importance of a firm to the sector or region and the benefits that flow from that firm to that sector or region.

The Commission may be satisfied that the effects are substantial where they have far reaching consequences that flow beyond the particular market or sector, contribute or impede the attainment of public policy goals, the potential threat to a region or sector's sustainability and livelihood, and the extent to which these effects will become irreversible.[1000]

[999] The Guidelines, at par 7.2.3.1.
[1000] The Guidelines, at par 7.2.3.2.

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When considering if the effect on employment can be regarded as substantial, the Commission will consider the following factors:[1001]the number of workers likely to be affected; the affected employees' skill levels; the ability of affected employees to find alternative employment in the short term; the nature of the sector relevant to the effect on employment including whether the sector employs largely unskilled workers, the unemployment rate in that sector, whether that sector is experiencing a trend of retrenchments, and whether the sector can be considered as mature, declining or emerging and the possibility of future employment opportunities; and whether the firms in question employ permanent or seasonal staff.

In respect of the ability of SMMEs owned or controlled by historically disadvantaged persons to become competitive, the following factors will be considered:[1002] whether these firms are impeded or permitted to compete in the relevant market and whether this impediment or participation promotes dynamic competition, innovation and growth within the market; whether any impediments limit the growth and expansion of these firms in the relevant market or adjacent markets; and whether any effect on these firms will have a secondary effect on the other public interest grounds listed in the Act.

Lastly, with regards to the ability of national industries to compete in international markets, the following factors will be considered:[1003] the role and importance of the particular industry in the local market, the role and importance of the particular industry in the international market, the relative structure and size of the particular industry by international standards, the extent of the effect on the sector should the particular industry's ability to compete in international markets be hindered; and whether the merger impedes on any related public policy goals and the relevant industrial policies related to the industry in question.

Regardless of these guidelines, the Commission is still required to evaluate each merger on its own specific set of facts. The Commission also remains empowered to exercise its discretion in merger regulation and deviate from these guidelines should the facts require.[1004]

[1001] The Guidelines, at par 8.1.3.1.
[1002] The Guidelines, at par 9.1.1.1.
[1003] The Guidelines, at par 10.1.3.1.
[1004] The Guidelines, at par 1.3 & 11.

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The Commission has done well to take cognisance of the various rulings of both the Tribunal and the CAC in the development of the *Public Interest Guidelines*. Particularly, the Commission has specifically limited its scope of its inquiry to only those public interest concerns that can be regarded as being merger-specific. The Commission has also taken note of the various conditions that have been agreed and imposed in previous decisions in developing examples of potential remedies that can address substantial public interest concerns.[1005] The publishing of the *Public Interest Guidelines* has the potential of reducing the complexity of merger approvals by limiting the scope of such enquiries to the terms laid down therein. Together with this, the *Public Interest Guidelines* also provide all parties with a greater level of transparency and certainty to the process that the Commission will follow in evaluating public interest concerns during merger regulation. This will empower all parties with the knowledge of specifically what types of information the Commission and Tribunal will require and the nature of the evidence that will need to be presented during proceedings. Lastly, the *Public Interest Guidelines* should also assist to quickly dispose of parties attempting to use public interest concerns as means of achieving goals that fall outside the ambit of the Act. Perhaps the only criticism is that the Commission could have gone even further to limit enquiries into substantial public interest concerns where the particular concerns can be adequately catered for under other pieces of legislation.[1006]

In closing, the *Public Interest Guidelines* also clearly highlight the potential for conflict between competition concerns and concerns of a more political nature. The various factors listed in the *Public Interest Guidelines* would find little application in a purely competition orientated enquiry, yet they are a prominent feature in merger regulation in terms of the Act. From a South African perspective, the *Public Interest Guidelines* bring to light the underlying war for the "soul" of competition law that currently exists between pure competition law on the one hand and the political goals of the larger industrial policy on the other. This will form part of the discussion in Chapter 8.

[1005] In respect of the effect of the potential effects on an industry and sector, and SMMEs, one of the proposed remedies is the obligation to continue to source inputs from local suppliers much like remedies imposed and agreed to Massmart however, the Commission must ensure that it takes into account various concerns raised by the CAC and Tribunal in *Massmart* on the practicality of a remedy of this nature. On the potential effects on employment, a moratorium on retrenchments is listed as a possible remedy following from the decisions in *Metropolitan, Massmart* and *SAB InBev.*

[1006] See specifically *Massmart* & *SAB Inbev*.

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Chapter 7 - The Future of Competition Regulation in South Africa: The Competition Amendment Act 18 of 2018

1. Introduction

In this chapter selected amendments to the Competition Act as introduced by the Competition Amendment Act 18 of 2018 will be discussed. The discussion will cover amendments in relation to the provisions on abuse of dominance and mergers as discussed in previous chapters as well as selected other amendments introduced by the Amendment Act that are relevant to the focus of this thesis. The purpose of this evaluation will be to determine whether these amendments have been aimed at addressing some of the deficiencies identified in previous chapters of this thesis or whether these amendments have been formulated with the specific aim of strengthening the Act's ability to achieve its political goals rather than its pure competition goals. The overall aim of this chapter will be to determine whether these amendments will aid in the achievement and maintenance of effective competition in South African markets. In particular, it will also be considered whether these amendments have the potential to undermine the independence of the competition authorities or whether they will detract further from the pure competition goals of the Act in favour of achieving the Act's political goals and serving the larger political agenda of the executive.

2. The 2018 Competition Amendment Act: Background

The reform initiatives that eventually culminated in the enactment of the Competition Amendment Act 18 of 2018, formally kicked off in 2017 with various proposed amendments to the Competition Act as initially captured in the 2017 Competition Amendment Bill.[1007] Subsequent to the publication of the 2017 Amendment Bill for public comment, a further substantially amended draft Amendment Bill followed in July 2018.[1008] Significant further changes to the July 2018 Bill were thereafter effected by the Portfolio Committee on Economic Development,[1009] and a final draft Amendment Bill was issued in October 2018.[1010] The parliamentary process for the adoption of the 2018 Competition Amendment Bill was completed on 5 December 2018 and the Bill was

[1007] Competition Amendment Bill, 2017 as published per GN 1345 in GG 41294 of 1 December 2017.
[1008] Competition Amendment Bill B23-2018 as published in GG 41756 of 5 July 2018.
[1009] See Portfolio Committee Amendments to the Competition Amendment Bill (10 October 2018).
[1010] Competition Amendment Bill B23-2018 as amended by the Portfolio Committee on Economic Development Government Gazette No. 42231.

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subsequently assented to by the President on 13 February 2019 as the Competition Amendment Act No.18 of 2018.[1011] On 12 July 2019, a Proclamation was published in the Government Gazette in terms of which some of the amendments contained in the 2018 Amendment Act came into force.[1012] The then Department of Trade and Industry indicated that the remaining amendments will be phased into effect once the additional work thereon has been completed.[1013]

To avoid extensive and unnecessary repetition due to the voluminous nature of all the amendments proposed in the three aforementioned bills, the discussion hereinafter will focus on the final version of the amended provisions as captured in the 2018 Amendment Act. Where relevant, reference will however be made to some parts of the respective draft bills in order to contextualise the discussions in this chapter and to illustrate certain of the attempts that were made to further politicise the Act.

2.1 The Background Note

The original document that gave insight into government's intention to effect comprehensive amendments to various sections of the Competition Act, was the then Ministry of Economic Development's *Background Note on the Amendment Bill* that accompanied the 2017 Competition Amendment Bill.[1014] The *Background Note* is a voluminous document that sheds interesting light on the motivation behind the various amendments to the Competition Act discussed in this Chapter. To ensure that none of the specific reasons it provided in respect of these amendments is underplayed, these reasons will be highlighted in the discussion below by various quotations of the exact wording used in the Background Note in order to emphasize the rationale behind these

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[1011] Hereinafter referred to as the "Amendment Act".

[1012] Proclamation No. 46 of 2019, Government Gazette No. 42578 of 12 July 2019. The following provisions have not yet come into force: those relating to national security and acquisitions by foreign acquirers; the changes to section 4 regarding allocation of market shares as a form of market division; the new powers of the Minister to make regulations regarding section 4 and section 5; the new section 8(4) relating to buyer power; the changes made to section 9 relating to price discrimination by dominant firms; the time limit for the Commission to decide an application for an exemption in terms of the new section 10(2A); and those relating to confidentiality and disclosure of information submitted to the Competition Authorities in terms of the changes to section 44 and section 45. Sections 5,6 27, 28 and 33(a) commenced into effect on 13 February 2020, see Government Gazette 43018 of 13 February 2020.

[1013] See Department of Trade and Industry "Media Statement on Promulgation of Certain Sections of the Competition Amendment Act, 2018) issued on 12 July 2019 available at https://www.thedti.gov.za/editmedia.jsp?id=5914 (last accessed on 24/10/2019).

[1014] Background Note on Competition Amendment Bill, 2017 (1 December 2017) (hereinafter referred to as the "Background Note"), published in Government Gazette No. 14294 of 1 December 2017.

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amendments and specific aspects that point to a larger agenda than mere traditional competition goals.

As a general point of departure, the *Background Note* commenced by acknowledging that the Competition Act could not by itself achieve many of the goals listed in section 2 (the purpose section) but that the Act rather "*forms part of a greater collection of complementary policies designed to achieve these goals*."[1015] In particular the *Background Note* stated: "*However, the explicit reference to these structural and transformative objectives in the Act clearly indicates that the legislature intended that competition policy should be broadly framed, embracing both traditional competition issues, as well as … explicit transformative public interest goals."*[1016]The *Background Note* thus confirmed government's view that competition policy, and consequently also competition legislation, should pursue pure competition goals as well as "*transformative*" public interest goals.

According to the *Background Note,* the proposed amendments to the Competition Act sought to advance the "*structural and transformative*" objectives of the Act in two important ways: first, the 2017 Amendment Bill focused on creating and enhancing the substantive provisions of the Act that were aimed at addressing two key structural changes in South Africa's economy, namely that of concentration and the racially skewed spread of ownership in the economy. The *Background Note* observed that South Africa's economy is characterised by unusually high levels of concentration which resulted partially from strategic barriers to entry created by incumbents and also by low rates of business formation and as a result of mergers and acquisitions. Specifically, it was observed in the *Background Note* that *"[C]oncentration at the levels observed in South Africa is not adequately explained by improvements in efficiency nor is it driven by innovation."* It was pointed out that this concentration was concerning as it *"impacted negatively on a viable competitive process and the enhancement of welfare".*[1017]

The *Background Note* further explained that enhanced scrutiny of the causes of concentration and the need for "*tailored measures to deconcentrate markets*" were

[1015] The Background Note at 6.
[1016] Ibid. Author's emphasis.
[1017] The Background Note at 7. Author's emphasis. Notably the reference here was to "welfare" which is a broader concept than "consumer welfare". The Note in particular observed that there is evidence that highly concentrated markets stultify innovation which is needed for viable, inclusive economic growth.

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sought to be facilitated through the proposed amendments. In particular, it stated that the amendments sought to ensure evidence-based inquiry into, and explicit scrutiny of, concentration when the competition authorities consider mergers, prosecute abuses of dominance and conduct market inquiries as the amendments permit the competition authorities to *"undertake far-reaching and targeted interventions to address concentration."*[1018]

The *Background Note* also stated that, insofar as the proposed amendments provided for scrutiny of the racially skewed spread of ownership in the economy, these measures were also required in order *to "realise the transformative vision of economic empowerment of all South Africans, in particular of those individuals who were historically excluded and disadvantaged"*. It was thus envisaged that the proposed amendments would increase opportunities to *"advance the transformation of ownership of the economy."*[1019]

The *Background Note* further indicated that the draft Bill also proposed amendments to the Act aimed at enhancing the policy and institutional framework, and the procedural mechanisms for the administration of the Act, designed to improve policy coherence, as well as to promote institutional and procedural efficiency.[1020]

Five priorities that the proposed amendments sought to address were indicated, namely: [1021]

(a) The provisions of the Act relating to prohibited practices and mergers had to be strengthened.

(b) Special attention had to be given to the impact of anti-competitive conduct on small businesses and firms owned by historically disadvantaged persons.

[1018] Ibid. Author's emphasis.
[1019] Ibid. Author's emphasis. The Background Note stated at 7 that while the transformative provisions are often motivated on the basis of an 'equity' argument, it is important to note the *economic* argument for transformation. It indicated that concentrated markets that inhibit new entrants and that, accordingly, exclude large numbers of black South Africans from the opportunity to run successful enterprises, are not a basis for strong and sustained growth and "[They] continue to limit the talent pool of entrepreneurs on which the growth potential of the economy relies. An inclusive growth path requires that we address these barriers to entry - whether they are regulated or hidden from scrutiny."
[1020] Background Note at 7.
[1021] Background note at 8.

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(c) The market inquiry-provisions had to be strengthened so that their remedial actions could effectively address market features and conduct that prevents, restricts or distorts competition in the relevant markets.

(d) It was necessary to promote the alignment of competition-related processes and decisions with other public policies, programmes and interests.

(e) The administrative efficacy of the competition regulatory authorities and their processes had to be enhanced.

Regarding the problem of concentrated markets, the *Background Note* pointed out *inter alia,* that concentration and racial exclusion often overlap. It stated that it was therefore Government's intention that changes would be made to the Competition Act to enable the competition authorities to "*deal more clearly*" with high levels of concentration where it has a negative effect on competition, to "*enhance*" small business development and *"promote*" the related goal of greater inclusion of black South Africans in the economy as this was required "*to achieve the purposes of the Act.*" The *Background Note* further pointed out that the Competition Act did not enable the Commission or the Tribunal to address concentration, but only collusion and market abuse. According to the *Background Note*, the proposed amendments would however provide for a "*flexible and responsible*" evaluation of concentration, especially through the market inquiry mechanism[1022] (which is beyond the scope of discussion of this thesis), and on that basis could develop *"evidence-based and reasoned measures to promote more developmental market structures."*[1023]

The *Background Note* also indicated that there was insufficient alignment in South Africa between competition processes and decisions and other public processes and interests that "*voters have embraced through the democratic process*".[1024] To address this issue, the *Background Note* indicated that one proposed solution would be to centralise competition regulation in the executive by potentially providing the Minister of (then) Trade and Industry with *"greater authority in the decision making process*."[1025] The *Background Note* pointed out however, that given the history of competition regulation,

[1022] See the amended sections 43A, 43B and 43C.
[1023] Background Note 10-11.
[1024] Background Note at 9.
[1025] Background Note at 22. Author's emphasis.

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particularly the manner in which the decision-making processes were previously concentrated in the executive, the (then) Economic Development Ministry ultimately rejected this proposal during the formulation of the 2017 Amendment Bill.[1026] As a result, the 2017 Amendment Bill rather sought to provide the (then) Minister of Trade and Industry with the "*necessary means*" to "*participate*" in competition related inquiries, investigations and adjudication. The intended purpose, according to the *Background Note*, was to provide the *"executive branch of government with a more effective means of participating in the decision-making process, to ensure adequate consideration of policy related matters, to better facilitate the integration of state policies into competition regulation, and to provide the necessary connection between the concerns of the electorate and competition policies".*[1027]

Thus, instead of embracing the notion that the Competition Act may not be the most appropriate medium through which to achieve socio-economic goals, it appears as though the 2017 Competition Amendment Bill and the subsequent draft Bills that followed in 2018, were indeed formulated with the focused intention of strengthening the Act's ability to promote socio-economic goals. Noteworthy at this stage however is that Oxenham *et al* remark that the amendments in the October 2018 Bill that was eventually enacted as the 2018 Competition Amendment Act in their "*rather unorthodox and novel ways may strike global observers as a violation of the adage that one must not fix what is not broken.*"[1028] They remark that the underlying reasons for the changes are "*rather straightforwardly conceded by the current, and arguably fluctuating, administration: the Bill is ostensibly designed not to enhance competition in the traditional antitrust sense, but rather to address so-called market concentration and perceived unequal ownership*

[1026] Ibid. Four reasons were given for the rejection of this proposal. Firstly, it would create a large degree of uncertainty due to regulation now being vested in competition authorities in one hand and the executive on the other. Secondly, the separation of competition and public interest components may hamper the development of innovative solutions designed to address these issues. Thirdly, there would be a greater potential for the contamination of competitive processes through the decisions being made solely of a political nature and being not subject to the same levels of transparency and accountability. Lastly, such a situation may unduly prolong competition decisions. See the Background Note at pg. 22.
[1027] Background Note at 22. Author's emphasis.
[1028] Oxenham, Currie and Stargard "Changing South Africa's Competition Law Regime: A Populist Departure from International Best Practices" (2019) *Journal of European Competition Law & Practice* 232 (hereinafter Oxenham *et al*). See also Tirtaux "South Africa's Competition Amendment Act – a Risk or a Boon for South Africa's Economy? (2019) *Concurrences* 214 available at www.https://concurrences.com/en/review/no-2-2019/international/south-africa-competition-amendment-act-a-risk-or--a-boon-for-south-africa-s-economy.pdf (accessed on 2 September 2021).

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patterns in the South African economy."[1029]They indicate that the headline under which to subsume all further commentary or evaluation, is: "*the Bill pursues a redistributive goal rather than aim at enhanced competitiveness.*"[1030]

In particular, Oxenham *et al* caution that considering each amendment in an isolated manner may not prompt an immediate startling reaction from an international audience and they remark: "*Why would it? Public interest or other 'populist' considerations in merger control are decidedly not a novel concept, nor one limited only to this country. Indeed, they were considered in other jurisdictions, many with highly developed antitrust regimes that have evolved over a century, such as the USA, yet were almost always roundly rejected.*"[1031]In order however, to appreciate the potential impact that the amendments may have - such as the "*violation of the separation of powers-principle, the watering down or altogether departure, from objective and international accepted standards and the increased risk of interventionist measures designed purely to frustrate competition*", the authors emphasize that it is important to consider some of the primary amendments in totality, as is done in more detail below.[1032]

3. Amendments effected by the Competition Amendment Act 18 of 2018

3.1 Abuse of Dominance

The prosecution of allegations of abuse of dominance are by their nature generally very difficult. There are a variety of reasons for this. Lewis observes that abuse of dominance *inter alia* requires the collection of a huge amount of evidence, often of a differing nature.[1033] As the discussions in Chapter 5 have shown, this evidence will often be economic in nature and not always readily available.[1034] This can make the process of gathering and presenting evidence both labour and time intensive. Then there is also the complication to consider that very often the dominant firm that is being prosecuted has an extensive "war chest", comprised of substantial financial resources, at its disposal in light of its dominance within the relevant market. But does simply reducing the test for

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[1029] Oxenham et al at 233.
[1030] Oxenham et al at 233.
[1031] Oxenham et al at 234.
[1032] Oxenham et al 234-235.
[1033] Lewis, speech entitled "Chilling Competition" at 7, available at https://www.comptrib.co.za/assets/Uploads/Speeches/lewis13.pdf (last accessed on 0/09/2018) (hereinafter referred to as Lewis "Chilling Competition").
[1034] See previous discussions in Chapter 5 at paragraph 4.

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establishing dominance to a legal standard that is solely dependent on the attainment of certain predetermined structural factors, solve this problem?

It may be argued that to some extent it may possibly reduce the difficulties in proving an allegation of abuse of dominance - however, it is submitted that one must not lose sight of the fact that this may create its own set of problems, as discussed in more detail below.

In Chapter 5 it was indicated that the test for dominance in South African competition law is set by section 7 of the Competition Act which reduces the test a single standard, being that of a firm's market share.[1035] It appears that there is little opposition to the view that reducing a finding of abuse of dominance to simply a legal standard will result in an over-inclusive model that will often have the effect that conduct that actually has no anti-competitive effect will nevertheless be declared anti-competitive.[1036] This has given rise to the argument that this legal and standards-based approach to establishing dominance should give way to a more economic and effects based standard, especially in the EU, as put forward in the *Lear Report* prepared for the (then) Office of Fair Trading in the UK.[1037] The *Lear Report* departs from the assumption that the sole aim of competition regulation should be the promotion of consumer welfare.[1038] It states that no conduct can be deemed to be anti-competitive *per se* and all conduct therefore will require an examination on whether or not the conduct concerned has a negative effect on consumer welfare.[1039] The reason for favouring a consumer welfare approach is premised on the idea that consumers are often dispersed and lack the power to influence the outcome of competition proceedings while firms are often few and have a substantial ability to influence these proceedings. The Report further states that because of the current status quo that exists in markets in general, the "*disparity of forces may need to be offset by*

[1035] See Chapter 5 at 3.
[1036] Lewis "Chilling Competition" at 3 & 8.
[1037] See Buccirossi, Spangnolo & Vitale "The Cost of Inappropriate Interventions/Non Interventions under Article 82" Economic Discussion Paper (September 2006), a report prepared for the Office of Fair Trading by Lear, OFT 864 (hereinafter referred to as "the Lear Report") available at http://webcache.googleusercontent.com/search?q=cache:7W6iu_2Djv4J:ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo_report.pdf+&cd=1&hl=en&ct=clnk&gl=za (last accessed on 12/12/2018).
[1038] The Lear Report defines consumer welfare as the un-weighted sum of the profits of all the firms and total consumers' surplus. Consumers' surplus refers to the difference in the price charged and the price consumers are willing to pay for the product. See the Report at pars 1.5 – 1.19.
[1039] The Lear Report at par 1.25 & 1.27.

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giving the competition authority an objective function that weighs more the interest of the underrepresented consumers".[1040]

As observed by Munyai the traditional hostility displayed towards dominant firms seems to be premised on the idea that the often ordinary actions of a dominant firm that are prohibited by competition legislation will benefit such dominant firm only while causing harm to all other market participants.[1041] Notably, the *Lear Report* concludes that there is a high likelihood that some of the conduct previously investigated by European authorities should in fact have been regarded as competitive actions *rather than* abusive conduct and that the" *effect that the wrongful prosecution of these actions would have on consumer welfare would be greater in markets where firms have obtained dominant positions through innovation and efficiency"*.[1042] This is due to the fact that the adoption of superior business practices that render a firm more efficient will generally result in reduction of prices for consumers. Limiting these efficient actions solely on the basis of an "*assumed"* abuse of dominance will negate these benefits and ultimately result in an increase in price for consumers.

Lewis, in relation to the South African Competition Act, however argues that an effects-based approach which relies on a more economic standard rather than legal standards, poses a greater risk of under-enforcement. This is why he praises the approach originally adopted by the Competition Act which, in his view, blends legal standards with an effect-based approach.[1043] This blended approach however also presents its own problems. As discussed previously, the standard for the establishment of dominance in terms of section 7 of the Competition Act is relatively low.[1044] It is also apparent that the abuse of dominance provisions of the Act appears to be aimed squarely at the established white owned firms that in many cases owe their dominance to the previous regime and its policies of state assistance.[1045]

The intention behind the abuse of dominance provisions of the Act in their original format appears to be directed at opening up of the market to a greater level of participation by

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[1040] The Lear Report at par 1.21.
[1041] Munyai *A Critical review of the Treatment of Dominant Firms in Competition Law – A Comparative Study at* 26 – 27.
[1042] The Lear Report at par 6.83 – 6.84. Author's emphasis.
[1043] See Lewis, "Chilling Competition" at 12.
[1044] See previous discussions in Chapter 5 at paragraph 3.3.
[1045] See previous discussions in Chapter 5 at paragraph 4.

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smaller new entrants and especially by those firms owned and controlled by individuals previously disadvantaged by state assistance policies. Croos remarks that these political motivations together with such a low standard for the establishment of dominance as captured in section 7 of the Act however seem to subject firms to prosecution solely on the basis of "*assumed"* market power and on "*assumed*" abuses of their supposed dominance.[1046] As will be highlighted in Chapter 8, the small number of successful prosecutions of alleged abuses of dominance to date is clear evidence to the fact that the Commission has been largely unable to prove anti-competitive effects of the "*alleged*" anti-competitive conduct that various dominant firms have been accused of.[1047]

Having regard to the amendments introduced by the 2018 Amendment Act, it appears as though the legislature has taken notice of this "*flaw*" in the Act's abuse of dominance provisions, albeit not for the better. Significant changes have been made to section 8 ('Abuse of dominance prohibited) and section 9 ("Price discrimination of dominant firms prohibited") of the Act, specifically for the purposes of addressing market concentration, ownership structures within various markets and for the promotion of small businesses - particularly those owned by previously disadvantaged individuals.

At a fundamental level these amendments commenced with a change to the definition of the concept of an "exclusionary act" which is central to many of the abuses of dominance listed in section 8, as discussed below.

3.1.1 Amendment of the Definition of an Exclusionary Act

The concept "*exclusionary act*" was originally defined in section 1 of the Act as "*an act that impedes or prevents a firm from entering into, or expanding within a market.*" The 2018 Amendment Act now defines it as an act that *"impedes or prevents a firm from entering into, participating in, or expanding within a market."*[1048] The definition has thus been extended to also cover "*participation*" in a market. Notably, during deliberation on the draft bills that preceded the Amendment Act, it was realised that it was also necessary to define the novel concept "*participate/participating*" that was sought to be introduced into the Act. Accordingly, the 2018 Amendment Act defines "*participate*" as "*the ability or*

[1046] See Chapter 7 at 5.2.
[1047] See Chapter 8 at 1.2.
[1048] Section 1(c) of the Competition Amendment Act 18 of 2018.

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opportunity for firms to sustain themselves in the market and 'participation' has a similar meaning."[1049]

The motivation for the amendment of the concept of "*exclusionary act*" is quite obvious. It is clearly intended to protect black owned businesses (i.e businesses owned by historically disadvantaged persons) that often cannot compete - not for any reason other than that those businesses are inefficient within the market.[1050] Thus the amendment has the potential of again placing the Act in conflict with itself in that authorities will yet again be posed with the question of opting for protecting consumer welfare and promoting competition within the market, or with protecting competitors at the expense of effective competition.

3.1.2 Amendment of section 8

3.1.2.1 Amendment of section 8(a)

Section 8 in its original format comprised section 8(a) to (d)(i) to (iv), which as pointed out in Chapter 5, covered excessive pricing (section 8(a)), refusal to grant access to an essential facility (section 8(b)), non-specified exclusionary acts (section 8(c)) and a list of four specified exclusionary acts (section 8(d)(i) to (iv). In particular, section 8(a) prohibited a dominant firm to "*charge an excessive price to the detriment of consumers*." The 2017 Amendment Bill initially proposed the amendment of section 8 by grouping section 8(a) to (d) together as subsection 8(1), and by introducing a subsection (2) and a subsection (3).[1051] The original section 8(a) would thus become section 8(1)(a). The 2017 Bill also proposed an amendment of the original section 8(a), by deleting the words "*to the detriment of consumers*".[1052]

The reason for this proposal, according to the *Background Note*, is that excessive pricing may also affect businesses (thus not only consumers) that purchase inputs from dominant firms.[1053] This proposed amendment was evidently an attempt to protect small

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[1049] Section 1(h) of the Competition Amendment Act 18 of 2018.
[1050] See Business Unity South Africa (BUSA) "Business High-Level Submission on the Competition Amendment Bill" (29 January 2018) available at http://busa.org.za/wp-content/uploads/2018/03/Member-3-High-Level-Submission-on-the-Competition-Amendment-Bill-30-01-2018.pdf (last accessed on 21/05/2019).
[1051] As pointed out below, later versions of the Bill introduced a further subsection (4).
[1052] Clause 3 of the 2017 Amendment Bill.
[1053] The Background Note at 15.

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businesses yet again.[1054] Deleting the word "*consumers*" would however clearly deflect away from the consumer welfare objective of section 8(a) and instead divert its purpose to the protection of customers (i.e. businesses that purchase inputs), which is arguably a concept that would include competitors of the dominant firm.

Notably, in the July 2018 draft of the 2018 Competition Amendment Bill, the subsection was indeed further changed to refer to charging an excessive price to the detriment of "*customers*" (not "*consumers*" as per its original wording).[1055]The Portfolio Committee, at its meeting in October 2018, subsequently changed the proposed wording of section 8(1)(a) to read that it is prohibited for a dominant firm to charge an excessive price to the detriment of "*consumers or customers*". The latter proposed amendment was incorporated into the October 2018 version of the Amendment Bill and subsequently enacted in the 2018 Competition Amendment Act.[1056] In the *Memorandum on the Objects* of the October 2018 version of the Amendment Bill it was remarked in this regard that "it is *not only consumers* that should be protected from excessive prices, but *all customers involved in commercial transactions*."[1057]

The challenge that this amendment poses is that it forces the issue of protecting competitors at the expense of the protection of competition. What the Department of Economic Development has however failed to take into account, is that forcing a firm to charge a lower price for inputs to rivals may increase that firm's production costs as a direct result of such provision.[1058] These costs will then inevitably need to be passed onto consumers. Thus, by protecting competitors through the amendment to article 8(1)(a), the unfortunate result is that, not only will competition be impeded, but consumers will be disadvantaged.

The eventual combination of consumers and customers in the amended section 8(1)(a) appears to be an attempt to include some sort of middle ground between consumer welfare and the protection of competitors. The problem this potentially presents lies in

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[1054] See Business Unity South Africa (BUSA) "Business High-Level Submission on the Competition Amendment Bill".
[1055] Clause 5 of the Amendment Bill B23-2018 (11 July 2018).
[1056] Portfolio Committee Amendments to the Competition Amendment Bill B23-2018 (24 October 2018) at 2; Clause of the Competition Amendment Bill B23 of 2018 (24 October 2018); section 8(1)(a) of the Competition Amendment Ac 18 of 2018.
[1057]Memorandum on the Objects of the Competition Amendment Bill, 2018 par 3.3.2.
[1058] See the Report at par 2.49.

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enforcing this provision against a firm where its conduct has no detrimental effect on consumer welfare. The Amendment Act provides no guideline as to how these two competing interests should be weighed up against one another. This begs the question, regarding the instances in which the protection of consumers should give way to the protection of competitors. It is submitted that this amendment potentially places an obligation on competition authorities to protect inefficient firms simply as a consequence of the fact that they are a customer of the dominant firm concerned. It will be interesting to see how the Commission and Tribunal will try to practically reconcile these conflicting objectives.

3.1.2.2 Amendments to section 8(c) and (d)

The 2017 Amendment Bill further proposed the deletion of section 8(c) which, in its original format prohibited a dominant firm "*to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain*".[1059] The *Background Note* explained that in order to "*further strengthen*" the provisions of section 8, section 8(c) would be deleted and section 8(d) would be transformed into an *open* list of the known, predictable exclusionary acts developed in competition jurisprudence as abuses of dominance.[1060]

As indicated in Chapter 5, section 8(d) in its original format provided for five listed exclusionary acts, prohibiting a dominant firm to:

"Engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-

(i) requiring or inducing a supplier or customer to not deal with a competitor;

(ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

[1059] Clause 3 of the 2017 Competition Amendment Bill.
[1060] Background Note 15. Author's emphasis.

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(iii) selling goods or services on condition that the buyer purchase separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services below their marginal or average variable cost; or

(v) buying–up a scarce supply of intermediate goods or resources by a competitor,"

The proposal to delete the general exclusionary act originally stated in section 8(c) of the Competition Act was however not carried through but some changes were nevertheless made to the wording of the original section 8(d). Section 8 as eventually amended by the 2018 Competition Amendment Act now reads as follows:

"8. Abuse of dominance prohibited.-

(1) It is prohibited for a dominant firm to-

(a) charge an excessive price to the detriment of consumers or customers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act-

(i) requiring or inducing a supplier or customer not to deal with a competitor;

(ii) refusing to supply scarce goods or services to a competitor or customer when supplying those goods or services is economically feasible;

(iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

(iv) selling goods or services at predatory prices;

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(v) buying up a scarce supply of intermediate goods or resources required by a competitor;

(vi) engaging in a margin squeeze."

The general exclusionary act-provision in section 8(c) was thus kept intact and the list of specified exclusionary acts in section 8(d) was broadened to include engagement in a "*margin squeeze*". For purposes of facilitating the interpretation of the new section 8(1)(d)(vi) the 2018 Amendment Act also introduced a definition of "margin squeeze", indicating that it occurs *'when the margin between the price at which a vertically integrated firm, which is dominant in an input market, sells a downstream product, and the price at which it sells the key input to its competitors, is too small to allow downstream competitors to participate effectively."*[1061] The inclusion of this definition reinforces the protectionist approach of the Amendment Act as it arguably allows for the protection of inefficient and uncompetitive competitors.

3.1.2.3 The introduction of sections 8(2), (3) and 8(4)

As indicated above, new subsections (2) and (3) were also introduced to section 8 by the 2018 Competition Amendment Act. The new section 8(2) reads as follows:[1062]

"(2) If there is a prima facie case of abuse of dominance because the dominant firm charged an excessive price, the dominant firm must show that the price was reasonable."

The *Memorandum on the Objects* of the October 2018 version of the Amendment Bill merely stated in this regard that section 8(2) was inserted to place the burden on the dominant firm to show that the price concerned is reasonable *after* a *prima facie* case is established.[1063]

Notably the version of the new section 8(3) that was initially proposed differed significantly from the version that was eventually enacted in the 2018 Competition Amendment Bill.

[1061] Clause 1 of B23-2018 (24 October 2018). The October 2018 draft also expanded on the definition of "average avoidable costs by introducing the words "divided by the quantity of the additional output" at the end of the definition so that the new definition would read: " 'average avoidable cost' means the sum of all costs, including variable costs and product-specific fixed costs, that could have been avoided if the firm ceased producing an identified amount of additional output, divided by the quantity of the additional output."
[1062] Clause 3 of the 2917 Competition Amendment Bill.
[1063] Memorandum on the objects of the Competition Amendment Bill 2018 par 3.3.6. Author's emphasis.

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In terms of the 2017 Amendment Bill it was proposed that section 8(3) should provide as follows:

"(3) The Commission must publish guidelines in terms of section 79 setting out the relevant factors and benchmarks for determining when a price is excessive."

The B*ackground Note* to the 2017 Competition Amendment Bill shed some light on the proposed new section 8(3) by indicating that, because the determination of excessive pricing cases is complex, the proposed section 8(3) would mandate the Commission to issue guidelines on how to determine excessive prices. In this regard the 2017 Competition Amendment Bill also proposed an amendment to section 79 of the Act which would empower the Commission to draft guidelines in order to require a body interpreting or applying the Competition Act to take the Guidelines into account even though guidelines issued by the Commission are not binding.[1064]

The proposed section 8(3) was tweaked extensively throughout the legislative process and the version that was eventually enacted in the 2018 Competition Amendment Act reads as follows:

"(3) Any person determining whether a price is an excessive price must determine if that price is higher than a competitive price and whether such difference is unreasonable, determined by taking into account all relevant factors, which may include-

(a) the respondent's price-cost margin, internal rate of return, return on capital invested or profit history;

(b) the respondent's prices for the goods or services-

(i) in markets in which there are competing products;

(ii) to customers in other geographic markets;

(iii) for similar products in other markets; and

(iv) historically:

[1064] See clause 37 of the 2017 Competition Amendment Bill.

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(c) *relevant comparator firm's prices and level of profits for the goods or services in a competitive market for those goods or services;*

(d) *the length of time the prices have been charged at that level;*

(e) *the structural characteristics of the relevant market, including the extent of the respondent's market share, the degree of contestability of the market, barriers to entry and past or current advantages that is not due to the respondent's own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market; and*

(f) *any regulations made by the Minister, in terms of section 78, regarding the calculation and determination of an excessive price."*

It is submitted that the introduction of these further subsections to section 8 has far-reaching consequences. While the regulations published in accordance with section 8(3)(f)[1065] could certainly assist authorities in determining whether or not a price charged can be regarded as excessive, the amended section 8(2), on the other hand, complicates these enquiries for dominant firms accused of excessive pricing. Given the current structure of the Act, its political goals and the amendment of section 8(2), a real possibility exists that more firms will now be subject to lengthy and frivolous litigation without the Commission being required to present a complete case which firms accused of excessive pricing will be required to answer to. While the political motivations behind such an amendment are clear, the potential exists for firms to be subjected to an increased amount of protracted litigation arising out of the amendment with these firms bearing the onus that they have not contravened the Act.

Boshoff, Sutherland and Theron commented on the 2017 Competition Amendment Bill that the presumption in the proposed section 8(2) is *"both badly formulated and unworkable even if its wording were to be improved.*" Their concern was inter alia that section 8(2) does not make it clear when a price will "*prima facie*" be an abuse of dominance. They indicated that the problem with this provision is, of course, that the charging of an excessive price is itself an abuse of dominance and it bore no relationship

[1065] See the Department of (then) Trade and Industry's "Consumer and Customer Protection and National Disaster Regulations and Directions" 19 March 2020 Government Gazette No. 43116.

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to the definition of "excessive price" in section 1. They consequently asked what the person alleging contravention of section 8(2) will have to prove to show a prima facie abuse? They indicate that this provision could require a special procedure before adjudicatory bodies that would require a first stage where only prima facie evidence would have to be put forward. But if this were so, they opined that it would be absurd to allow the respondent to escape liability only by proving reasonableness. Their view at the time was thus that a better threshold for a shift in the evidentiary burden/onus would be required.[1066]

They further remarked that, if the implications of the new section 8(2) were that the Commission would do very little analyses (given that it is not clear what a prima facie case in this context entails) and that, if the Commission would simply refer the case to the Tribunal for adjudication, then it would amount to an "*abdication*" of the Commission's role as an investigator. The result would then be that the Tribunal would be unnecessarily burdened. They further remarked that *"[T]he Bill expects that the shifting of the evidentiary burden will increase the prospects of successful prosecution. This does not seem to follow logically."*[1067] Consequently Boshoff, Sutherland and Kemp cautioned that *"the likelihood of causing more harm than good and of having too many false positives, therefore mitigate strongly against the presumption proposed in section 8(2)."*[1068]

3.1.2.4 The introduction of section 8(4)

In the July 2018 draft of the Amendment Bill a new section 8(4) was inserted to deal with the guidelines by the Commission as previously proposed in the 2017 Amendment Bill.The 2018 Competition Amendment Act eventually introduced a more extensive section 8(4) that reads as follows:

"(4)(a) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to directly or indirectly, require from or impose on a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons, unfair-

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[1066] Boshoff, Sutherland & Theron *CCLE Comments on the Competition Amendment Bill ,2017* (hereinafter CCLE) at 7-8.
[1067] CCLE at 8.
[1068] CCLE at 8.

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(i) prices; or

(ii) other trading conditions.

(b) It is prohibited for a dominant firm in a sector designated by the Minister in terms of paragraph (d) to avoid purchasing, or refuse to purchase, goods or services from a supplier that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of paragraph (a).

(c) If there is a prima facie case of a contravention of paragraph (a) or (b), the dominant firm alleged to be in contravention must show that-

(i) in the case of paragraph (a), the price or other trading condition is not unfair; and

(ii) in the case of paragraph (b), it has not avoided purchasing, or refused to purchase, goods or services from a supplier referred to in paragraph (b) in order to circumvent the operation of paragraph (a).

(d) The Minister must, in terms of section 78, make regulations –

(i) designating the sectors, and in respect of firms owned or controlled by historically disadvantaged persons, the benchmarks for determining the firms, to which this section will apply; and

(ii) setting out the relevant factors and benchmarks in those sectors for determining whether prices and other trading conditions contemplated in paragraph (a) are unfair."

These amendments are clear in their intention to protect certain defined competitors in certain defined sectors, as will be determined by the now Minister of Trade, Industry and Competition.[1069] This amendment however appears to move the mandate of the Commission further away from the goal of achieving and maintaining effective competition in the South African market and closer to the goal of merely protecting certain

[1069] See Government Gazette No. 43018 13 February 2020 "Regulations on Buyer Power Made by the Minister under Competition Act, 1998, where the then Minister of Trade and Industry designated the sectors of grocery wholesale and retail, agro-processing and e-commerce and online services.

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competitors within the market. It is submitted that this amendment can be construed as nothing more than a deliberate attempt to use the Act as a means for achieving the South African Government's empowerment goals, more specifically a greater spread of ownership along racial lines, at the expense of effective competition.

Notably Oxenham *et* al remark that "*[S]etting aside this rather explicit goal of using competition legislation to effectuate redistributive economic policy, with a significant political public–interest mandate placed on the competition authorities, we also see a second theory emerging: it posits that another driving force behind the Bill may well be the recent history of failure of the country's Competition Commission (SACC). The SACC has failed to attain victories in several dominance cases and investigations, nor reaped the expected enforcement fruit of certain of its broad and far-reaching market enquiries that it conducted. Put plainly, the Bill as drafted seeks to reverse the SACC's bad fortunes, and will help the Commission's task of winning in court easier. Conversely, it will burden parties that currently possess above or close to the inarguably low 35 per cent presumptive dominance threshold, likely prompting them to consider settling the Commission complaints more willingly than they would otherwise have under the legislative status quo."*[1070]

In particular Oxenham *et al* refer to the "*buyer power*"-provisions in section 8(4) and remark that despite requiring the Minister to publish regulations which would assist in further clarifying the standards and benchmarks to be used in order to assess a respondent's conduct in terms of this provision, *"without first having sight of these regulations, it is near impossible to assess how this provision will operate in practice.*[1071]They observe that the socio-economic focus and subjective nature of section 8(4) will render it very difficult for section 8(4) to be reconciled with the objective pure competition concerns which may arise from buyer power and state that: " *Absent a clear and objective framework, this provision may significantly hinder ordinary pro-competitive effects and simply serve to justify inefficiencies at an upstream supplier level."*[1072]

3.2 Amendment of Section 9

[1070] Oxenham *et al* 233.
[1071] Oxenham *et al* 236.
[1072] Oxenham *et al* 236-237.

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The 2017 Amendment Bill also proposed drastic changes to the price discrimination provisions of the Act as contained in section 9. In its original format section 9 provided as follows:

"*(1) An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if*

(a) it is likely to have the effect of substantially preventing or lessening competition;

(b) it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(c) it involves discriminating between those purchases in terms of-

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) payment for services provided in respect of the goods or services.

(2) Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant firm establishes that the differential treatment-

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including-

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(i) *any action in response to the actual or imminent deterioration of perishable goods;*

(ii) *any action in response to the obsolescence of goods;*

(ii) *a sale pursuant to a liquidation or sequestration procedure; or*

(iv) *a sale in good faith in discontinuance of business in the goods or services concerned."*

When the 2017 Competition Amendment Bill was published, the *Background Note* explained, in relation to the amendments that were proposed to be made to section 9, that as with the provisions of section 8, the ambit of section 9 would be expanded to prohibit price discrimination by a dominant firm against its suppliers. In addition, the proposed amendments sought to address the provisions in section 9 regarding allocation of the burden of proof to provide that the onus is on the dominant firm to show that the relevant action of price discrimination is not likely to have an effect of preventing or lessening competition.[1073] The *Background Note* further stated that, most importantly, it was proposed that section 9 "*requires*" that "*special attention*" be given to the effect that anti-competitive price discrimination by a dominant firm may have on small businesses and firms owned or controlled by historically disadvantaged persons. According to the *Background Note*, "*the entry and viability of these 'outsider' firms are harmed by price discrimination where it is used to disadvantage them, to the benefit of larger firms.*" The *Background Note* further stated that, ensuring that the competition authorities take cognisance of this consequence and that the authorities consider it in every price discrimination case "*advances the inclusive and transformative purposes of the Act.*"

The proposed amendments to section 9 underwent several changes over the course of the various draft Bills. In the version that was eventually enacted in the 2018 Competition Amendment Act the heading of the section was changed to read "Price discrimination by dominant firm *as seller* prohibited".[1074] The significantly amended section 9 now reads as follows:

[1073] Author's emphasis.
[1074] Author's emphasis.

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"(1) An action by a dominant firm, as the seller of goods or services, is prohibited price discrimination, if-

(a) it is likely to have the effect of-

(i) substantially preventing or lessening competition; or

(ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively;

(b) It relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and

(c) it involves discriminating between those purchasers in terms of-

(i) the price charged for the goods or services;

(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;

(iii) the provision of services in respect of the goods or services; or

(iv) the payment for services provided in respect of the goods or services."

(1A) It is prohibited for a dominant firm to avoid selling, or refuse to sell, goods or services to a purchaser that is a small and medium business or a firm controlled or owned by historically disadvantaged persons in order to circumvent the operation of subsection (1)(a)(ii).

(2) Despite subsection (1), <u>but subject to subsection (3),</u> conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of subsection (1) is not prohibited price discrimination if the dominant firm establishes that the differential treatment—

(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from

(i) the differing places to which goods or services are supplied to different purchasers;

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(ii) methods by which goods or services are supplied to different purchasers; or

(iii) quantities in which goods or services are supplied to different purchasers;

(b) is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or

(c) is in response to changing conditions affecting the market for the goods or services concerned, including—

(i) any action in response to the actual or imminent deterioration of perishable goods;

(ii) any action in response to the obsolescence of goods;

(iii) a sale pursuant to a liquidation or sequestration procedure; or

(iv) a sale in good faith in discontinuance of business in the goods or services concerned.

(3) If there is a prima facie case of a contravention of section (1)(a)(ii)-

(a) subsection (2)(a)(iii) is not applicable; and

(b) the dominant firm must, subject to regulations issued under section 9(4), show that its action did not impede the ability of small and medium businesses and firms controlled and owned by historically disadvantaged persons to participate effectively.

(3A) If there is a prima facie case of a contravention of subsection (1A), the dominant firm alleged to be in contravention must show that it has not avoided selling, or refused to sell, goods or services to a purchaser referred to in subsection (1A) in order to circumvent the operation of subsection (1)(a)(ii).

(4) The Minister must make regulations in terms of section 78-

(a) to give effect to this section, including the benchmarks for determining the application of this section to firms owned and controlled by historically disadvantaged persons; and

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(b) setting out the relevant factors and benchmarks for determining whether a dominant firm's action is price discrimination that impedes the participation of small and medium businesses and firms controlled or owned by historically disadvantaged persons."

The *Memorandum on the Objects* of the 2018 Amendment Bill (October version) stated that to prove price discrimination, the complainant is required to prove, inter alia, that the specific instance of price discrimination concerned is likely to have the effect of substantially preventing or lessening competition as per section 9(1)(a). The *Memorandum* further pointed out that the inclusion of the word "substantially" in the original version of section 9(1)(a) resulted in small and medium businesses often being able unable to show prohibited price discrimination because the effect on small businesses is not considered to amount to "*substantial*" prevention or lessening of competition. Consequently, the view was that section 9 favoured complainants that are large firms because they can more easily demonstrate a substantial effect on competition. Thus section 9(1)(a)(ii) was added so that a complainant could be able to prove that price discrimination by a dominant firm is likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons to participate effectively in the market.[1075]

These amendments, much like the dominant theme of the Amendment Act thus far, again changes the aim of the particular section to be better suited to protecting certain competitors rather than protecting the process of competition itself.[1076] This is clear from the inclusion of subsection (3) which prevents a firm from relying on the defences contained in subsection (2) where a *prima facie* case exists that the specific firm has prevented small and medium sized firms and those owned by historically disadvantaged individuals from participating effectively in the market. This again shifts the onus on the dominant firm to prove that it is not guilty of the alleged contravention. However, there appears to be little rationale for excluding such a firm from the exceptions listed in the Act and further to subject it to a different set of regulations to be determined by the now Minister of Trade, Industry and Competition as provided for in the new subsection (4)(a). In addition to placing the emphasis on the protection of certain competitors, it is submitted

[1075] Memorandum on the Objects of the Competition Amendment Bill, October 2018, par 3.4.2.
[1076] See Business Unity South Africa (BUSA) "Business High-Level Submission on the Competition Amendment Bill". Also see previous discussions in Chapter 5 at paragraph 4.

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that these amendments create the potential for further political interference in competition regulation. Government should however be cautious not to undermine the independence of competition authorities through amendments to existing competition law which may facilitate greater political interference in the regulatory and adjudication process.

Of relevance in this context is the observations by Oxenham *et al* who point out that the amendments to section 9 entail "*watering down the threshold for breaching the price discrimination criteria for purposes of assessing allegations of price discrimination, with the burden of proof notably placed on the respondent."* They refer to the requirement in section 9 that, when determining whether a dominant firm's conduct amounts to price discrimination, such dominant firm must show that its conduct does not impede the ability of small and medium businesses and firms controlled or owned by historically disadvantaged persons to participate effectively. However, they observe that "*quite crucially it is not apparent - and will not be known by practitioners or companies, unless and until guidelines are published on the issue – what is meant by the novel language of "imped[ing] the ability" to participate effectively."*[1077]

They further refer to the Minister's responsibility for determining what small and medium businesses are and remark that it will have the result that a firm could be found to have violated the price discrimination provisions based either on a pure competition test or a standalone public interest test. They argue that the introduction of two separate standards to assess price discrimination cases will cause greater uncertainty and likely have the unintended consequence of dampening pro-competitive and overall price-lowering commercial practices. They emphasize that the onus rests fully and exclusively on the dominant firm to demonstrate that its pricing strategy does not *"impede the ability"* of small businesses or firms owned by historically disadvantaged persons to *"participate".* Thus, as they point out, a rebuttable presumption of harm is created[1078]

3.3 Merger Regulation

3.3.1 Amendment of section 12A

[1077] Oxenham *et al* at 236, see Government Gazette No. 40138 13 February 2020 "Regulations on Price Discrimination made by Minister under Competition Act, 1998.
[1078] Oxenham *et al* at 236.

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As indicated in Chapter 6, the test for merger analysis is set out in section 12A. After several substantial amendments over the course of the various drafts Bills, section 12A, as amended by the 2018 Competition Amendment Act, now reads as follows:

"12A. Consideration of mergers-

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

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

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

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

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

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(2) When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market, including-

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(a) the actual and potential level of import competition in the market;

(b) the ease of entry into the market, including tariff and regulatory barriers;

(c) the level and trends of concentration, and history of collusion, in the market;

(d) the degree of countervailing power in the market;

(e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;

(f) the nature and extent of vertical integration in the market;

(g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail;

(h) whether the merger will result in the removal of an effective competitor;

(i) the extent of ownership by a party to the merger in another firm or other firms in related markets;

(j) the extent to which a party to the merger is related to another firm or firms in related markets, including through common members or directors; and

(k) any other mergers engaged in by a party to the merger in the preceding three years.

(3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on-

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons to effectively enter into, participate in or expand within the market;

(d) the ability of national industries to compete in international markets; and

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(e) *the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market."*

The merger evaluation regime in the Competition Act has thus been amended significantly as the Amendment Act now places the competition test and the public interest test on par with each other by virtue of the amendment to section 12 A(1).[1079] A further new change is the requirement in the new section 12A(2)(i), (j) and (k) that, amongst the factors to determine whether a merger will impede competition, consideration must be given to the extent of ownership by a party to the merger in another firm or other firms in related markets; the extent to which a merging party is related to another firm or firms in related markets, including through common members or directors; and whether a merging party engaged in any other mergers in the preceding three years. The public interest provision in section 12A(3)(c) have also been augmented to extend it to medium sized businesses (and not only small businesses as was previously the case) and an extra public interest consideration has been added by the new section 12A(3)(e), namely: the promotion of a greater spread of ownership especially for previously disadvantaged persons, and notably also "workers".

The 2018 Competition Amendment Act also introduced a few definitions relevant to the merger evaluation regime as captured in section 12A. A definition of "medium-sized business" has been introduced which means "a medium-sized firm as determined by the Minister by notice in the Gazette. "Small and medium business" has been defined to mean "either a small business or a medium-sized business. The definition of "small business" has been augmented to give the Minister the power to determine by notice in the Gazette that a business is a small firm or, if the Minister has not made such a determination, then the concept "small business" refers to "a small firm as set out in the National Small Business Act 102 of 1996". Notably a definition of "workers" has also been included to mean "employees as defined in the Labour Relations Act, 1995 (Act No 66 of 1995), and in the context of ownership, refers to ownership of a broad base of workers."

[1079] See Magana *Public interest versus competition considerations: A Review of the Merger Review Guidelines in terms of section 12A of the Competition Act, 1998* (LLM dissertation, Unisa, 2021) 54 to 60 where he discusses the impact of the Amendment Act on the management of conflict between public interest and competition considerations in merger control..

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In assessing the intention behind these amendments, it is again necessary to have regard to the *Background Note* to the 2017 Amendment Bill. In the *Background Note* it was explained that the amendment of section 12A(1) reflects the "*settled, established*" position in South African case law that the competition and public interest tests for the approval of a merger are "equal in status". It was stated that it also confirms the legislative intention that a merger must be justified on both competition and public interest grounds to be approved. According to the *Background Note* the proposed amendments sought to prevent "*creeping concentration*" and the erection and maintenance of strategic barriers to entry as well as to regulate the conditions under which a merger was approved. Regarding the explicit consideration in all mergers of cross-shareholdings and cross-directorships and disclosure of merger activity engaged by the merging firms in the three years preceding a merger the Background Note indicated that it would serve to identify markets in which, and firms by which, creeping concentrations are being pursued. It was further stated that these requirements would reveal merger activity that may have fallen below the (then) current thresholds for scrutiny by the competition authorities. The view was expressed that this approach would ensure that merger transactions that lead to to creeping concentrations are appropriately investigated and considered by the competition authorities.[1080]

The *Background Note* pointed out that co-ordination between competitors may occur through a common shareholder and that overlapping ownership structures may increase concentration. To address this, it stated that the proposed amendment to section 12A provided for mandatory disclosure and express scrutiny of these relationships during merger proceedings. The *Background Note* further indicated that the amendment relating to other mergers having been entered into by one of the merging parties in the preceding three years sought to enable the Commission to scrutinise transactions occurring within a three-year period that result in a change of control, or which are steps toward a change of control, as if they occurred simultaneously. Thus, the *Background Note* indicated that this "*package of amendments*" would require the competition authorities to consider these structural features in every merger as well as to identify measures to ameliorate any identified and credible concerns.[1081] It stated that the amendment to section 12A further

[1080] Background Note at 18.
[1081] Background Note at 18.

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sought to explicitly create public interest grounds in merger control that address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.[1082]

A number of criticisms can be levelled against the amendments that were affected to section 12A by the 2018 Competition Amendment Act. Firstly, there appears to be a fundamental misunderstanding with the amendment of section 12A(1) and the newly introduced section 12(1A).[1083] The Act originally required that a merger first be evaluated for its effect on competition and then be evaluated to determine whether there are any substantial public interest concerns which justify the merger not being approved or being approved. The effect that the amendment of section 12 A(1) read together with section 12(1A) will have on merger regulation would however be more in line with the argument raised by Goldfields in the *Harmony*-case as discussed in Chapter 6.[1084] It was pointed out in the aforesaid chapter, that the argument went that *even* where a merger raises no anti-competitive effects, it would still need to be justified on substantial public interest grounds.[1085] This argument was however categorically rejected by the Tribunal.[1086]

As also previously pointed out, section 12A(1) in its original format relegated public interest concerns to a secondary evaluation that can either condemn a merger that presents no anti-competitive effects or save an otherwise anti-competitive merger.[1087] The amendments introduced by the Competition Amendment Act would however mean that mergers will now need to be justified on both competition and public interest grounds at the primary assessment level. There can be little doubt that this will significantly complicate merger regulation. Furthermore, it would appear as though no merger would be capable of approval unless the merging parties were to agree to concessions specifically designed at achieving public interest goals. The practical implications of such an amendment may also prove difficult to implement. Clearly, government and trade unions would now be given a bigger voice in merger regulation. This creates the potential for merger implementation to be substantially delayed due the adjudication process being

[1082] Ibid.
[1083] See Business Unity South Africa (BUSA) “Business High-Level Submission on the Competition Amendment Bill”.
[1084] See *Harmony Gold Mining Company Limited/Gold Fields Limited* 93/LM/Nov04. See previous discussions in Chapter 6 at par 4 at paragraph 4.3.
[1085] See *Harmony* at 34 and 41 as well as Chapter 6 at par 4.3.
[1086] Ibid.
[1087] See previous discussions in Chapter 6 at par 4.3 and *Harmony* at par 45 – 55.

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significantly complicated by having to deal with a greater amount of considerations that previously would have been deemed irrelevant for purposes of the Act. Needless to say, an amendment of this nature has serious implications.

As pointed out, the amendment to section 12A(2) to include the new paragraphs (i),(j) and (k) is aimed at preventing what the *Background Note* terms "*creeping concentration*" and the prevention of the erection and maintenance of "*strategic barriers to entry*".[1088] This amendment requires that when determining whether or not a merger substantially prevents or lessens competition in accordance with section 12A(2), factors such as cross-shareholdings and cross-directorships must be considered in the evaluation process. The relevance that this would have to the promotion of consumer welfare is however unclear. It is in fact also unclear whether cross-shareholding and cross-directorships have *any* relevance to effective competition within a market. Actually, the amendment again points more towards the achievement of policy goals outside of the scope of competition law.

When viewed against the backdrop of the new public interest concern of the promotion of a greater spread of ownership with an additional reference to the "*workers*"[1089] of the merging firms contained in section 12A(3)(e), it is submitted that the merger evaluation process may be altered forever. It is conceivable that this new public interest concern will be used to force firms to concede to handing over shareholding in the merged entity purely for the sake of complying with this public interest concern. The chilling effect that this may have on mergers going forward is frightening to contemplate. Furthermore, this could potentially act as a doorstop to pro-competitive mergers proceeding in the future, which, more than likely, will have a much greater effect on social upliftment through increased consumer welfare.[1090] The role that "*workers*" will play in this regard is also unclear. Perhaps merging firms will now be required to create employee share trusts with the sole aim of benefitting a single segment of its workforce. But what level of shareholding will this trust be required to hold in the merged entity for purpose of meeting the new public interest concern incorporated in the Act? The inclusion of this new public interest concern is fraught with uncertainty. What is clear though, is that this is yet another

[1088] The Background Note at 18.
[1089] The Amendment Act defines workers "employees as defined in the Labour Relations Act, 1995 (Act No. 66 of 1995), and in the context of ownership, refers to ownership of a broad base of workers;"
[1090] See previous discussions in Chapter 6 at par 5.

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ploy to use the Act to achieve a government agenda at the expense of achieving effective competition within the South African Market.

Notably Oxenham *et al* refer to the elevation of the public interest standards in the (at that stage proposed to be) amended section 12A and remark: *"The Bill expressly elevates public interest criteria (including ownership levels and ability of small or medium businesses to compete in the market) to the same relevance as traditional competition elements. Other than simply listing factors to take into account, the Bill does not provide any guidance on how the agencies should go about quantifying any public interest considerations. Furthermore, there is no guidance as how the agencies should go about assessing transactions where the competition and public interest considerations are of 'equal' weight, but point in opposite directions, nor how to balance short term adverse competition effects with long term public interest effects. Absent any objective standard or quantifiable means by which to assess the impact of socio-economic effects, we submit that the Bill is likely to result in unpredictable, subjective and litigious merger control regime. If recent merger decisions by the Commission failed to spell out with sufficient clarity the grounds for, and evaluation of, public interest commitments, the proposed Bill will only serve to hasten the gradual disappearance of procedural transparency and due process."*[1091]

Boshoff, Sutherland and Theron however remark that the amendment of section 12A(1)(b) regarding the consideration of public interest reflects existing jurisprudence.[1092] Their view is that it will ensure that there is no doubt that public interest has to be considered in every merger case. Nevertheless, they point out that the commentary in the *Background Note* is "*perhaps inaccurate*", when it states that the competition and public interest analysis is "*of equal status*". They remark that public interest will have to be considered in every merger case and that merger conditions are often imposed in order to ensure that the public interest criteria are met, *but* point out that public interest *"has never persuaded an adjudicatory authority to approve a merger which cannot be justified on competition grounds or to reject a merger that is not anti-competitive on the mere ground that it would harm public interest."*

[1091] Oxenham *et al* 235.
[1092] *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04 par 42.

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3.3.2 Amendments to sections 15 and 16

The Amendment Bill further sought to extend the powers of the Commission and Tribunal to make orders and impose conditions on mergers relating to public interest concerns, particularly the issues of employment and small firms owned or controlled by historically disadvantaged persons. In this regard amendments were proposed and effected to sections 15 and 16. In its original format section 15 was titled "[R]evocation of merger approval" and provided as follows:

"(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if-

(a) the decision was based on incorrect information for which a party to the merger is responsible;

(b) the approval was obtained by deceit; or

(c) a firm concerned has breached an obligation attached to the decision.

Section 15 in particular was amended by the 2018 Competition Amendment Act and now reads as follows:

"15. Revocation of merger approval and enforcement of merger conditions.

(1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) and (c) if-

(a) the decision was based on incorrect information for which a party to a merger is responsible;

(b) the approval was obtained by deceit; or

(c) a firm concerned has breached an obligation attached to the decision.

(2) If the Competition Commission revokes a decision to approve a merger under subsection 1, it may prohibit that merger even though any time limit set out in this Chapter may have elapsed."

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Section 16 of the Competition Act in its original format provided that:

“(1) If the Competition Commission approves-

(a) a small or intermediate merger subject to any conditions, or prohibits such a merger, any party to the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the conditions or prohibited merger; or

(b) an intermediate merger, or approves such merger subject to any conditions, a person who, in terms of section 13A(2 , is required to be give notice of the merger, by written notice and in the prescribed form, may request the Competition Tribunal to consider the approval or conditional approval, provided the person had been a participant in the proceedings of the Competition Commission.

(2) Upon receiving a referral of a large merger and recommendation from the Competition Commission in terms of section 14A(1), or a request in terms of subsection (1), the Competition Tribunal must consider the merger in terms of section 12A, and the recommendation or request, as the case may be, and within the prescribed time-

(a) approve the merger;

(b) approve the merger subject to any conditions; or

(c) prohibit the implementation of the merger.

(3 Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger and section 15, read with the changes required by the context, applies to a revocation in terms of this subsection,

(4) The Competition Tribunal must-

(a) publish a notice of the decision made in terms of subsection (2) or (3) in the Gazette; and

(b) issue written reasons for any such decision.”

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Only section 16(3) was amended by the 2018 Competition Amendment Act and now reads as follows:

"(3) Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to a merger, including the issues referred to in section 12A(3)(b) or (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection."

The amendments to the revocation of merger approval in terms of section 15 and merger proceedings before the Tribunal in terms of section 16, are clearly aimed at extending the mandate of the Commission and the Tribunal in merger regulation. The exact intention behind the amendment however remains unclear. It is submitted that it could possibly be intended as a tool that would empower competition authorities to impose any condition after the fact that they deemed appropriate on the basis of vague public interest concerns without having to worry about falling outside the scope of the Act due to such issues falling within the scope of other pieces of legislation. Looking at the mergers discussed in the Chapter 6, many of the conditions imposed in the *Massmart* and *SAB* mergers were the result of concessions that the merging firms were "bullied" into agreeing to following their engagements and negotiations with Government.[1093] It is submitted that the amendments to sections 15 and 16 create the potential for the Commission and Tribunal to impose conditions that previously fell outside of the scope of the public interest component of section 12A, should they deem it appropriate.

Additionally, this new wide discretion afforded to competition authorities by the amendments to section 15 and 16 has the potential of releasing these institutions from the shackles of being subservient to other pieces of legislation such as the Labour Relations Act 66 of 1995 on issues involving public interest concerns. Together with this, the funds created in the *Massmart* and *SAB* mergers were both designed to assist the development of SMMEs in the merged entities' supply chain and particularly in *Massmart*, those owned by historically disadvantaged individuals. Both these funds were established

[1093] See Chapter 6 at par 5.2.

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as a consequence of concessions made by the merging parties.[1094] This amendment may now empower competition authorities to impose a condition on merging parties to establish funds that seek to advance this goal. Not only this, but authorities may now also be empowered to determine the construction of these future funds with merging parties - possibly having very little say in this regard. Conditions such as these may have serious implications for a merged entity's business going forward. The form that these new potential conditions may take remains to be seen but the potential for these amendments to add an extra level of complexity to merger regulation appears to be a likely outcome. Whether these conditions may prove practical and how they may interact with other pieces of legislation and the greater public policy are also questions that will need to be answered.

3.3.3 Amendments to section 17

Section 17(1) which bears the title "Competition Appeal Court merger proceedings" was also amended. Section 17 in its original format provided as follows:

"(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal Court, subject to its rules, by-

(a) any party to the merger; or

(b) a person who, in terms of section 13A(2) is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal."

Subsequent to its amendment by the 2018 Competition Amendment Act, section 17(1) now reads as follows:

"(1) Within 20 business days after notice of a decision by the Competition Tribunal in terms of section 16, an appeal from that decision may be made to the Competition Appeal court, subject to its rules, by-

(a) any party to the merger;

[1094] See previous discussions in chapter 6 at par 5.2 and 5.3.

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(b) the Competition Commission;

(c) the Minister; or

(d) a person who, in terms of section 13A(2), is required to be given notice of the merger, provided the person had been a participant in the proceedings of the Competition Tribunal."

The *Background Note* indicated that the proposed amendment to section 17 would provide the Minister and the Commission with the right to appeal against a decision of the Tribunal, a provision that was previously "*lacking*" in the Act. The *Background Note* stated that it would thus address a lacuna in the Act and provide the Commission and the Executive with a "*meaningful means*" of participating in the Act's adjudicative processes.[1095] Providing the executive with a means of intervening in matters to which they were not originally a party is fraught with difficulty and appears to lack a competition rationale. How this may play out in future regulation is discussed in more detail later in this chapter.

3.3.4 Amendments to section 18

Notably, neither the 2017 Amendment Bill nor the Amendment Bill that was released in July 2018 proposed any amendments to section 18 that deals with intervention in merger proceedings. However, subsequent to the proposed amendment of section 17 in the July 2018 draft of the Amendment Bill to allow for the Minister to appeal decisions of the Tribunal to the Competition Appeal Court, the Portfolio Committee realised that it became necessary to also propose the amendment of section 18(1) to widen the Minister's participation in merger proceedings. Section 18(1) in its original format provided as follows:

"(1) In order to make representations on any public interest ground referred to in section 12A(3), the Minister may participate as a party in any intermediate or large merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the prescribed manner."

[1095] Background Note at 23.

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Accordingly, an amendment to section 18 was proposed in the October 2018 version of the Amendment Bill to substitute the original section 18(1). This amendment to section 18(1) was subsequently enacted in the 2018 Competition Amendment Act with the result that the amended section 18(1) now reads as follows:[1096]

> *"(1) In order to make representations on any public interest ground referred to in section 12 A(3), the Minister may participate as a party in any merger proceedings before the Competition Commission, Competition Tribunal or the Competition Appeal Court, in the prescribed manner"*

thus widening the Minister's participation to cover all mergers regardless of their size.

3.3.5 The new section 18A

In addition to the abovementioned amendments, another amendment that has proved to be, and will continue to be, one of the most controversial amendments to the Competition Act, is the introduction of a new section 18A entitled *"Intervention in merger proceedings involving foreign acquiring firm"* which was first introduced in the July 2018 draft of the Amendment Bill.[1097]

In the *Memorandum on the Objects* of the July version of the Competition Amendment Bill it was stated that the introduction of section 18A would provide the President with the powers to constitute a Committee comprised of Ministers and officials determined and appointed by the President with powers to intervene in a merger where the acquiring firm is foreign, *and* where the merger may adversely affect the country's national security interests. It was explained that this amendment also provides for the determination of national security interests as well as the issuing of regulations that will govern access to information, including confidential information, and the process, procedures and timeframes associated with the consideration of these kinds of mergers.[1098]

[1096] Clause 13 of the Competition Amendment Bill B-23 of 2018 (24 October 2018).
[1097] Clause 14 of the Competition Amendment Bill of 2018 (July 2018). See also Tavuyanago" An analysis of the National Security Interest Provisions in terms of section 18A of the Competition Act 89 of 1998" (2021) PELJ vol 24 available at http://dx.doi/10.17159/1727-3781/2021/v24i0a6031.pdf (accessed 2 September 2021).
[1098] Memorandum on the Objects of the Competition Amendment Bill, 2018 (July version) par 3.11. See also the October version of the Memorandum on the Objects of the Competition Amendment Bill par 3.12.

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The version of section 18A that was eventually introduced by the 2018 Competition Amendment Act provides as follows:[1099]

"18A(1) The President must constitute a Committee which must be responsible for considering in terms of this section whether the implementation of a merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic.

(2) The Committee contemplated in subsection (1) must consist of such Cabinet Ministers and other public officials as may be determined and appointed by the President.

(3) The President must identify and publish in the Gazette a list of national security interests of the Republic, including the markets, industries, goods or services, sectors or regions in which a merger involving a foreign acquiring firm must be notified to the committee referred to in subsection (1), in terms of subsection (6).

(4) In determining what constitutes national security interests for purposes of this Act, the President must take into account all relevant factors, including the potential impact of a merger transaction –

(a) on the Republic's defence capabilities and interests;

(b) on the use or transfer of sensitive technology or know-how outside of the Republic;

(c) on the security of infrastructure, including processes, systems, facilities, technologies, networks, assets and services essential to the health, safety, security or economic well-being of citizens and the effective functioning of government;

(d) on the supply of critical goods or services to citizens, or the supply of goods or services to government;

(e) to enable foreign surveillance or espionage, or hinder current or future intelligence or law enforcement operations;

1099 Clause 14 of the Competition Amendment Bill B23 o-2018 (24 October 2018).

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(f) on the Republic's international interests, including foreign relationships;

(g) to enable or facilitate the activities of illicit actors, such as terrorists, terrorist organisations or organised crime; and

(h) on the economic and social stability of the Republic.

(5) The President must issue regulations governing-

(a) the notification, processes, procedure and timeframes to be followed by the Committee referred to in subsection (1) when performing its functions under this section; and

(b) access to information concerning the merger, including confidential information.

(6) A foreign acquiring firm which is required to notify the Competition Commission in terms of section 13A(1) of an intended merger must, at the time of the notification of the merger to the Competition Commission, file a notice with the Committee referred to in subsection (1) in the prescribed form and manner if the merger relates to the list of national security interests of the Republic as identified by the President in terms of subsection (3).

(7) Within 60 days of receipt by the Committee referred to in subsection (1) of a notice in terms of subsection (6), or such further period which the President may agree to, on good cause shown, the Committee must further consider and decide on whether the merger involving a foreign acquiring firm may have an adverse effect on the national security interests of the Republic identified by the President in terms of subsection (3).

(8) The Committee referred to in subsection (1) may take into account other relevant factors, including whether the foreign acquiring firm is a firm controlled by a foreign government.

(9) During its consideration of a merger in terms of this section, the Committee may consult and seek the advice of the Competition Commission or any other relevant regulatory authority or public institution.

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(10) The Minister must, within 30 days of the decision contemplated in subsection (7)-

(a) publish a notice in the Gazette of the decision to permit, permit with conditions or prohibit the implementation of the merger; and

(b) inform the National Assembly, in appropriate detail, of the decision.

(11) The Competition Commission may not consider a merger in terms of section 12A, and the Competition Tribunal may not consider a merger in terms of section 16(2), if the foreign acquiring firm failed to notify the Committee in terms of subsection (6).

(12) The Competition Commission may not make a decision in terms of section 13(5)(b) or 14(1)(b), and the Competition Tribunal may not make an order in terms of section 16(2), where the Minister has published a notice in the Gazette prohibiting the implementation of the merger on national security grounds.

(13)(a) The Committee may revoke its approval of the merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, if-

(i) the approval was based on incorrect information for which a party to the merger is responsible;

(ii) the approval was obtained by deceit; or

(iii) a firm concerned has breached an obligation attached to the approval.

(b) If the Committee revokes its permission in terms of paragraph (a), the Competition Commission's or Competition Tribunal's approval or conditional approval of the merger is deemed to be revoked.

(c) Unless the Committee determines otherwise, the Competition Commission's or Competition Tribunal's approval or conditional approval of a merger involving a foreign acquiring firm is deemed to be revoked if the foreign acquiring firm failed to notify the Commission in terms of subsection (6).

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(14) *The Competition Tribunal may impose an administrative penalty, in accordance with the provisions of section 59(3), on the parties to a merger involving a foreign acquiring firm for any contravention contemplated in section 59(1)(d), read with the changes required by the context.*

(15) *The President may delegate any power or function conferred on him or her under section (3) or (4) to any Cabinet Member."*

The true motive behind this proposed amendment appears unclear. The vast majority of the factors listed in the proposed section 18A have never featured in the mergers previously considered by the Commission and Tribunal.[1100] This is not to say that the potential for these factors to arise does not exist, but should these issues fall within the ambit of the Competition Act? On closer inspection this new section appears to follow from similar developments in the US, Canada, and Australia.[1101] There is however one important difference, namely that all of these other jurisdictions have elected to deal with these issues involving foreign acquiring firms in various other pieces of legislation and not as part of competition policy and competition legislation. Canada, for example, has amended the Investment Canada Act[1102] so that all transactions involving a foreign acquiring firm now require notification. In Australia the Foreign Acquisitions and Takeovers Act 1975 requires that mergers and acquisitions involving foreign acquiring firms that meet the threshold laid down by the Act must first meet approval from the Foreign Investment Review Board.[1103] In the US similarly, transactions involving foreign acquiring firms are scrutinised by the Committee on Foreign Investment in the United States in terms of the requirements laid down in the Foreign Investment Risk Review Modernization Act of 2018.[1104]

[1100] See the previous discussions in Chapter 5 at pars 4 & 5.
[1101] See Part IV of the Trade Practices Act 1974 (Australia), the Competition Act RSC 1985, the Investment Canada Act RSC 1985. The United States does not have competition laws specifically applicable to foreign mergers. Various sectoral laws and national security laws do address foreign mergers that are within the scope of their jurisdictional provisions.
[1102] See the Investment Canada Act RSC 1985.
[1103] It is however important to note that as of 29 March 2020, all thresholds in terms of which transactions would require approval by the FIRB have been temporarily reduced to zero which means that all transactions involving foreign acquiring and investing firms in Australia will require prior approval of the FIRB. See *Temporary measures in response to the coronavirus [GN53]*.
[1104] See sections 800.104, 800.213, 800.244, 800.254 and 800.256.

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It appears unlikely however, given the fact that several mergers previously considered by the Tribunal have involved foreign acquiring firms, and taking into account that South African firms are often viewed as attractive platforms from which multinationals can expand their operations into Africa, that this amendment could be aimed squarely at such mergers. It is submitted that it is possible that the new section 18A could be used as another mechanism through which Government could seek to impose additional conditions on mergers of this nature, especially where these mergers present no adverse effects on competition. The potential chilling effect that the amendment could have on foreign investment in South Africa should also be considered. It appears that the amendment has the potential to further delay transactions from being implemented as well as creating a greater level of uncertainty as to what foreign firms will be required to do in order to meet the prescriptions of the Act.[1105] It is submitted that this amendment may well prove to be an impediment to investments by foreign firms in the South African market as foreign firms may seek to avoid having to comply with these notification procedures or, due to mergers being refused on obscure national security grounds.

Notably Oxenham *et al* remark regarding section 18A that it is not uncommon for countries s to include mechanisms in terms of which certain sensitive foreign party transactions are considered and approved or vetoed based on a country's legitimate geopolitical security interests. They however submit that national security issues should be regulated by separate legislation rather than by competition legislation. In their view, the National Security clause will result in a lengthy review period, *"adulterating the concept of pure competition law-based merger evaluation",* and it will further result in unpredictable outcomes and conflate the role and function of the Competition Commission and the political executive. They point out that as part of its mandate, the Committee to be appointed in terms of section 18A is entitled to consult with the Commission. However, they observe that: "*It is unclear what assistance the SACC could be to the Committee in assessing matters of national security, and SACC Commissioner*

[1105] See Moran "Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries" (2009) *OECD Globall Forum VIII on International Investment* available at http://www.oecd.org/investment/globalforum/44231376.pdf (last accessed on 21/05/2019) at 3, Business Unity South Africa (BUSA) "Business High-Level Submission on the Competition Amendment Bill", Business Live Editorial "Competition Amendment Bill will add to uncertainty" (1 August 2018) available at https://www.businesslive.co.za/bd/opinion/editorials/2018-08-01-editorial-competition-amendment-bill-will-add-to-uncertainty/ (last accessed on 21/05/2019), and Thorts "Need to limit uncertainty for foreign acquiring firms" (15 March 2019) *Dealmakers* available at http://www.inceconnect.co.za/article/thorts---need-to-limit-uncertainty-for-foreign-acquiring-firms-2019-03-15 (last accessed on 21/05/2019).

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Bonakele conceded at a recent antitrust conference at New York University that the potential for political interventionism had increased due to certain provisions in the Bill, including the newly introduced security clause."[1106]

3.4 Aligning competition-related decisions with other public policies, programmes and interests

Interestingly, the *Background Note* stated that there was insufficient alignment of competition related processes and decisions with other public policies, programmes and interests and with the social policies that voters embrace through the democratic process.[1107] This disjuncture required to be addressed and, according to the *Background Note*, one option would have been to centralise the decision-making processes in the Executive where there is *"a confluence of all related matters – competition-related priorities and other public policies, programmes and interests*." The *Background Note* indicated that this could be achieved by providing the responsible Minister with a greater role in the decision-making process by, for example, providing such Minister with the right to review merger decisions on specified grounds, such as the impact it would have on employment, small businesses and upon businesses or potential businesses owned or controlled by historically disadvantaged persons. The *Background Note* further indicated that there was international precedent for providing the executive with "*an effective veto-power over mergers*".[1108]

According to the *Background Note* this approach was however problematic: [1109] First, it could create a high level of uncertainty through the introduction of a dual approval system, centred on the one hand in the regulator, and on the other hand, the executive. Second, the separation of competition and public interest issues into two unconnected processes could make the development of innovative solutions that affect both sets of considerations, more difficult to craft. Third, the possibility of improper considerations that fall outside the scope of the Competition Act being applied in a merger will be higher when one process is simply a political decision that is not subject to the same

[1106] Oxenham *et al* at 235.
[1107] Background Note at 22.
[1108] Ibid.
[1109] Ibid.

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transparency and engagement that would be the case in a public, regulator-led process. Finally, the dual-approval system could lengthen and delay consideration of mergers.

In terms of the *Background Note* the second, and preferred, option was therefore to follow the underlying philosophy of the Competition Act and to keep the decision-making processes within the Commission, Tribunal and Competition Appeal Court, but to provide the responsible Minister with more effective means of "*participating*" in competition-related inquiries, investigations and adjudicative processes. According to the *Background Note* this option would allow the Executive to "*engage in the decision-making processes, ensure the consideration of policy-related matters, enable better integration of policies across the state and provide the necessary connection between concerns of the electorate and the work of the competition authorities*." The view was that such an approach would promote transparency and a rational consideration of all related matters.[1110]

Thus, in relation to the amendments proposed in this regard the *Background Note* stated that market regulation to foster competition and economic growth is "*quintessentially a policy issue for which the Executive is responsible and accountable. Therefore, the Executive should have access to the Act's mechanisms that assist with the development of relevant policies and programmes for that market*."

3.5 Improving Institutional Efficacy

The *Background Note* further indicated that, while it was apparent that the Commission and Tribunal were effective institutions, it was nevertheless necessary to enhance their capacity, provide for functions associated with the proposed amendments discussed above and further streamline their processes. In addition, it was necessary to regulate the aspect of appeals from the Competition Appeal Court and prevent competition-related matters from being determined in multiple fora.[1111]

In sum, the Background Notice stated that the package of amendments that were proposed in the 2017 version of the Competition Amendment Bill constituted "*a comprehensive and significant enhancement*" of the policy implementation mechanisms,

[1110] Ibid.
[1111] Background Note at 23.

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institutional arrangements, powers and processes of competition authorities. It also indicated that the amendments would strengthen the available interventions that would be undertaken to redress the specific challenges posed by concentration and untransformed ownership in the South African markets. It was observed that these measures would advance the fulfilment of the purposes in section 2 of the Competition Act and it would create inclusive, vibrant and competitive markets to the benefit of all South Africans, as contemplated in the preamble of the Act.

The 2018 Amendment Act subsequently introduced a variety of amendments aimed at improving the operational efficiency of both the Commission and the Tribunal.[1112] With regards to the Tribunal, the composition of the Tribunal, as set out in section 26(2) of the Competition Act, was also amended. In its original format sections 26(2) provided that:

"The Competition Tribunal consists of a Chairperson and nor less than three, but not more than ten, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the Minister, from among persons nominated by the Minister either on the Minister's initiative or in response to a public call for nominations."

The amended version of section 26(2) as introduced by the 2018 Competition Amendment Act however now reads as follows:

"(2) (a) The Competition Tribunal consists of a Chairperson and not less than three, but not more than 14, other women or men appointed by the President, on a full or part-time basis, on the recommendation of the Minister, from among persons nominated by the Minister either on the Minister's initiative or in response to a public call for nominations, and any other person appointed in an acting capacity in terms of paragraph (b).

(b) The Minister, after consultation with the Chairperson of the Competition Tribunal, may appoint one or more persons who meet the requirements of section 28[1113], as acting part-time members of the Competition Tribunal for such a period as the Minister may determine.

[1112] See the Amendment Bill at clauses 27 and 38.
[1113] Section 28 sets the requirements a person must meet to appointed to the Tribunal as well as the grounds that would disqualify a person from be appointed to the Tribunal.

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(c) *The Minister may re-appoint an acting member at the expiry of that member's term of office.*

(d) *Sections 30 to 34 and 54 to 55*[1114]*, read with the changes required by the context, apply to acting members of the Competition Tribunal.".*

In terms of the new section 26(2), the Tribunal would thus now be composed of the Chairperson together with up to 14 additional members.[1115] Furthermore, the Minister of Trade, Industry and Competition in consultation with the chairperson may appoint any number of acting members of the Tribunal for a duration determined by the Minister.[1116]

Oxenham *et al* point out that the Competition Act has historically required that the Commission be independent and perform its duties impartially without fear or favour. Moreover, each organ of state is obliged to assist the Commission to remain independent. They however remark that the now increased role of Ministerial intervention in the Commission's day-to-day work is "*directly at odds with these principles (which are also Constitutionally enshrined).*" In this regard Oxenham refers to *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; NXASANA v Corruption Watch NPC and Others*[1117] where the Constitutional Court stated that: *"there is…a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts".*[1118] The authors state that such principle of independence must apply with equal force to the competition authorities *"as [p]artisanship can degrade the brand of the antitrust agencies, reduce their influence abroad, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness."*[1119]

In respect of the amended section 26(2), Oxenham *et al* further observe that in their view the appointment of part-time panel members poses a material risk to the independence

[1114] Sections 30 – 34 deals with the conduct, appointment of acting members and remuneration of members of the Tribunal while 54 and 55 deal with the powers of presiding officers and rules applicable to proceedings.
[1115] Section 26(2)(a).
[1116] Section 26(2)(b).
[1117] (CCT333/17; CCT13/18) [2018] ZACC 23 (13 August 2018).
[1118] Oxenham *et al* at 237.
[1119] Oxenham *et al* at 237 with reference to Kovacic "Policies and Partisanship in U.S. Federal Antitrust Enforcement" (2014) *Antitrust Law Journal* 704.

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– both actual and perceived - of the Tribunal. They remark that this risk is amplified by the extensive scope for ministerial intervention, which contravenes the conclusion drawn by the United Nations Conference on Trade and Development Round Table Discussions that: *"It is generally said that the appointment of competition officials by a minister is less conducive to independence than appointment procedures that provide for the participation of representatives of more than one government branch. In addition, it is assumed that competition officials whose terms are not renewable and cannot be removed from office except by legal procedures have less of an incentive to please those who appointed them."*[1120]

In relation to rights of appeal, Oxenham *et al* point out that provision is made for both the Commission and the Minister to have a right of appeal regarding the Tribunal's decisions on public interest grounds. They remark that the Commission is tasked with assessing both competition and public interest elements in the merger control assessment and that, while there remains much debate as to whether specialist bodies such as competition law agencies should assess industrial policy objectives at all, they remark that it is not uncommon to see such conflation occur in more nascent competition legislation.[1121]

They however point out that no other jurisdiction provides for both the Competition Agency *and* the Minister to have such broad powers to intervene in mergers on public interest grounds. Oxenham *et al* thus state that, while the right of the executive to make representations is beyond reproach, permitting the Minister to appeal against competition decisions solely on the basis of public interest grounds, however undermines the independence of, and confidence in, the specialist adjudicative bodies' role and competence. In their view it further risks *"an unjustified infringement of the separation of powers in favour of ensuring the executive has a second bite at the cherry."*[1122]

4. Some poignant final observations by Oxenham, Currie and Stargard

As pointed out, Oxenham *et al* consequently take the view "*don't fix what's not broken*" and poignantly remark that "*[A]ntitrust statutes are fundamentally instruments for protecting and promoting economic competitiveness in otherwise free markets, with an*

[1120] Oxenham *et al* at 237.
[1121] Oxenham *et al* at 237-238.
[1122] Oxenham *et al* at 238.

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open structure for existing competitors to prosper based on their acquired business acumen and ensuring that new entrants are able to emerge and innovate. The goal of maintaining competitive markets therefore protects competition, not competitors as the adage goes: competition law protects the ultimate consumer, not the disappointed competitor. They are not however, vehicles for promoting certain classes of competitors over others. Effecting social economic change may be a valid and honourable goal, but has traditionally been - and should remain in the authors view - the domain of industrial and other policies specifically aimed at these very goals, as opposed to the highly technical, and admittedly narrow, province of competition law."[1123]

Oxenham *et al* further argue that deviation from the above principles exposes firms to greater intervention by third parties. In this regard, they quote the following statement by the former Chairman of the Competition Tribunal, David Lewis: "*As the Commission's investigatory prowess has improved, the utility of permissive intervention has decreased, and its dangers have increased concomitantly. The danger is not so much that interveners, particularly those who are competitors, will provide self-interested information and analyses, but rather that they will use intervention as a mechanism for delaying and obstructing transactions in which time is often extremely costly. Recent years have been marked by interventions that have not contributed an iota of useful insight to the adjudicators but have simply served to harass their competitors.*"[1124]

Furthermore, Oxenham *et al* point out that harmonizing the global patchwork of antitrust laws should be an important goal for all competition enforcers worldwide to ensure not only predictability and commonality of outcomes, but also transparency.[1125]They refer to the observations by commentators in relation to the Wal-mart /Massmart merger that because those proceedings occurred in a competition tribunal rather than in a a Minister's office it made an important difference to the way the arguments were framed and presented, and increased the transparancy of the process [1126]

Fast-forward a few years later, however, and Oxenham *et al* remark that it is no longer a secret that the merging parties in the Anheuser-Busch/SABMiller merger in 2016 had

[1123] Oxenham *et al* at 239.
[1124] Ibid.
[1125] Ibid.
[1126] Ibid.

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elected to rather engage the relevant Minister *directly* in order to obtain merger approval than to engage the specialist competition agencies for such purpose. They comment that this strategy proved successful *particularly after the merging parties agreed to significant non-merger specific public-interest related commitments.*"[1127]According to them the Ministry-driven Amendment Bill (as it then was) was likely to incentivize merging parties to deal directly with the Minister, further calling into question the competency and role of the Competition Commission.[1128]

They conclude that the established South African competition law framework has worked admirably well since 1998 and that it is widely recognized as a model to other African jurisdictions with younger competition law regimes. In their view the amendments to the Competition Act were not likely to strengthen competition law enforcement in South Africa. If anything, their opinion is that it would make it more difficult for foreign as well as domestic entities to engage in business activities (especially unilateral and contracting behaviour, but also in merger and acquisitions) in South Africa because of a decrease in certainty and predictability of competition law and enforcement. Significantly, they state that "*The country's reputation as an African competition law-lodestar is at risk.[1129]While the context of South Africa's economic and political climate cannot be ignored when assessing the suitability and timing of the introduction of the (then) Bill, it appears that too much credence has been given to a populist agenda. The increased scope for ministerial intervention aimed at assessing foreign transactions under a separate merger control regime may send conflicting signals to global investors. Finally, any further weakening of pure economic competition tests implies cost in terms of lost efficiency, or less competitive outcomes in the case of false positives in enforcement-ultimately resulting in negative consequences for consumers, growth, and employment. Accordingly, and ironically, the (then) Bill's overt pursuit of additional and now elevated public interest factors: will, we submit, negatively impact the public interest itself*."[1130]

5. What does the Amendment Act mean for South African Competition Regulation?

[1127] Ibid.
[1128] Ibid.
[1129] Oxenham at 240.
[1130] Ibid.

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The various amendments discussed above that are aimed at improving institutional efficiency will undoubtedly assist both the Commission and the Tribunal in carrying out their respective mandates. More capacity within these institutions will help to facilitate a more effective competition regulatory environment. However, many of the other amendments contained in the Amendment Act appear to do little to advance the achievement of effective competition in the South African market. Evidence of this can be seen in the long title of the Amendment Act which provides as follows:

"To amend the Competition Act, 1998, so as to introduce provisions that clarify and improve the determination of prohibited practices relating to restrictive horizontal and vertical practices, abuse of dominance and price discrimination and to strengthen the penalty regime; to introduce greater flexibility in the granting of exemptions which promote transformation and growth; to strengthen the role of market inquiries and merger processes in the promotion of competition and economic transformation through addressing the structures and de-concentration of markets; to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic; to mandate the Competition Commission to act in accordance with the results of a market inquiry; to amend the process by which market inquiries are initiated and promote greater efficiency regarding the conduct of market inquiries; to clarify and foster greater certainty regarding the determination of confidential information and access to confidential information; to provide the Competition Commission with the powers to conduct impact studies on prior decisions; to promote the administrative efficiency of the Competition Commission and Competition Tribunal; and to provide for matters connected therewith."

The long title is fairly clear in its intention. Improving the Act's ability to adequately address prohibited conduct certainly should be welcomed. However, there are two statements within the long title that should give cause for concern: Firstly, the statement that the Amendment Act is intended *"to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged*

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persons while at the same time protecting and promoting employment, employment security and worker ownership" displays a substantial shift in the purpose that the Act now seeks to achieve. As has been discussed previously in this chapter,[1131] the Amendment Act adopts a protectionist attitude that places the protection of small and medium firms and those controlled and owned by historically disadvantaged individuals at the forefront of competition regulation. This is evident from the reference to such firms and persons in almost every amendment discussed herein. The problem that this presents is that it has the clear potential of moving the objective of the Act away from its pure competition goals in favour of its political goals which lie outside the realm of traditional competition. If nothing else, this is an evident attempt to protect competitors who form part of Government's larger affirmative action goals[1132] rather than seeking to achieve effective competition within the South African market.

Secondly, the statement in the preamble "*to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic",* is particularly alarming. Following the previous discussions in Chapter 3, one of the principal deficiencies identified in the competition regulation regime that was in place before the Amendment Act, and one of the primary tenets underlying the Competition Act since it was introduced, was to ensure the independence of both the Commission and the Tribunal.[1133] Admittedly, the Amendment Act does little to undermine the institutional independence of the Commission and the Tribunal. However, many of the amendments contained in the Amendment Act certainly open the door for a greater degree of interference ("p*articipation*") in competition regulation by the executive branch of Government.[1134] As pointed out, prior to the enactment of the 1998 Competition Act, competition regulation was largely ineffective due to the fact that the prosecution of allegations of anti-competitive conduct was left to the sole discretion of the Executive.[1135] The recent amendments that are aimed at providing the Minister of Trade, Industry and Competition with the right to appeal any

[1131] See previous discussions at pars 2.1, 2.2, and 2.3.
[1132] See the Background Note at 7 – 8.
[1133] See previous discussions in chapter 3 at par 2.
[1134] See Chapter 3 at par 1.
[1135] See Chapter 3 at par 1.

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decision of the Commission or Tribunal are quite puzzling.[1136] From an effective regulatory perspective, it is submitted that the Amendment Act has the potential to take South Africa backwards.

Implementing such a matter in practice may also be fairly difficult. There would be little justification that would warrant the Minister interfering in a matter where, for example, the relevant parties have elected not to proceed with an appeal against a ruling of the Tribunal. Additionally, compiling the record for such an appeal and what the Minister's involvement therein would be, are also practical obstacles that the Amendment Act provides no guidance on. Furthermore, providing the Minister with access to confidential commercial information is a potentially dangerous development. It is submitted that empowering a Minister with this type of information may place such Minister in conflicting situations in the ordinary course of his duties and maintaining a level of confidentiality restricted solely to the administration of the Act may also prove difficult.

While the amendments to the abuse of dominance provisions have the potential to undermine the Act's ability to achieve and maintain effective competition, Merger regulation in particular, is the area that creates the greatest concern for the potential "*capture*" of competition law. The elevation of public interest concerns in merger regulation to a primary inquiry; the creation of a new public interest ground founded solely on the ownership by previously disadvantaged persons; and providing the President with the power to interfere in merger proceedings based on vague "*national security interest*" concerns, are some of the most alarming amendments to the Act. Judging by the recent history of merger regulation as well as competition regulation as a whole, it is submitted that this appears nothing more than a ploy through which Government can bully acquiring firms, especially foreign acquiring firms, into agreeing to concessions aimed at achieving Government's transformative objectives - with little regard to the achievement of effective competition and greater consumer welfare.

Notably Moran points out that there appears to be only three plausible threats that warrant the prohibition of mergers involving foreign acquiring firms, which include: a merger where a country may become dependent on a foreign controlled supplier for a good or service essential to the proper functioning of the economy; a merger that may result in a

[1136] See the new section 43F.

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transfer of technology to a foreign controlled entity which could then be deployed in manner harmful to that country's national interests; and a merger that may result in the potential capability for infiltration, surveillance, or sabotage in the provision of goods and services essential to proper functioning of the economy.[1137] The national security provisions contained in section 18A are much wider which leaves the potential for uncertainty in the outcome of future mergers involving foreign acquiring firms.

It is submitted that it is incumbent on the executive, the legislature and competition authorities to ensure that the "*soul*" of competition law is not lost to policy considerations that are beyond the scope of traditional competition law. While the Amendment Act will undoubtedly alter the landscape of South African competition regulation going forward, the actual effect that the Amendment Act will have on the attainment of effective competition will, for the time being at least, await to be seen. Unfortunately, it is submitted that these amendments, as pointed out above, are not directed at attaining effective competition but have been crafted to serve a political agenda that transcends the objectives of effective competition and consumer welfare.

In particular, the Amendment Act has shifted the goal posts in South African competition regulation. The argument could now be made that the principal aim of the Act is the political goal of the promotion and protection of small and medium businesses owned by historically disadvantaged individuals. The attainment and maintenance of the pure competition goal of effective competition is becoming nothing more than afterthought. How is it possible that political goals have been elevated to supersede the true goal of competition regulation? Perhaps the formulation of the Amendment Act itself holds the key. The regulation of competition in South Africa has traditionally been the assigned to the Department of Trade and Industry, since superseded by the Department of Trade, Industry and Competition, which department was also responsible for the formulation of the Act in the first place.[1138] Interestingly, the 2018 Amendment Act was however formulated by the Department of Economic Development. The Department of Economic Development was a relatively new Ministry formed in 2009 and its mandate is to *"coordinate the contributions of government departments, state entities and civil society*

[1137] Moran "Foreign Acquisitions and National Security: What are Genuine Threats? What Are Implausible Worries" in Chapter 11 of *World Scientific Book* (2013) 371 at 4, 7 & 8.
[1138] Se the previous discussions in Chapter 3 at pars 1 – 3.

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to effect economic development; improve alignment between economic policies, plans of the state, its agencies, government's political and economic objectives and mandate; and promote government's goal of advancing economic development via the creation of decent work opportunities."[1139]

As discussed in Chapter 2, competition law forms part of industrial policy which falls in the mandate of Department of Trade and Industry. Why then did the Department of Economic Development conceptualize and develop the Amendment Act? Although these two departments were merged in June 2019[1140], it is still an interesting question. Given the fact that the Department of Economic Development, prior to the Amendment Act, had no actual experience dealing with the speciality field that is competition regulation, perhaps therein lies the clue as to why the advancement of the Act's political goals and by extension, the broader political aspirations of the current government appear to have been prioritised in the Amendment Act. The Department of Economic Development's mandate clearly supports this conclusion given the fact that the advancement of the government's political objectives was at the core of its mandate. This appears in clear contrast to one of the core programmes of the Department of Trade, Industry and Competition which is to "*[D]evelop and roll out policy interventions that promote competition issues, through effective economic planning, spatial implementation and aligned investment and development policy tools*".[1141]

The major challenge that the Amendment Act creates is to favour the interventionist approach championed by the now largely outdated Harvard theory of competition regulation. The Amendment Act, much like Harvard scholars, supports the theory that through increased intervention in highly concentrated markets, a more competitive marketplace can be created. There are however those that argue that this goal of increased competition is at odds with the attainment of allocative efficiency. Kolasky in particular, argues that the emergence of the Harvard theory during the 1960's and its principal aim of protecting smaller competitors directly contributed to the economic

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[1139] See https://nationalgovernment.co.za/units/view/13/department-economic-development-edd (last access on 26/10/2019).

[1140] See https://nationalgovernment.co.za/units/view/46/department-of-trade-industry-and-competition-the-dtic (last access on 26/10/2019).

[1141] See http://www.thedtic.gov.za/know-the-dtic/department-of-trade-industry-and-competition, specifically Programme 9: Competition Policy and Economic Planning (last access on 26/10/2019).

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stagnation in the United States during the 1970's.[1142] Unfortunately, the victim of this strengthening of the Act's political approach to competition regulation may well be the attainment and maintenance of effective competition itself which in turn will almost certainly have negative consequences on the economy as a whole.

[1142] See W. J. Kolasky "The Role of Competition in Promoting Dynamic Markets and Economic Growth" (2012) Address at U Tokyo America Center Tokyo, Japan November 12, 2002 available at http://www.justice.gov/atr/public/speeches/200484.htm (last accessed on 30/10/2019). Also see Chapter 2 at par 3.1.

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Chapter 8 – Do Politics and Competition Law Really Mix?

1. The Role of Politics in South African Competition Law

Building onto the discussions in the previous chapters this chapter will now deal with the manner in which politics has influenced competition regulation. Specifically, it will be considered how politics has influenced the prosecution and regulation of instances of collusion, abuse of dominance and merger regulation in South Africa. In addition to these discussions, the exemption provisions of the Act will be briefly discussed within the context of larger theme of this chapter and this thesis as a whole.

1.1. Collusion

The nature of collusion is so egregious that there are no justifications and circumstances that firms could rely on to justify their engagement in collusive conduct.[1143] It is also widely held that collusion represents the single most detrimental form of anti-competitive conduct that firms can engage in.[1144] The reason why collusion remains so reprehensible is because consumers stand to suffer the most harm from such conduct. The general effect of collusion is to force consumers to pay higher prices for a particular good or service due to the fact that firms that are expected to compete with one another have instead agreed to not compete, and thereby to distort the ordinary competitive process and market forces responsible for the balancing of the market. Conduct of this nature removes all incentive for competing firms to seek innovative and efficient business practices with the aim of reducing their costs and passing these benefits on to consumers in the form of reduced prices. Through collusion, firms are able to ensure an often-predetermined level of profitably - either through engaging in price fixing, bid rigging or through the division of markets.[1145] South Africa is no different in this regard. If anything, given the large number of people living in poverty in South Africa, the prevention of

[1143] See previous discussions at Chapter 4 at par 2 and See OECD Roundtable on Collusion at 39 – 40 and Monti (2010) at 2 – 3.
[1144] See previous discussions at Chapter 4 at par 2 and Scordamaglia "Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees at 20.
[1145] See previous discussions Chapter 4 at par 2.

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collusive conduct should be of paramount importance to the South African competition authorities also.[1146]

The bread and construction industry cartels, as previously discussed in Chapter 4, are prime examples of just how detrimental collusive conduct can be. The bread cartel unduly raised the price of an essential food product which had the largest negative impact on the poorest segments of the population, while in the construction industry cartel, particularly in the case of the 2010 Soccer World Cup-stadium projects, an unnecessary burden was placed on the public purse.[1147] In an ideal world, it would be assumed that the funds wasted as a consequence of collusion in these projects could have been used for the betterment of those poorer segments of the population. While the jury is still out on the allegations of collusion in the trading of forex by the various banks[1148], the anti-competitive effects and the effects on consumer welfare, of the bread and construction industry cartels, are plain to see.

As pointed out by Ginsburg and Wright, sanctions in competition law and especially in cases of collusion, serve two purposes. Firstly, they seek to disgorge some the illicit profits derived through such conduct and secondly, they seek to provide a sufficient disincentive for firms to engage in similar conduct in the future.[1149] The question however remains as to whether the remedies applied to these situations can be regarded as having had a positive impact on competition, consumer welfare and redressing the damage caused by the collusive conduct. To answer this question, the potential effects that the remedial action has had on deterring other firms from engaging in similar conduct and promoting competition within the market need to be considered, and it is necessary to determine to what extent such remedial action has been successful in undoing the damage caused by this conduct or whether such remedial action has actually been used as a means for furthering a political agenda.

1.1.1. Deterrence

[1146] See the previous discussions on the bread and other food industries cartels in Chapter 4 at parS 4.1 and 4.5.
[1147] See previous discussions in Chapter 3 at par 5.
[1148] See Chapter 4 at par 4.3.
[1149] Ginsburg & Wright “Antitrust Sanctions” (2010) *Competition Policy International* 3 at 5 – 6.

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In terms of section 59(1)(a) of the Act, the Tribunal is empowered to impose an administrative penalty on a firm that has been found to have engaged in collusion in contravention of the cartel prohibition in section 4(1)(b). The extent of the administrative penalty imposed on a firm that has been found to have engaged in such conduct will be determined by taking into account a variety of factors, including the nature and duration of the conduct in question, the damaged caused by the conduct, the level of profitability derived by a firm through the conduct, whether the firm has previously been found guilty of similar conduct, and the extent of a firm's cooperation with the Commission in investigating the potential contravention of the Act.[1150] The administrative penalty previously could not exceed 10% of the firm in question's turnover and exports in and from South Africa in the preceding financial year.[1151] In terms of section 59(2A) as introduced by the 2018 Amendment Act, authorities will further be required to take into account the effect that the anti-competitive conduct has had on small and medium sized firms and those firms owned or controlled by historical disadvantaged individuals. Notably, the amendments introduced by the 2018 Amendment Act permits the maximum administrative penalty to be increased to 25% of a firm's turnover in, or imports from, South Africa in the case of repeat offenders.[1152]

Bonakele and Mncube observe that the purpose of these administrative fines is to serve as a deterrent to dissuade firms from engaging in similar conduct in the future; to disgorge some of the illicit profits firms obtained through collusion; and to indirectly restore the balance of power back in the consumers' favour.[1153] But, as will be discussed in further detail in this chapter, much debate exists on how effective administrative penalties are in deterring anti-competitive conduct as well as redressing the injustices such conduct has caused.[1154] What is relevant though to the present discussion, is the potential deterrent effect that the settlement agreements reached in both the bread and construction industry cartels, as discussed in Chapter 4 may have had.

[1150] See section 59(3)(a) – (g). Also see *Competition Commission and Federal Mogul Aftermarket Southern Africa (Pty) Ltd* [2003] 2 CPLR 464 (CT) and *Competition Commission v South African Airways (Pty) Ltd* [*2005*] 2 *CPLR 303* (CT).
[1151] Section 59(2).
[1152] See section 59(2A) of the 2018 Amendment Act as discussed in Chapter 7 paragraph 3.5.
[1153] See Bonakele & Mncube at 8.
[1154] See Ratz *Competition Law Damages and their Quantification in South African Law* (LLD Thesis, University of Pretoria, 2016) at 30 – 31.

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Both settlement agreements in the bread and construction industry cartels had far reaching implications for their respective industries. The Pioneer settlement imposed an extremely large fine on Pioneer Foods in the amount of R500 million.[1155] The settlement went even further and required a price reduction commitment from Pioneer, required that Pioneer Foods maintain and increase its capital expenditure commitments and lastly, R250 million of the penalty was used to set up the Fund for purposes of lowering the barriers of entry into the agro-processing industry.[1156] The price reduction commitment led to Pioneer Foods suffering a substantial loss in profits while the Fund, at least in theory, would create greater competition within the industry.[1157]

The settlement agreements in the construction industry and the subsequent VRP signed between the Government and the various accused construction companies followed similar lines.[1158] The hope was that the terms of the VRP would have the potential to subject the firms that were party to it to a substantial degree of renewed competition from smaller black owned firms which have found themselves now empowered by the agreement.[1159] However, developments in the construction industry since the implantation of the VRP have seen several large construction firms finding themselves in substantial financial difficulties.[1160] The terms of the VRP, and the liability it subjected the parties to, certainly has not aided the situation or the industry as a whole.

Although the administrative penalties levied against the firms in the bread and construction industry cartels were substantial, the real deterrent effect can actually rather be seen in the other remedies which formed part of the respective settlement agreements. The two remedies that however stand apart from the rest are the price reduction commitment imposed on Pioneer Foods and the VRP to which several of the

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[1155] See Chapter 4 at 4.2.1. and the Consent Order, at par 14.
[1156] See the Consent Order at par 11.2 and 11.3.
[1157] The Consent Order at par 14.
[1158] See Chapter 4 at par 4.2.1.
[1159] See The Department of Economic Development's press briefing on construction industry Settlement Agreement "Promoting construction-industry transformation through partnerships" (Chapter 4 at par 4.2.2).
[1160] See https://www.globenewswire.com/news-release/2021/03/24/2198258/28124/en/South-Africa-Construction-Industry-Report-2020-Industry-Performance-COVID-19-Impact-Influencing-Factors-Industry-Associations.html (last accessed on 26/03/2021 at 11h00). Several large construction firms have been placed in business rescue subsequent to the concluding of the VRP. These include Basil Read, one of the largest construction groups in South Africa, being placed into business rescue in June 2018, Esor's construction subsidiary being placed into business rescue in August 2018, Liverio Group, the largest majority black-owned construction group in South Africa, being placed into business rescue and subsequently provisional liquidation in December 2018, and Group 5, another of the largest construction groups, being placed into business rescue in March 2018.

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construction firms implicated in the construction industry were party. It is submitted that the price reduction commitment not only resulted in a loss of profits for Pioneer Foods but also subjected Pioneer Foods to greater competition within the relevant markets as other firms were now forced to reduce their prices too in order to remain competitive. The VRP, on the other hand, has already been shown to be extremely disruptive to the construction industry as the firms involved were forced to either sell majority stakes in their construction businesses to historically disadvantaged individuals, or mentor and develop smaller black competitors within the industry.[1161]

Given the far-reaching consequences and disruptive natures of these last-mentioned remedies, there can be little doubt that they will serve as powerful deterrents to future collusion between firms. These remedies send a clear signal to other market participants that an administrative fine is not the only sanction that may be imposed for contravening section 4 of the Act. Instead, it is submitted that firms will now be alive to the fact that, should they be found to have contravened the Act, they may be subject to sanctions that will have far more detrimental effects to their current business models than simply paying a fine which they can set off as a “cost of doing business”. Firms that have been complicit in engaging in such conduct, whether it be for the purposes of ensuring profitability or for the purposes of shielding themselves from effective competition, place themselves at far greater long-term risks than what a simple administrative fine would pose. In this way, the Act could thus be used as a tool to achieve specific industry policy goals whose scope extends far beyond ordinary competition law. Firms seeking to avoid being subject to such drastic remedial action will do well to avoid engaging in collusive conduct to avoid the risk of having their business operations disrupted through politically motivate “remedies”.

1.1.2. The Effect Remedies imposed in Cases of Collusion have had on Competition

The actual effect that these remedies will have on competition awaits to be seen. It may take several years for the benefits of the Fund and Trivano Trust to bear fruit.[1162] As discussed above, the price reduction commitments imposed on Pioneer Foods

[1161] See The Announcement at par 1.1(d).
[1162] See previous discussions in Chapter 4 at pars 5.1.2 and 5.2.

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undoubtedly had a positive effect on competition within the bread industry. It is also important to bear in mind that the mere presence of new entrants in the market will not in itself stimulate competition within the two industries. These new smaller entrants will still have to adopt businesses practices and strategies that will enable them to effectively compete within the market and may even be forced to be extremely innovative in the way in which they do business to ensure that they can compete with their larger, more established rivals. Authorities must also not lose sight of the fact that these smaller competitors cannot rely on state assistance alone to make them competitive in their respective markets. Only once these new entrants have successfully established themselves as effective competitors within the market will their effect on competition be capable of being measured.

As it currently stands, the rationale behind the aforementioned remedies (i.e the Fund and the Trivano Trust) are based largely on speculation and the belief that the promotion of small and medium sized business will have a positive effect on competition. Whether this has the potential to positively affect competition within the various industries will be a question of time. In this regard, the Commission would do well to study the potential effects of these remedies on a periodic basis while taking into account all relevant factors of the particular markets to ensure a better understanding of the measurable tangible positive effects on competition that these remedies have had on their respective markets.

1.1.3. Redressing the Damage

Much has already been said in this thesis on the South African Government's obsession with market structure and concentrations of ownership and its aim to deal with these problems through the Act. The Commission has to some degree shared Government's sentiments on market structure and appears to be a firm believer in the doctrine that where a market is highly concentrated, collusion, whether explicit or tacit, would be inevitable.[1163] This doctrine has however come under severe criticism with various authors arguing that high concentrations of ownership does not per se translate into collusion in all circumstances and that much more would be required for the total

[1163] See Stigler "Henry Calvert Simmons" (1974) *Journal of Law and Economics* 3 at 4, also see Turner "The Definition of an Agreement Under the Sherman Act" (1962) *Harvard Law Review* 655 at 656.

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disappearance of an effective competitive market.[1164] Authors such as Brozen, Stigler and Peltzman all argue that high market concentrations often arise as a result of a firm offering a better quality product at better prices than those of its competitors.[1165] The large market shares that these firms enjoy then allow them to benefit from economies of scale which ultimately reduces their costs of production and translates into a reduction in price for consumers. If competition authorities were to now attempt to dismantle these large firms for the sake of reducing market concentration, the possibility exists that this would translate into an increase in the firm's costs of production and these costs would ultimately be passed onto consumers.[1166]

From the South African perspective, the argument that many firms owe their high market concentrations to the adoption of superior business practices will struggle to find supporters. Much of the concentration that exists in various markets are a direct consequence of apartheid era policies of discrimination and state support.[1167] But, as markets begin to mature and become subject to greater competition from newer entrants, this argument will potentially shift to market concentrations being the result of new superior business practices. The bread and milling industries are prime examples of industries that benefitted from years of state support.[1168] There is little evidence to support the notion that deconcentrating the two industries will have a positive effect on consumer welfare but, because the cartel conduct as discussed in Chapter 4, affected the poorest segments of the population, the price reduction commitments have certainly gone a long way to redressing the damage caused by this conduct especially in light of the fact that it did result in an overall decrease in the average price of bread products.[1169]

The construction industry on the other hand, is distinctively different from the bread industry. The South African construction industry did not benefit from years of state support and was rather forced to adopt innovative techniques in order to remain relevant

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[1164] Posner "Oligopoly and the Antitrust Laws: A Suggested Approach" (1969) *Stanford Law Review* 1562 at 1565, also see Brozen "The Concentration-Collusion Doctrine" (1977) *Antitrust Law Journal* 826 at 830.
[1165] See Brozen "The Concentration-Collusion Doctrine" at 827, also see Stigler "Industrial Organization and Economic Progress in L. D. White *The State of Social Sciences* (1956), at 5 and Peltzman "The Gains and Losses from Industrial Concentrations", (1977) *Journal of Law and Economics* 229, at 231.
[1166] Brozen "The Concentration-Collusion Doctrine" at 827 – 829. Posner argues that the increase in costs could amount up to 20% which would translate into an increase in price of about 15%.
[1167] See Chapter 4 at par 5.1.
[1168] See Chapter 4 at par 5.1.
[1169] See Statistics South Africa's: "Average Monthly Food Prices" dated July 2017 at Chapter 4 at par 5.1.1.

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and competitive both locally and abroad.[1170] Unlike the Pioneer settlement agreement, there was no price reduction commitment reached with any of the construction firms involved in collusion.[1171] The resulting settlement agreements were only aimed at deconcentrating the industry and specifically increasing the participation of firms owned by historically disadvantaged individuals.[1172] These remedies have however done little to undo the damage caused to consumer welfare occasioned by the collusion. What does remain clear though, is that there appears to be little support and little evidence in favour of the notion that simply deconcentrating industries will in itself have a positive effect on consumer welfare. In some cases it would actually appear, as observed by Carter, that this may in fact have a negative effect on consumer welfare in circumstances where the efficiencies gained through economies of scale are negated through such deconcentration.[1173] South African authorities will thus do well in the future to ensure that where they insist on deconcentration of a particular industry, such deconcentration will in fact have a positive outcome for the market, on consumer welfare, and on competition as a whole.

1.2. Abuse of Dominance

As discussed previously, although the prosecution of abusive conduct has remained a priority for competition authorities worldwide, successfully proving such allegations has remained an elusive goal.[1174] There are two primary reasons for this: firstly, the difficulties occasioned in proving the concept of dominance and secondly, the difficulties in proving actual harm suffered as a consequence of such conduct. The Act attempted to simplify the process, at least from the perspective of establishing dominance, to reducing the possession of dominance within a market to the attainment of a predetermined legal standard, namely a firm's market share.[1175] However, even this has not aided the Commission in successfully proving allegations of abuse of dominance. The question that remains is whether further _amplifying the abuse of dominance provisions of the Act as envisaged by the 2018 Amendment Act would aid in the successful prosecutions of actual

[1170] See Ofori, Hindle & Hugo "Improving the Construction Industry of South Africa: A Strategy" (1996) *Habitat International* 203.
[1171] See previous discussions in Chapter 4 at par 5.2.
[1172] See Chapter 3 at par 4.1 and The Announcement at par 1.1(d).
[1173] See Carter "Collusion, Efficiency and Antitrust" (1978) *Journal of Law and Economics* 435, at 440.
[1174] See previous discussions in Chapter 4 at par 5.
[1175] See section 7 of the Act.

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allegations of abuse of dominance or, whether it would simply further add to the over-inclusive nature (establishing dominance through market share alone) of the present provisions of the Act?

Prior to the amendment of the Act by the 2018 Competition Amendment Act, there had been thirty-two instances of allegations of abuse of dominance referred to the Tribunal. Eighteen of these instances were matters which were considered on their merits while the other fourteen were matters where interim relief was sought - of which only two such applications were ever successful.[1176] Of the matters considered on their merits, the Commission has only been successful in proving instances of abuse of dominance in five matters and five others have been resolved through settlements reached between the parties concerned.[1177] A brief summary of the matters considered on their merits is contained in the table below:

Matter	**Allegation**	**Outcome**
a) *The Competition Commission v SAA (Pty) Ltd* (18/CR/Mar01)	Inducement in terms of section 8(d)(i)	The Commission was successful in proving the alleged contravention.
b) *Commission v Patensie Sitrus Beherend Beperk* (37/CR/Jun01)	Inducement in terms of section 8(d)(i)	The Commission was successful in proving the alleged contravention.
c) *Nationwide Poles CC v Sasol Oil (Pty) Ltd* (72/CR/Dec03)	Price Discrimination in terms of section 9(1)	The complaint was dismissed on appeal.
d) *Harmony Gold Mining Company Ltd & Another v Mittal Steel South Africa (Ltd)* (13/CR/Feb04)	Excessive Pricing in terms of section 8(a)	The Commission was initially successful in proving the alleged contravention however on appeal the CAC overturned the Tribunal's decision and remitted the matter back to the Tribunal whereafter the parties reached a settlement.

[1176] For a detailed look at the interim relief applications considered by the Tribunal see Lesofe & Nontombana "A Review of Abuse of Dominance Provisions of the Competition Act – is it necessary?" Available at http://www.compcom.co.za/wp-content/uploads/2016/07/1.-Review-of-Abuse-of-Dominance-Provisions-of-the-Competition-Act-%E2%80%93-Is-it-Necessary.pdf (date of last access 14/12/2017) (hereinafter I Lesofe & Ntombana "A Review of Abuse of Dominance Provisions of the Competition Act – is it necessary?", more particularly Table 1 at 5 – 6.

[1177] Lesofe & Nontombana "A Review of Abuse of Dominance Provisions of the Competition Act – is it necessary?" at 5.

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e) *Commission v Telkom SA Ltd* (11/CR/Feb04)	Denial of access to essential facilities and inducement in terms of sections 8(b) and 8(d)(i)	The Commission was successful in proving a contravention of both sections.
f) *Mandla-Matla Publishing (Pty) Ltd v Independent Newspapers* (48/CR/Jun04)	Refusal to deal in terms of sections 8(c) and (d)	The Commission refused to prosecute and the matter was referred directly to the Tribunal where the complaint was dismissed.
g) *Commission v Sasol Chemical Industries* Ltd (31/CR/May05)	Excessive pricing, exclusionary conduct and price discrimination in terms of sections 8(a), 8(c), 8(d) and 9(a)	Matter resolved through settlement confirmed by the Tribunal.
h) *Commission v British American Tabaco SA (Pty) Ltd* (55/CR/Jun05)	Inducement in terms of section 8 (d)(i)	The complaint was dismissed.
i) *Commission v Senwes Ltd* (110/CR/Dec06)	Inducement and price discrimination in terms of sections 8(d)(i), 8(d)(iii), 8(c) and 9(1)	The Commission was successful in terms of section 8(c).[1178]
j) *Mapula Restaurant v Coca-Cola Fortune (Pty) Ltd* (91/CR/Aug07)	Price discrimination in terms of section 9(1)	The Commission refused to prosecute and the matter was referred directly to the Tribunal where the complaint was dismissed.
k) *Nationwide Airlines (Pty) Ltd & Comair Ltd v SAA (Pty) Ltd* (80/CR/Sep06)	Inducement in terms of section 8(d)(i)	The Commission was successful in proving the alleged contravention.
l) *Commission v SAB Ltd* (134/CR/Dec07)	Price discrimination in terms of section 9(1)	The Complaint was dismissed.

[1178] This matter involved a former agricultural cooperative that held a dominant position in the grain storage industry. Senwes would charge a daily storage tariff capped at 100 days but removed this cap as it applied to traders so that it only applied to farmers. The Tribunal ultimately held that the conduct amounted to margin squeeze in terms of section 8(c) of the Competition Act due to Senwes charging independent traders a higher tariff than that charged to farmers. Senwes appealed the decision on the basis that margin squeeze had not been pleaded and even if it had no case had been made for it on the evidence. The CAC upheld the Tribunal's decision but this was subsequently overturned by the Supreme Court of Appeal on the basis that the relevant comparison was between independent traders and Senwes' own trading arm on not independent traders and farmers. The SCA held that this has not been properly covered by the referral under section 8(c) but rather the referral under section 8(d)(i) which, the Tribunal held had not been properly established. The Constitutional Court however held that a proper case had been made in terms of section 8(c) but referred the matter back to the Tribunal due to procedural errors in the manner in which the Tribunal adjudicated the initial complaint. See *Senwes Limited v The Competition Commission* 87/CAC/Feb09, *Senwes Limited v Competition Commission* (118/2010) [2011] ZASCA 99, and *Competition Commission of South Africa v Senwes Ltd*; 2012 (7) BCLR 667 (CC).

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m) *Commission v Rooibos Ltd* (129/CR/Dec08)	Allegations of exclusionary conduct in terms of section 8(c)	Matter resolved through settlement confirmed by the Tribunal.
n) *Commission v Arcelor Mittal South Africa Ltd* (61/CR/Sep09)	Excessive pricing and discrimination in terms of sections 8(a) & 9(1)	Matter resolved through settlement confirmed by the Tribunal.
o) *Commission v Foskor (Pty) Ltd* (43/CR/Aug10)	Excessive Pricing in terms of section 8(a)	Matter resolved through settlement confirmed by the Tribunal.
p) Commission v Sasol Chemical Industries Ltd (48/CR/Aug10)	Excessive pricing in terms of section 8(a)	The Complaint was dismissed on appeal.
q) *Commission v Media 24 (Pty) Ltd* (92/CR/Oct11)	Predatory price in terms of section 8(d)(iv) & 8(c)	The Commission was initially successful under section 8(c) however, the matter was subsequently overturned by the CAC and such ruling was further confirmed by the Constitutional Court.[1179]
r) *Lekoa Fitment Centre v Altech Netstar* (Pty) Ltd (504/CR/13)	Exclusionary conduct in terms of section 8(a) & 9(1)	The complaint was dismissed.

But why has the Commission been so unsuccessful in proving allegations of abuse of dominance thus far? Perhaps the answer lies in the nature of the conduct itself. Unlike instances of collusion where the anti-competitive effects of the conduct can be relatively easily determined and assessed, Lewis points out that the anti-competitive effects of single firm conduct are often not so easy to determine.[1180] This difficulty, coupled together with the traditional hostility that competition authorities have exhibited towards dominant firms, has led to the enactment of rules and laws that seek to prohibit certain forms of conduct on the occurrence of certain predetermined facts. But it has been argued that this over reliance on legal rules for the establishment for proof of abuse of dominance at the expense of an evaluation of economic considerations can often lead to a situation of over-regulation.[1181] The reason for this is simple: This over-reliance on legal principles may result in conduct which has no anti-competitive effect, or which may even have pro-

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[1179] See *Media 24 Proprietary Limited v Competition Commission of South Africa* (146/CAC/Sep16) and *Competition Commission of South Africa v Media 24 (Pty) Limited* (CCT90/18) [2019] ZACC 26.
[1180] See Lewis "Chilling Competition" at 5. Also see *Mittal Steel Ltd and Another v Harmony Gold Mining Company and Another* at par 48 – 55.
[1181] See Chapter 7 at paragraph 3.1 anLewis "Chilling Competition" at 6.

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competitive effects, nevertheless being regarded as a dominant firm abusing its dominant position within the market.

Lewis however remains in total defiance of this argument.[1182] His stance is rather predicated on the fact that the economic theories of competition regulation have been developed and applied to conduct without taking into account the specific circumstances and structural factors that may exist in the market in question. Lewis goes on to state that it is his strong view that "*much of the micro-economic theory that dominates thinking about firm conduct and its consequences, has tunnelled so deep into the entrails of the conduct that it has lost sight of the features of the actual economies in which the rules are being applied, economies of vastly differing sizes, structures and histories*".[1183] In a country with such a unique history as South Africa and in economies that are characterised by a variety of highly concentrated key industries, this argument would be of particular importance where, Lewis argues, a greater possibility of under-enforcement exists rather than over-enforcement.[1184] Many of these economic theories of competition regulation were originally developed in the United States, a robust free market economy that is not characterised by the high levels of concentration that exist in the South African market as well as in the EU for that fact.[1185]

Both the EU and South Africa have several key industries often dominated by a single firm that can usually owe this dominant position within the market to years of state ownership, state assistance and/or poor regulatory environments.[1186] But it would be asinine to simply tar all evaluations of single firm conduct with the same brush. It does not appear likely that economic theories have blindly been applied by competition authorities globally to allegations of abuse of dominance without at least considering, to some degree, the particular circumstances that exist in the market in question. For this reason, Lewis attempts to defend the position adopted by the South African Competition Act which seeks to establish an alleged abuse of dominance through an enquiry into both legal and economic principles.[1187] But the argument can also be made that South African authorities place too great a weight on legal principles particularly in the establishment of

[1182] Lewis "Chilling Competition" at 6.
[1183] Lewis "Chilling Competition" at 3.
[1184] Lewis "Chilling Competition" at 3.
[1185] See the previous discussions at chapter 2 at paragraph 1.
[1186] Lewis "Chilling Competition" at 6
[1187] See Chapter 7 at paragraph 3.1 and Lewis "Chilling Competition" at 6.

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dominance.[1188] Although in order to prove an allegation of abuse of dominance, it is necessary to prove the relevant elements of the contravention as well as its anti-competitive effect, the possibility of false positives still exists. In support of this argument, two previously discussed cases will be compared in an attempt to highlight the potential dangers.

The first matter that will be revisited, is the *SAA* matter that was discussed in Chapter Five.[1189] This is a matter where both the Tribunal and the CAC appear to have arrived at the correct decision as it pertains to SAA abusing its dominant position within the domestic airline market. Firstly, it cannot be doubted that SAA was in fact a dominant firm. SAA's market share of the domestic airline market at the time of the complaint was in excess of 70%, more than sufficient for a finding a dominance in terms of section 7. However, despite SAA's exceptionally large market share, SAA attempted to argue that it in fact did *not* possess sufficient market power to control prices or exclude its competitors. The CAC refused to entertain this argument on the basis that where a firm's market share exceeds 45%, that firm would irrebuttably be presumed dominant.[1190]

But even if the CAC was willing to entertain this argument, it would have been doomed to failure. SAA is a parastatal that has long benefitted from years of state assistance.[1191] Much of this assistance has been to maintain the airlines' solvency. Without this assistance, there is a very strong likelihood that SAA would have long ceased to be able to effectively compete. This assistance ensured that SAA could, prior to it being placed into business rescue, maintain its dominant position within the market despite the fact that it is clear that its business strategies have thus far been unsuccessful in making the airline profitable, let alone competitive with local and international rivals.[1192] Taking all

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[1188] Munyai *A Critical Review of the Treatment of Dominant Firms in Competition Law – A Comparative Study* (LLD Thesis, University of South Africa 2016) at 122.
[1189] See the previous discussion in Chapter 5 at par 4.3 *The Competition Commission v South African Airways (Pty) Ltd* 18/CR/Mar01 and *South African Airways (Pty) Ltd v Comair Limited & Another* 92/CAC/Mar10.
[1190] See *SAA* CAC ruling at par 71 – 74.
[1191] On 5 December 2019, SAA was placed in business rescue. See "Notice of Commencement of Business Rescue Proceedings" available at https://matusonassociates.co.za/wp-content/uploads/2019/12/Notice-of-Commencement-of-Business-Rescue-and-Appointment-of-Practitioner-Creditors.pdf (last accessed on 19/10/2021 at 11:23)
[1192] Business rescue proceedings in respect of SAA terminated on 31 April 2021 following the successful adoption of the business rescue plan. This plan however was subject to the National Treasury providing SAA with a further R10 billion in funding. See https://matusonassociates.co.za/wp-content/uploads/2019/12/30-04-2021-SAA-Notice-of-Substantial-Implementation2951353.1-signed.pdf (last accessed on 19/10/2021 at 11:26).

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these factors into account, there could have been be no other finding than a finding that SAA was dominant within the relevant market, namely that of the domestic airline industry.

Secondly, the actual effect that SAA's conduct had on the domestic airline market must be considered. Even the Tribunal conceded that in order to sustain a finding of abuse of dominance in terms of section 8(d), the complainant would need to prove that the exclusionary conduct complained of has had an anti-competitive effect which would require that the conduct either harms consumer welfare or has the effect of foreclosing the market to rivals.[1193] Now, it would be difficult to determine consumer welfare or the foreclosure of rivals without considering significant economic data which seeks to provide evidence of such an effect. The Tribunal further indicated that when it is faced with the question of the foreclosure of rivals, as was the case in *SAA*, such a conclusion would be partly factual and partly based on reasonable inferences drawn from proven facts.[1194] The exact nature of these facts would obviously need to be dealt with on a case-by-case basis, but it seems highly unlikely that an accurate inference could be drawn without considering a large amount of economic data pertaining to both the dominant firm and the foreclosed rival. Nonetheless, in the present matter it appears as though the Tribunal arrived at the correct decision. Given the strength of SAA's dominant position within the market, the reward programme it engaged in could have had no other effect but to incentivise travel agents to draw potential customers away from Nationwide and Comair and push those customers towards buying tickets with SAA.[1195] Furthermore, in view of SAA's extremely large share of the market, its dominant position being assured by continued state assistance, and volumes of tickets that were at play, there simply was no way that Nationwide and Comair would have been able to effectively compete with SAA.

While the *SAA* matter can be used in support of an argument in favour of a more structured approach at the expense of an effects-based approach to allegations of abuse of dominance, the second matter, being *Nationwide Poles*, highlights the dangers of over-enforcement that such an approach presents.[1196] *Nationwide Poles* more so than

[1193] *SAA* CAC ruling at par 132.
[1194] *SAA* CAC ruling at par 132.
[1195] *The Competition Commission v South African Airways (Pty) Ltd* at 218.
[1196] See *National Poles CC v Sasol Oil (Pty) Ltd* 72/CR/Dec03 and *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/April05. Also see the previous discussions in Chapter 4 at par 4.1.

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anything else, should highlight the dangers of establishing dominance solely through a market share-approach. As was discussed in the analysis of the *Nationwide Poles*-case in Chapter 5, the argument could be made that, given the competitiveness of the wood preservative market and Sasol Oil's falling market share in both the wood preservative markets and creosote markets, Sasol Oil did not possess the power to raise the price of its product above the competitive price.[1197] This is also notwithstanding the fact that Sasol Oil's product already cost more than that of its competitors but, this was due to the fact that it had a higher input cost associated with its wax additive and the manner in which it was impregnated into the wood.[1198] Sasol Oil's declining market share seems to point to the fact that it simply did not possess market power in the market in question. It is impossible for a firm to be dominant without possessing substantial market power. This evidences the fact that dominance cannot and should not be established solely through a firm's market share.

Lewis attempts to counter this argument by stating that the substantive hurdles necessary to establish dominance in terms of section 7 are "*formidable*" in that defining the relevant market would require an analysis of supply-side substitution as well as evidence of durability of a high market share over a substantial period of time.[1199] The purpose of section 7, Lewis contends, is to simply "*cut to the chase*" and create a much lower standard for the establishment of dominance through the most common indicia of dominance, namely market share, without having to prove the existence of a concept as abstract as market power.[1200] But as we have seen, both the EU and the US have attributed dominance to extremely high market shares, usually in excess of 60%.[1201] In comparison, 45% appears to be an relatively low standard to create an irrebuttable presumption of dominance. What Lewis also fails to accept is that dominance cannot exist without the actual possession of market power. Section 7 presupposes that a firm with a market share in excess of 45% has market power within the particular market. The *Nationwide Poles* case however shows that this may not always be the case. Furthermore, it appears as though the Tribunal did not take into account supply-side

[1197] *National Poles CC v Sasol Oil (Pty) Ltd* at par 43 and 51.
[1198] *Sasol Oil (Pty) Ltd v Nationwide Poles CC* at par 23.
[1199] Lewis "Chilling Competition" at 8 – 9.
[1200] Lewis "Chilling Competition" at 9.
[1201] See Assaf & Facey, "Monopolization and Abuse of Dominance in Canada, the United States and the European Union: A Survey", at 536 and *Hoffman La Roche v Commission*.

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substitutability[1202] when defining the market. Nationwide Poles did lead evidence to the fact that CCA was not suited to its particular needs but no evidence was lead on whether SAK-100 or any of the other wood preservative products available at the time would be suitable for its needs.[1203] Instead, the Tribunal placed far too heavy a weight on the complainant's preference in the product when determining what the relevant market was, and did not take into account the fact that alternative products existed that were available to the complainant.

Although Sasol Oil was previously a parastatal that had been the recipient of years of state assistance, it cannot simply be assumed that this would necessarily render a firm dominant. The fact that Sasol Oil's product is also distinguishable from other creosote products further points to a degree of innovation and risk undertaken by Sasol Oil in the development of the product.[1204] Despite this, it appears as though the Tribunal failed to take these circumstances into account. The possibility remains that, had all the relevant economic evidence been examined, Sasol Oil may have been found to *not* possess sufficient market power despite its market share. The Act however, in its present form, would not permit such an enquiry which unfortunately shackles authorities to assume market power in all cases where a market share exceeds 45%. The fact remains that the potential for further frivolous litigation will remain rife.

The only saving grace that firms have had is that a finding of dominance has necessitated that the conduct in question either have a detrimental effect on consumer welfare or have the effect of foreclosing the market to its rivals.[1205] The Amendment Act now seeks to reduce this standard particularly in the case of excessive pricing.[1206] By amending section 8 to the effect that a firm will be guilty of charging an excessive price whether it be to the detriment of consumers *or customers* of that firm is a dangerous prospect. The potential certainly now exists for adverse findings of dominance even though the conduct in question has no adverse effect on consumer welfare. It is however submitted that the

[1202] See Chapter 6 at par 3.2.2.
[1203] *National Poles CC v Sasol Oil (Pty) Ltd* at par 33 – 36.
[1204] See Chapter 5 at par 4.1.
[1205] See the discussion in Chapter 6 par 3.2.2.
[1206] Section 8(1)(a) of the Amendment Act provides as follows:
"It is prohibited for a dominant firm to—
(a) charge an excessive price to the detriment of consumers or customers"

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rationale for an amendment to this effect is not rooted in achievement of competition related concerns but rather to create a tool for the furtherance of political agendas.

1.3. Exemptions from the Application of the Act

In terms of section 3, the Act applies to all economic activity within or having an effect in the Republic, except for collective bargaining agreements in terms of the Labour Relations Act and concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose.[1207] Section 3 goes further to state that where the Act applies to a sector or industry falling within the jurisdiction of another regulatory authority, the Act and such regulatory authority should exercise concurrent jurisdiction in accordance with sections 21(1)(h) and 82(1) and (2) of the Competition Act.[1208] This provides a unique mechanism that prevents parties in certain industries from justifying their collusive conduct by arguing that such conduct forms part of existing industry level agreements falling outside of the scope of the Act.

The Act does however provide a mechanism through which firms can apply to be exempted from the application of the Act, specifically in cases involving allegations of prohibited conduct listed in Chapter 2 of the Act. Section 10 provides that a firm may apply to the Commission for exemption from the application of the Act where the agreement or practice or category of agreement or practice meets the requirements of subsection (3).[1209] The Commission may only grant an exemption if any restriction imposed on the firm concerned by the agreement or practice is required to attain one of the following objectives:

a) *"The maintenance or promotion of exports;*

b) *the promotion of effective entry into, participation in or expansion within a market of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;*

c) *changes in productive capacity necessary to stop decline in an industry; or*

[1207] Section 3(1)(a) – (e).
[1208] Section 3(1A)(a) and (b).
[1209] Section 10(1) (a) & (b).

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d) *the economic development, growth, transformation or stability of any industry designated by the Minister, after consulting the Minister responsible for that industry."*[1210]

The grounds which may be used as a justification for exemption from the application of the Act are however interesting in that they do not advance any rational competition goal. These justifications, like many of the other oddities of the Act, also appear to be political in their design. When looking at the justifications aimed at exports and specific industries, it would appear that the Government is happy to allow anti-competitive conduct to thrive in order to save and/or promote an industry that in all likelihood is uncompetitive in its nature solely for the achievement of a state agenda. This also presents a potential paradox in that many of the industries that have been specifically identified as severely concentrated and devoid of effective competition, owe their privileged position in the market due to years of state assistance which essentially isolated them from competition.[1211] Again now, the Act appears prepared to allow a similar situation to proliferate in the achievement of the industrial policy goals of the present administration through the use of competition law.

In the same breath, the exemption aimed at promoting small and medium sized firms or firms owned or controlled by historically disadvantaged persons follows the same narrative. Imagine for a second a situation where a large group of small and medium sized firms servicing a particular market resolve to engage in collusive conduct with the aim of competing with a larger rival. Now imagine that these firms have been successful in taking market share away from this larger rival and have now collectively established themselves within the market. In order to maintain this newfound position within the market, these firms now agree to continue to collude with one another and agree not to compete amongst themselves. In addition to this, the lack of competition within the market further results in consumers being charged an excessive price. While such exemptions may not be indefinite[1212], the potential exists for new distortions in the market that may need to be redressed. Admittedly, a situation such as this represents a perfect storm of

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[1210] Section 10(3)(a) & (b)(i) – (iv).
[1211] See OECD), Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "Serial Offenders: Industries Prone to Endemic Collusion" at 6.
[1212] See for example the conditional exemption granted to the South African Petroleum Industry Association which was granted for a period of five years between 1 January 2016 and 31 December 2020. Government Gazette 43050 of 26 February 2020.

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anti-competitive abuses that may be unlikely to arise in the real world. However, the potential for such a situation still exists. It would be interesting to see how the Commission would deal with an application for exemption in such circumstances. It will also be interesting to see how the Commission may later attempt to alter the structure of the market to break down some of the barriers that the exemption may create.

The same could be said of firms owned or controlled by historically disadvantaged persons. Picture for example two large firms of this nature colluding with each other to the detriment of consumers or a large potentially dominant firm controlled or owned by historically disadvantaged individuals abusing its dominant position within the market. How will the Commission deal with applications for exemption in these situations particularly where the exemption appears to have little competitive merit?

The purpose behind these exemptions clearly serves little competitive purpose. They again appear to be a mechanism through which political objectives of the Government are sought to be achieved by means of the use of competition law. The aims which section 10 appears to want to achieve are in stark contrast to the objectives that competition law should seek to achieve. The question remains, how will these opposing objectives be weighed against one another when the situation finally arises?

1.4. The Competition Commission, a Misunderstood Mandate?

The Commission's mandate is clearly set out in section 21 of the Act. The functions of the Commission can be summarised to include: the implementation of measures to increase market transparency as well as to develop public awareness of the provisions of the Act, investigate allegations of anti-competitive conduct; negotiate and conclude consent orders in terms of section 63; approve or refuse small and medium mergers; refer matters to the Tribunal and appear before the Tribunal; negotiate with, participate in, as well as advise and receive advice from any other regulatory body[1213] on competition matters; and deal with any other matter referred to it by the Tribunal.[1214] In broad terms, the Commission's mandate can simply be understood as requiring it to attend to all

[1213] Section 1 defines the term "regulatory authority" as an entity established in terms of national, provincial or local government legislation or subordinate legislation responsible for regulating an industry or sector of an industry.
[1214] Section 21 (1)(a) – (l).

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matters of a competition nature save for the matters falling exclusively within the jurisdiction of the Tribunal.

A potential complication in this mandate may however exist in the construction of the Act itself. In carrying out its mandate, the Commission will need to be cognisant of the objectives of the Act stated in section 2. As discussed in detail throughout this thesis, section 2 contains both pure competition goals as well as political goals of a socio-economic nature generally alien to competition law. The Act itself however fails to state how these often-opposing goals should be weighed against each other when dealing with matters of a competition nature. The question is therefore: how is the Commission to weigh these often-conflicting goals with one another when carrying out its mandate and, if and when, should competition goals give way to the Act's political goals?

When looking at some of the matters that have already been discussed in this thesis, there appears to be evidence of this conflicted relationship in the carrying out of the Commission's mandate. The Pioneer settlement, as discussed in Chapter 4, is one of the first examples where the Commission possibly lost sight of its mandate.[1215] In negotiating the settlement in terms of which the Fund was established, National Treasury intervened in the settlement proceedings as it was of the view that the Commission had exceeded its mandate in agreeing to some of the conditions forming part of the consent order. While the Commission is free to negotiate administrative penalties within the thresholds laid down in the Act, the Commission is not at liberty to determine how these penalties may be utilised. Administrative fines are paid into the National Revenue Fund where they form part of the fiscus and can be only appropriated in accordance with an Act of Parliament. The Pioneer settlement initially required that R250 million of the R500 million fine be appropriated for the establishment of the Fund. While the appropriation of these funds was clearly outside of the Commission's authority, the relevant Government parties took over the responsibility for the creation of the Fund to ensure legal compliance for the effective implementation of the Fund.[1216]

[1215] See Bonakele & Mncube at fn 8. Also see previous discussions at Chapter 4 at par 4.1.
[1216] See Chapter 4 at par 4.1.

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The stated aim of the Fund was to increase competition within the agro-processing market through the promotion of small and medium sized producers.[1217] This is evidence of the way that the Commission is trying to achieve a competition goal (increased competition) while also trying to achieve the political goal of promoting small and medium sized businesses. The fact remains that effective competition can only be achieved through the creation of effective competitors. Whether or not the promotion of small and medium sized businesses in the manner envisaged by the Act in itself can achieve this goal remains to be seen. It is submitted that state assistance alone will not achieve this goal. If a firm is only competitive as a consequence of such assistance, then once that assistance is removed the firm will in all likelihood find itself out in the cold and no longer being able to effectively compete. State assistance may also hinder the achievement of effective competition as it too, may remove the incentive for smaller firms to adopt efficient business practices and seek innovation. Similarly, it is precisely as a consequence of years of state assistance that various South African markets are categorised by high levels of concentration. Some of these measures aimed at supporting smaller and medium sized businesses can have the potential of taking away from the one hand and simply giving to the other. In this way, market concentration may merely move from one set of firms to another without achieving the goal of effective competition.

Further evidence of this potentially misunderstood mandate of the Commission can be seen from the writings of some its members. Bonakele and Mncube state that when negotiating consent orders, the Commission acts within its mandate as the "proxy of the public interest".[1218] Although the paper contains a disclaimer stating that views expressed in the paper of those of the writers and not those of the Commission, it is clear that this particular school of thought is alive and well within the Commission, especially given the fact that Bonakele occupies the role of Commissioner of the Commission.

Undoubtedly the Commission can be regarded as the custodian of competition law and policy in South Africa. However, the public interest which can be equated to the concept of public policy, is an infinitely wider concept that influences all aspects of society.

[1217] Bonakele & Mncube "Designing Appropriate Remedies for Competition Law Enforcement: The Pioneer Foods Settlement Agreement" at 3.

[1218] Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 3. At the time of publication Tembinkosi Bonakele was the Deputy Commissioner of the Commission and Liberty Mncube was the Principal Investigator of the Commission with Bonakele subsequently becoming the Commissioner of the Commission.

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Gumede defines public policy as "all exposed aspirations of an administration which are propelled by the will of the people".[1219] Public policy can therefore be regarded as all those concerns of the greater population as a whole which will ultimately influence all policy decisions of the executive. Certainly, public policy will greatly influence the development and implementation of competition law but to argue that the Commission is also the custodian of public policy is a step too far. There are various institutions tasked with promoting public policy each with its own specific defined role. The Commission is no different. The Commission is tasked with fulfilling its mandate given to it by the Competition Act and achieving the goals of the Act. In this way, the Commission can ensure that public policy as it relates to competition law is promoted. The Act however is very clear in the extent that the Commission's mandate is limited simply to aspects related to the Act. The Commission should therefore be mindful of this in the fulfilment of its mandate.

Further evidence of the conflicted mandate of the Commission can be seen in the *Massmart* merger as discussed in Chapter 6.[1220] Initially the Commission recommended to the Tribunal that the merger should be approved without any conditions. The Commission's recommendation was based on the fact that the merger presented no possibility of substantially preventing or lessening competition and in fact, had the potential of increasing competition within the retail sector. It was only after receiving the submissions from the various Ministers and trade unions concerned, that the Commission changed its recommendation to the merger being approved subject to various conditions. The various concerns raised fell squarely within the public interest component of section 12A, many of which the Tribunal and CAC found were not substantial enough to influence the approval of the merger. The Commission was not necessarily incorrect in changing its recommendation to the Tribunal. Given the role that public interest plays in merger regulation, the Commission is duty bound to take these considerations in account. However, the change in tune of the Commission points to just how conflicted the Commission can be when weighing the socio-economic and pure competition goals of the Act against one another.

[1219] Gumede "Public policy making in a post-apartheid South Africa: A preliminary perspective" (2008) *Africanus* 38(2) 7 at 16.

[1220] See the previous discussions in Chapter 6 at par 5.2 and the merger of *Walmart Stores Inc & Massmart Holdings Limited* 73/LM/Dec10.

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A further example can be found in the merger between *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd.*[1221] In this matter Shell SA sought to acquire Tepco, a subsidiary of Thebe Investment Corporation (Pty) Ltd, a broad-based black empowerment investment holding company. In terms of the proposed merger, Thebe Investment Corporation would acquire between 17,5% and 25% in Shell SA's new retail and distribution arm.[1222] In evaluating the merger, the Tribunal held that Shell SA represented one of the largest players in various commercial and retail petroleum markets while Tepco represented one of the smallest. Ultimately, both the Commission and the Tribunal held that the merger would not substantially prevent or lessen competition due to the fact that the merger would not raise barriers to entry, the homogenous nature of the products concerned meant customers could easily change suppliers, none of the market participants could be held to possess market power given the regulated nature of the market, and Tepco's small footprint meant that the merger would not result in an effective competitor exiting the market.[1223] However, on the issue of public interest, the Commission recommended that the merger be approved subject to the following three conditions:

a) Tepco continues to exist in the market jointly controlled/owned by Thebe Investment Corporation and Shell SA;

b) That the Tepco brand be maintained as a viable brand in the marketplace; and

c) Any agreement, including a shareholders' agreement, between the parties pursuant to these conditions must be submitted to the Commission for its approval prior to the implementation thereof by the parties.

In evaluating these conditions, the Tribunal held that the first condition amounted to a restructuring of the deal into a format that neither party wanted and would fail to further any empowerment objective envisaged in the transaction.[1224] The second condition too, failed to serve any public interest or remedy any ill, and there appeared to be no justification to approve the third condition as the parties ultimately remained free to

[1221] 66/LM/Oct01.
[1222] The merger saw Shell SA divide its operation into two new companies. Shell South Africa Energy (Pty) Ltd would be responsible for the refinery, chemicals, renewables, energy, production and exploration parts of the business while Shell South Africa Marketing (Pty) Ltd would be responsible for the retail marketing, marketing distribution network, commercial fuels, LPG, aviation, marine, lubricants and bitumen portions of the business.
[1223] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 32 – 35.
[1224] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 42.

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structure their relationship however they saw fit.[1225] When looking at the conditions in general, the Tribunal was of the view that the only rational explanation for the Commission's recommendations was to prevent ownership and control passing out of the hands of historically disadvantaged persons.[1226] The Tribunal further cautioned the Commission about intervening in commercial transactions in support of historically disadvantaged investors, as interventions such as those proposed by the Commission in this matter could actually have the effect of constraining the seller's ability to raise capital rather than constraining the acquiring firm's market power.[1227]

This matter clearly highlights how the Commission was more concerned with the socio-economic goal of transformation and the participation of historically disadvantaged persons in the market than the merger's *actual effect* on competition in the market. In fact, the Commission was so concerned with this goal that it appears to have lost sight of its mandate in its entirety. The Commission found that the merger presented no potential adverse effect to competition but persisted to insist on the imposition of the conditions on public interest grounds. These conditions however appeared more aligned with the political goals contained in section 2 than the public interest concerns listed in section 12A. The role of public policy also arose in this matter with the Commission arguing that, through the public interest concerns raised in this matter, the Commission sought to enforce public policy. The argument was predicated on the view that although the conditions may not be in the best interest of Thebe Investment Corporation's shareholders, the conditions were in the best interests of ensuring the spread of ownership of historically disadvantaged persons within the market.[1228] The Tribunal again cautioned the Commission against using public interest as a basis for intervening in transactions where there is no adverse effect on competition and where the interests of historically disadvantaged persons will not be affected by the transaction itself, especially when these historically disadvantaged persons have expressly rejected such interventions by the Commission.[1229]

[1225] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 41 – 46.
[1226] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 47.
[1227] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 49 – 51.
[1228] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 57.
[1229] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 58.

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The relationship between industrial policy and competition law may also play a role in complicating the Commission's mandate. Industrial policy broadly refers to the various policy instruments of the Government through which resources can be directed to the participants of identified sectors with the aim of affording those participants some sort of advantage.[1230] Since 1994, South African industrial policy has long identified competition law as one of the primary tools through which to achieve some of the goals set by the larger public policy. The *National Industrial Policy Framework* of 2004 (the NIPF)[1231] mentions competition policy as one of the strategic programmes through which industrial policy goals can be achieved. Specifically, the NIPF states that competition policy has two broad goals in respect of industrial policy namely, the promotion of higher levels of competition in the economy in order to facilitate the entry of small and medium sized firms into markets and the achievement of minimum levels of economies of scale in certain industries to ensure global competitiveness.[1232] The subsequent *Industrial Policy Action Plan* (IPAP)[1233] also identifies competition law as a conduit through which Government can achieve some its industrial policy goals.[1234]

Industrial policy and competition law have the potential to be key tools in the achievement of their respective policy goals. Qobo argues that industrial policy can be instrumental in encouraging competition in markets provided that competition law and industrial policy share a common goal.[1235] However, in the same breath Mandiriza, Sithebe and Viljoen observe that industrial policy can also harm competition in the market where it is at cross purposes with competition law.[1236] The IPAP identifies several key areas of concern that need to be addressed through competition policy, including low levels of competition within concentrated markets; the effect anti-competitive conduct can have on

[1230] Mandiriza, Sithebe & Viljoen "An Ex-post Review of the Wal-Mart/Massmart Merger" at 11 – 13.
[1231] The Department of Trade and *Industry The National Industrial Policy Framework* (2004) ("the NIPF") available at https://www.thedti.gov.za/industrial_development/docs/NIPF_r2.pdf (last accessed on 29/10/2019) was not designed as a blueprint for industrialisation but rather identified the key policy role players necessary to drive the process.
[1232] The NIPF at 11.3.
[1233] The Department of Trade and *Industry Industrial Policy Action Plan 2014/15 – 2016/17* ("the IPAP") (available at https://www.idc.co.za/wp-content/uploads/2019/02/IPAP2014.pdf (last accessed on 29/10/2019) differed from the NIPF in that it was a mid-term plan designed to strength the country's industrial capacity by identifying key industrial sectors to develop based largely on their potential for growth and employment creation as well as their potential to contribute towards import diversification and growth.
[1234] IPAP at 35.
[1235] Qobo "Competition Policy Response to State Intervention: A Competition Practitioner's Perspective on IPAP5" (2013), available at http://www.compcom.co.za/wp-content/uploads/2014/09/KhanyisaQobo-CompetitionConferencePaper201328final29.pdf (date of last access 17/10/2018).
[1236] Mandiriza, Sithebe & Viljoen "An Ex-post Review of the Wal-Mart/Massmart Merger" at 10.

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employment and low income earners through the charging of excessive prices; greater scrutiny of dominant firms; and facilitating the entry and growth of new entrants into the market.[1237]

The introduction of the 2018 Amendment Act clearly points towards competition policy being aligned to these industrial policy goals. When looking at the industrial policy goals together with the amendments to section 9, section 12A and the inclusion of section 18A introduced by the Amendment Act,[1238] it is clear that the Act is increasingly being viewed as a mechanism that can empower increased state interference in markets with the aim of assisting Government in achieving its industrial policy objectives. But what effect will this have on promoting effective competition within markets? Both the Amendment Act and the IPAP appear fairly one dimensional in their approach on how they will attempt to achieve greater competition within the market. The breakdown of existing market concentrations and the promotion of the entry of small and medium firms and those owned or controlled by historically disadvantaged individuals are the principal aim of the Amendment Act and competition policy as a whole. It will remain to be seen whether this alone will promote greater competition within the market or whether or not it will simply result in a transfer of market share from established participants to new entrants. The Commission's prioritisation framework in itself is contradictory in that it states the Commission's resources should be directed at particular industries based on the impact on consumer welfare and particularly low-income earners, the state of competition within the industry, and Government's economic priorities.[1239] How these competition goals need to be weighed up against Government's larger industrial policy is unclear. The fact remains that the Commission's mandate appears to be shifting towards one where it is expected to achieve the political goals first and competition goals second.

1.5. Do Public Interest Concerns Belong in Merger Regulation?

1.5.1. The Argument in Favour of Including Public Interest in Merger Regulation

When examining the various Government policy documents leading up to the enactment of the Competition Act, it is easy to see why public interest grounds found their way into

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[1237] IPAP at 35 – 36.
[1238] See previous discussions in Chapter 7 at pars 3.1.4 and 3.2.
[1239] Mandiriza, Sithebe & Viljoen "An Ex-post Review of the Wal-Mart/Massmart Merger" at 4.

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merger regulation. As this thesis has stated repeatedly, the current Government is a strong believer that the Act is an important instrument for the achievement of its larger industrial policy goals.[1240] Lewis, the first chairperson of the Tribunal.under the 1998 Act, has long been a strong supporter of the inclusion of public interest considerations in merger regulation and a firm believer that competition law will play a pivotal role in the alleviation of the distributional and poverty issues that persistently plague developing nations.[1241] In support of this argument, Lewis argues that, even though other jurisdictions do not explicitly contain specific public interest grounds that need to be evaluated during merger proceedings, public policy considerations will undoubtedly still have a degree of influence in the decisions of regulators.[1242] There is an indisputable truth to this statement. Any regulator, whether it be a competition regulator or the regulator for a different industry, will always be, to some degree, informed by the larger public policy aspects of the particular jurisdiction. Failing to take public policy into account will certainly expose regulatory decisions to a degree of potential distrust by the public or even subject them to potential administrative review.

Lewis goes on to state that public interest considerations will generally find a greater application in developing nations than in developed nations for two reasons: firstly, industrial policy plays a greater role in achieving certain strategic Government goals and secondly, nascent regulatory bodies are seeking legitimacy and credibility within their markets.[1243] It is this fight for credibility which ultimately makes institutions such as the Commission more sensitive to the larger public interest. The need to establish credibility arises from the fact that the best way for the public at large to recognise how competition law may contribute to economic development through the prioritisation of efficiency goals, is to win support by creating the impression that the authorities are seen to be grappling with larger socio-economic issues.[1244] Lewis proceeds to pose two important questions: can public interest objectives be better achieved through other policy instruments rather

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[1240] See previous discussions at Chapter 3 at par 2, 4 and 5, Chapter 4 at par 3 and 4, Chapter 5 at par 4, Chapter 6 at par 4.3, 5 and 6, and Chapter 7 in its entirety.
[1241] Lewis "Competition Regulation: The South African Experience" *Paper presented to: ISCCO Conference* 2000 – Tapei, June 2001 (available at https://www.comptrib.co.za/assets/Uploads/Speeches/lewis8.pdf last accessed 17/09/2018) at 1.
[1242] Lewis "The Role of Public Interest in Merger Regulation" *International Competition Workshop, Merger Working Group*, Naples, 28-29 September 2002 (available at https://www.comptrib.co.za/assets/Uploads/Speeches/lewis5.pdf, last accessed 15/09/2018).
[1243] Lewis "The Role of Public Interest in Merger Regulation" at 2.
[1244] Lewis "Competition Regulation: The South African Experience" at 2.

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than competition law and, who should be the judge of the weight that public interest concerns are given in merger analysis?[1245]

While the overall theme of this thesis has been to question the place of the socio-economic and political goals of the South African Act in competition regulation and whether these goals can be more effectively dealt with through other policy instruments, Lewis' argument that determining the weight that public interest concerns have in merger regulation should fall to competition authorities, is interesting. Green, in turn, considers the argument for a separation in the adjudication of competition matters with the assessment of the economic in nature "*pure competition goals*" being left to competition authorities and the assessment of non-economic political goals being left to the executive and/or judicial arms of Government.[1246] This separation argument appears to be premised on the idea that by empowering competition authorities with the ability to consider political goals, it would amount to a delegation of the legislature's legislative authority which could prove to be constitutionally problematic.[1247] Furthermore, Green remarks that competition bodies are ill-equipped to make public policy decisions that may have far reaching consequences for the market and potentially the country as a whole.[1248]

The writer cannot help but agree with Lewis' statement and reject the notion of a separation in the assessment of competition issues. This may seem contradictory to the overall theme of this thesis, but Lewis' argument remains sound. The ultimate authority for approving mergers belongs to the Commission and the Tribunal. The Commission has been empowered with the very specific mandate of evaluating the effect on competition that certain forms of conduct and certain transactions may have. If the process of determining how public interest concerns should be weighed in merger regulation is given to a different regulatory authority, it is more than likely that such other institution will favour an approach that meets *its* specific mandate or public interest objectives rather than be concerned about the competitive effect of the particular transaction. The Commission, on the other hand, needs to ensure that a proposed merger

[1245] Lewis "The Role of Public Interest in Merger Regulation" at 2.
[1246] Green "Integration of Non-Efficiency Objectives in Competition Regulation" 2008 *University of Toronto*, available at https://tspace.library.utoronto.ca/bitstream/1807/17173/1/Green_Ofer_200811_LLM_Thesis.pdf (date of last access 12/12/2018) at 85.
[1247] Green "Integration of Non-Efficiency Objectives in Competition Regulation" at 87 – 91. Also see Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978) at 72 - 79.
[1248] Green "Integration of Non-Efficiency Objectives in Competition Regulation" at 90.

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meets the best interest of competition. However, the Commission is also to some extent in tune with the needs of public policy which play an integral part in the development and application of competition policy.[1249] This places competition authorities in the best position to make the most appropriate decisions pertaining to public interest considerations during merger regulation.

Political participation in merger regulation is however not a unique feature of South African competition law.[1250] Many jurisdictions such as the UK, Germany, Australia and Canada have enacted measures to review mergers particularly in circumstances where the acquiring firm is a foreign-controlled or foreign-owned firm.[1251] These provisions have also been enacted under the auspices of protecting national interests and permit designated members of the executive to refuse mergers involving foreign acquiring firms where they are believed to pose a risk to national security interests.[1252] The point of the departure for the Act was that while the authority to intervene in mergers in many of these foreign jurisdictions is assigned in terms of various other legislative instruments empowering the relevant Government Minister to intervene, any interference in merger proceedings under the Competition Act is strictly limited to the public interest concerns listed in the Act and with the power to intervene being confined to independent competition authorities and not the executive branch of Government.[1253] This, at least in theory, insulates the process from executive interference while still providing a mechanism through which the larger industrial policy goals can find proper consideration during merger proceedings.[1254] The hope was clearly to ensure that a proper competitive process exists that takes public interest concerns into account while remaining free from Government meddling for furtherance of a state agenda. The problem that now seems to have now emerged is that with the amendment of section 12A and the inclusion of section

[1249] Lewis "The Role of Public Interest in Merger Regulation" at 3.
[1250] See Chapter 6 at par 4.3 and chapter 7 at par 3.2.4.
[1251] See the Canadian Investment Canada Act of 1985 and the Australian Foreign Acquisitions and Takeovers Act of 1975 (Regulation 2015) No. 217, 2015.
[1252] See Chapter 7 at par 3.2.4.
[1253] See Green "Integration of Non-Efficiency Objectives in Competition Regulation" at 85 and Lewis "The Role of Public Interest in Merger Regulation" at 2. Also see Nzero "Implications of Public Interest Considerations in the Interpretation and Application of the Failing-Firm Doctrine in South Africa Merger Analysis (2017) *THRHR* 602 at 614.
[1254] Hodge, Goga, & Moaholi "Public Interest Provisions in the South African Competition Act – A Critical Review", *Competition Policy, Law and Economics Conference* 2009. Available at www.compcom.co.za/wp-content/.../Public-Interest-Provisions14-August-2009-2.doc (lasted accessed 02/10/2018 at 20:13).

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18A by the 2018 Competition Amendment Act, there appears to be greater potential for Government interference in merger proceedings.

1.5.2. The Arguments Against the Inclusion of Public Interest in Merger Regulation

The inclusion of public interest concerns in merger regulation has garnered its fair share of criticism. Reekie was one of the first authors to criticise the inclusion of these goals when the Competition Act was initially enacted. His argument centred on the fact that competition law should be focussed on assisting the achievement of an efficient allocation of resources so to maximise overall welfare within the market. Where other socio-economic goals are sought to be achieved, his view was that Government would do well to use other policies specifically designed to achieve such goals.[1255] Reekie's sentiments appear to echo a long-standing school of thought, especially amongst economists who have favoured the consumer welfare and the efficiency principles of the Chicago theory of competition regulation.[1256]

The Organisation for Economic Cooperation and Development's (OECD) own Business and Industry Advisory Committee ("BAIC") is firmly of the view that the inclusion of public interest concerns in merger regulation is both unnecessary and could also prove to be counter-productive.[1257] The BAIC is of the view that the inclusion of these public interest concerns in merger regulation has the potential of having a chilling effect on investment due to firms now being faced with a greater degree of uncertainty stemming from inconsistent regulatory decisions.[1258] In this regard, the BAIC argues that merger regulation should be focussed on the core competition goals such as the achievement of competitive prices and static and dynamic efficiencies within the market. In support of this argument, the BAIC states *that "an effective competition regime promoting maximum*

[1255] Reekie "The Competition Act, 1998 An Economic Perspective" (1999) *The South African Journal of Economics* 67(2), 257, at 265.
[1256] See Chapter 2 at par 3 and 4.
[1257] See the BAIC's "Public Interest Considerations in Merger Control" (June 2016), presented by the BAIC to OECD Competition Committee Working Party No.3 on Co-Operation and Enforcement, available at https://www.justice.gov/atr/file/872386/download (date of last access 09/12/2018 at 13h30). The paper was submitted to the Working Party's discussion on the important issue of the links and drivers between merger review and public interest considerations.
[1258] The BAIC's "Public Interest Considerations in Merger Control" (June 2016) at 2.

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efficiency can lead to the enhancement of social and political policy by providing a neutral marketplace".[1259]

Many of the social ills that exist in markets can be traced back to the various structural factors that have created and maintained uncompetitive distortions in the market. The assumption appears to be that through the maximisation of efficiency and the achievement of a competitive marketplace, the gains achieved through effective competition would greatly assist in the resolution of socio-economic ills. Effective competition by no means will achieve these goals on its own, but the evidence appears to point to the fact that the prioritisation of the achievement of effective competition in merger regulation will provide a medium, although only indirectly, through which social upliftment may be achieved. However, as observed by Elzinga, the inclusion of these alien public interest goals in merger regulation appears to do little else other than take competition law further away from its intended goal.[1260]

There is a further concern that the inclusion of public interest concerns in merger regulation can undermine the integrity of the regulatory process. The reason for this, according to the OECD, is that by allowing these concerns to infiltrate the regulatory process, other public bodies may be empowered to override the decisions of competition regulatory authorities.[1261] This exposes merger regulation to the risk of political interference. The potential then exists that merger regulation can be manipulated not for the betterment of competition but rather as a means of achieving other political goals falling outside the scope of competition policy. Even if the evaluation of public interest concerns in merger regulation is vested in a single regulatory authority, the question then arises as to how these often-conflicting interests are to be weighed against one another and when should pure competition goals give way to public interest concerns?

[1259] BAIC "Public Interest Considerations in Merger Control" (June 2016) at 4. The BAIC relies on the views of several academics including Elzinga "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts" (1977) *University of Pennsylvania Law Review* 1191, Brodley "The Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress" (1987) *University of New York Law Review* 1020, Baxter "Responding to the Reaction: The Draftsman's View" (1983) *California Law Review* 618, as well as the Australian National Competition Policy Review of 1993.

[1260] Elzinga "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts" (1977) *University of Pennsylvania Law Review* 1191 at 1200.

[1261] OECD "Public Interest Considerations in Merger Control", OECD Working Party No.3 on Co-Operation and Enforcement, June 14-15, 2015, DAF/COMP/WP3/(2016) 3 at 5.

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It can be argued that the previous construction of public interest concerns within the South African Act has not totally undermined the regulatory process, but it certainly has complicated the process. Be that as it may, it appears clear that the inclusion of public interest concerns will remain a contentious issue in merger regulation for some time to come.

2. Competition law and socio-economic development

Looking at the previous discussions in this thesis, it has been pointed out several times that the Competition Act was enacted not only for the sake of ensuring effective competition within the South African market, but also as a tool through which various political goals could be achieved. Government has also made no secret of the fact that it envisions the Act as a key tool for achieving its various industrial policy goals.[1262] It appears that there is a growing trend in competition circles that competition law should be seen as an important tool for the achievement of certain socio-economic goals.[1263] Socio-economic goals however often differ quite substantially from public interest goals in that they are often much wider in their scope and include aspects such as housing, social justice, education and access to clean water. Kukovec argues that the growing inequality in the US and the rest of the world has necessitated a paradigm shift in competition regulation to better allow it to assist in alleviating inequality.[1264]

The argument against the possession of market power, especially in the South African context, is that because it tends to increase the return for shareholders, it will inevitably contribute towards widening inequality amongst consumers. This argument then favours greater intervention in markets to redress the damage caused by the possession of excessive market power.[1265] Kukovec however rejects this argument on the basis that there is no certainty that the exercise of market power can simply be assumed as directing benefit away from the poor in favour of the rich. Furthermore, adopting policies that are aimed at protecting the so-called "*weaker party*" cannot in itself ensure upliftment of those

[1262] See Chapter 3 and Chapter 7.
[1263] See Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (2012) at 338 and Whish & Bailey, *Competition Law* (2021) at 21.
[1264] Kukovec "Antitrust and Inequality – Time for a Paradigm Shift" available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/10/CPI-Kukovec.pdf (last accessed- 14/10/18) at 1.
[1265] See Baker & Salop, "Antitrust, Competition Policy and Inequality", (2015) *Georgia Law Journal* 1 at 1.

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who find themselves "*in structurally underprivileged positions in society*".[1266] This argument is also supported by Hovenkamp who argues that competition law is not an effective method of transferring wealth away from the rich to the poor or from larger firms to smaller firms.[1267] Crane also argues that the enforcement of competition laws can only contribute to resolving structural inequality in markets through the economic effects that will be enjoyed through eliminating deadweight losses caused by monopoly pricing and thereby growing social welfare - which in turn will assist in preventing the redistribution of welfare away from consumers and towards producers.[1268]

Needless to say, as pointed out by Fox, the growing trend among developing nations is to perceive competition law as a means of achieving allocative efficiency while also contributing towards the development of smaller market participants.[1269] As we have seen, South Africa is certainly no different in its approach. The point of divergence however is that the South African Competition Act is distinctly tailored towards developing small and medium sized businesses, specifically owned by those defined as historically disadvantaged, and thereby aimed at breaking up established white monopolies. As Fox observes, "*the South African competition law applies a limited measure of affirmative action*".[1270] This is especially true of the inclusion of the provisions which allow companies owned by historically disadvantaged individuals to apply to be exempt from the application of the provisions of the Act. These provisions clearly serve a political objective far outside of the scope of ordinary competition law. It also points to the willingness of Government to allow potential competitive abuses for the sake of advancing its own transformative goals.[1271]

Fox however is quick to point out that the Act in itself cannot be expected to drastically change the composition of ownership within the market and that the promotion of competition solely on a firm's ability to compete and aid efficiency in itself will prove a

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[1266] Kukovec, "Taking Change Seriously; The Discourse of Justice and the Reproduction of the Status Quo" in Kochenov, de Bùrca and Williams *Europe's Justice Deficit?* (2015) at 326.
[1267] Areeda & Hovenkamp *Antitrust Law* 2001 at 100.
[1268] See Crane, "Antitrust and Wealth Inequality" (2016) *Cornell Law Review* 1171 at 1174.
[1269] Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" (2000) *New York Law Review* 579 at 586.
[1270] Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" at 587.
[1271] Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" at 587.

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more powerful empowerment tool.[1272] Elzinga, while acknowledging that the political goals may well not seriously conflict with pure competition goals in all circumstances, points out that *"the pursuit of efficiency goals through antitrust enforcement is consistent with the objective of equitable distribution of income. This is not to say that antitrust policy alone is a sufficient redistributive tool".*[1273] The fact remains that competition law is one small but significant piece of a much larger policy puzzle.

As pointed out, Reekie criticised the political nature of the Act when it was first enacted and argued that competition law is not the appropriate area in which to achieve goals such as equality and international competitiveness.[1274] Smit, recognising Reekie's argument, states that effective competition regulation through which market concentrations and anti-competitive conduct can be removed from markets, will itself go a long way towards achieving the various goals listed in the Act.[1275] Smit also looks at policy instruments such as Broad Based Black Economic Empowerment[1276] which, instead of opening the market up to greater participation by historically disadvantaged individuals, has rather led to a transfer of ownership away from white individuals to a small group of black elite.[1277] It appears as though the Act is being used as a tool for advancing these political aspirations with a growing number of mergers and acquisitions being required to contain a BEE component in order to avoid having approvals unduly delayed.[1278]

Coupled together with the sanctions discussed in the bread and construction industries as well as the various public interest concerns that Government has sought to have imposed in the *Massmart* and *SAB* mergers, a trend begins to emerge in which Government appears to be increasingly resorting to using competition law as a means for accomplishing the goals of other policy instruments, more specifically affirmative action and a redistribution of wealth, where these other instruments appear to have failed

[1272] Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" at 588.
[1273] Elzinga "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts" (1977) at 1195 and 1213.
[1274] Reekie "The Competition Act, 1998 An Economic Perspective" at 265.
[1275] Smit "The Rationale for Competition Policy: A South African Perspective" at 16.
[1276] See Chapter 3 at 3.1.
[1277] Smit "The Rationale for Competition Policy: A South African Perspective" at 17.
[1278] See The Competition Commission *Competition News*, the Official Newsletter of the Competition Commission, Sixteenth Ed. (2004a) available at http://www.compcom.co.za/wp-content/uploads/2014/09/March-04-Newsletter.pdf (last accessed on 09/04/2019).

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in achieving their intended purposes . The problem however appears to be that this is often done at the expense of achieving effective competition within the market.

Another interesting point to consider is that the achievement of an internationally competitive market requires that goods manufactured in South Africa must be able to compete with those of its international rivals. However, Smit points out that the various tariff protections that Government enacted to protect certain industries from cheap imports, such as the steel, textile and poultry industries, has in fact laid the foundation on which various anti-competitive market structures and concentrations in the South African economy have been built.[1279] The Act is thus ill-suited to creating markets that can compete on the international stage. While competition will have a part to play, it is submitted that this task remains solely within the scope of the larger industrial policy.

While the politically orientated goals of the Act generally only play a minor role in the evaluation of allegations of prohibited conduct, despite some arguing for these goals to play a greater role[1280], they certainly play a central role in merger regulation. This is not to say that the Commission and Tribunal should turn a blind eye to these goals in their assessment of allegations of anti-competitive conduct. The low threshold for the establishment of dominance[1281] has clearly been influenced by these political goals while the various sanctions that the Commission has sought to be imposed when allegations of prohibited conduct have been proved, scream of political motivations often falling far outside the realm of competition law.[1282] There is little disputing the notion that competition law plays an important role in both industrial policy and overall economic development, both in South Africa and internationally. The real debate however revolves around competition law's ability to address various social ills in society on its own. It does seem that the vast majority of authors are staunchly opposed to the ability of competition law to adequately address these issues that fall outside the scope of traditional competition policy.

[1279] See Smit "The Rationale for Competition Policy: A South African Perspective" at 17.
[1280](Author unknown) "The Incorporation of the Public Interest Test in the Assessment of Prohibited Conduct – A Juggling Act", *The Competition Commission* available at http://www.compcom.co.za/wp-content/uploads/2014/09/The-incorporation-of-the-public-interest-test-in-the-assessment-of-prohibited-conduct-a-juggling-act.pdf (date of last access 17/10/2018) at 13.
[1281] See Chapter 5 at par 3.3.
[1282] See Chapter 4 and par 4 and 5.

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The Tribunal certainly to some extent appears to agree with this position. In *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* discussed in paragraph 2 above, the Tribunal was particularly opposed to the Commission's attempts to interfere in a merger - given how the merger might have affected the standing of the previously disadvantaged shareholders of the acquired firm within the merged entity. The various conditions that the Commission sought to have imposed on the merger were largely based on securing the spread of ownership of previously disadvantaged groups within the relevant market while *not* taking into account the fact that the merger presented these historically disadvantaged shareholders with substantial value and provided them with a better footing to compete in the retail fuel industry.[1283] The Tribunal also took note of Shell's various empowerment initiatives aimed at historically disadvantaged individuals and expressed its doubts on the Act's ability to achieve these goals.[1284] Ultimately, the Tribunal held that the public interest goals of the Act were at best "*secondary to other statutory and regulatory instruments*" which have been specifically designed and enacted for the purposes of achieving these goals.[1285] This view was shared too by the CAC in *Massmart* where it held that "*The fact that conditions were imposed by the Tribunal, no matter the criticism, of its reasoning, is reflective of this concern, manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation*".[1286]

The problem however remains in the fact that pure competition goals and political goals are at opposite ends of the regulatory spectrum. Pure competition goals are often capable of being quantified and measured in economic terms. Political goals on the other hand, are often abstract and not capable of being measured in such terms. This complicates the process of weighing up efficiency goals with competing political goals as their respective data sets may prove irreconcilable. As Baxter states, "*because it may be difficult to convert non-economic benefits [derived through the promotion and achievement of political goals] into economic terms, it is impossible to compare those benefits to the economic costs that must be incurred to achieve them.*"[1287] Areeda and Hovenkamp go even further to state that *"[A]rguably, competition law is neither the ideal*

[1283] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 57.
[1284] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 54.
[1285] *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* at par 58.
[1286] *The CAC's Decision* at par 154.
[1287] See Baxter, "Responding to the reaction: the draftsman's view" at 621.

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nor the appropriate nor the effective instrument for achievement of social, political and other non-economic objectives. As commented, 'antitrust was not intended to rule the world, nor is it well suited for that task' ".[1288] Hovenkamp argues further that competition law is not an exercise of morality but rather a defensible intervention in markets in circumstances where it is deemed economically justifiable to do so.[1289]

The overall theme remains that competition law is wholly unsuited to the achievement of political goals. Crampton and Facey point out that competition law is particularly ill-suited to achieving the goals of greater employment, the preservation of small to medium sized businesses and the promotion of "*vaguely defined international competiveness*".[1290] Pitofsky takes the view that "*inefficient small business will suffer losses regardless of how the antitrust laws are interpreted, and the income redistribution that can be achieved through antitrust channels is trivial.*"[1291] Green however presents an argument that certainly rings true of recent developments in South Africa with the enactment of the 2018 Competition Amendment Act. In particular Green argues that the inclusion of various vague political goals in competition policy has the potential of making competition law susceptible to "*misuse or capture by interest groups that possess political power*".[1292] In this way, the inclusion of political goals in competition law allows these policy instruments to be abused for the promotion of specific private interests rather than the larger public interest.[1293]

Recent developments in South Africa and the provisions of the Amendment Act discussed in both this chapter and the previous chapter certainly paint the picture for the Act to potentially be used to such lengths. The obvious counter to such a situation would be to ensure that competition authorities enjoy sufficient independence to guarantee that they can effectively carry out their mandate free from political interference. The

[1288] Areeda & Hovenkamp at 96.
[1289]Hovenkamp, *The Antitrust Enterprise: Principle and Execution* (2005) at 10.
[1290] Crampton & Facey, "Revisiting regulation and deregulation through the lens of competition policy", (2002) *World Competition* 25 at 30. See also: Organisation for Economic Co-Operation & Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition "The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency" (2003) available at: http://www.oecd.org/dataoecd/58/55/2485613.pdf: (last accessed 09/09/2018 at 09h00) at 4.
[1291] Pitofsky, "The political content of antitrust", (1979) *University of Pennsylvania. Law Review* 1051, at 1056.
[1292] Green "Integration of Non-Efficiency Objectives in Competition Regulation" at 103.
[1293] Ibid.

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Commission has however now been faced with the situation that the promotion and protection of the spread of ownership amongst previously disadvantaged individuals has been placed at the forefront of the amendments contained in the Amendment Act. How the Commission is to balance its pure competition goals with this particularised empowerment goal remains unclear. The unfortunate reality however remains that where the will to use legislative instruments for attainment of private interests exists, policy weaknesses will always remain subject to potential exploitation for the achievement of these goals.

A final point to consider is that the Commission has also failed to provide any categorical evidence which shows that its interventions in competition regulation on political grounds have yielded tangible socio-economic results. While the studies previously conducted by the Commission (which have been discussed earlier in this thesis) point to some positive effects,[1294] the Commission would do well to undertake an in-depth analysis on whether the goals envisaged by these remedies have yielded the desired results. The Commission would also do well to determine whether these interventions have had tangible positive effects on competition in the relevant markets. It is also interesting to note that despite all these arguments against competition law's ability to address these various social-economic issues, the 2018 Amendment Act, rather than addressing these deficiencies in the Act, appears intent on taking competition regulation further down the wrong road.

[1294] See Mandiriza, Sithebe & Viljoen "The Impact of the Agro-Processing Competitiveness Fund in Facilitating Entry into selected Agro-Processing Sectors" at 5 - 6 and Mandiriza, Sithebe & Viljoen "An Ex-Post Review of the Wal-mart/Massmart Merger" at 13.

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Chapter 9 – Conclusion and Recommendations

1. Has the Competition Act Achieved Effective Competition Regulation?

The study undertaken in this thesis has highlighted how South African competition regulation, through the various goals contained in the Act, is increasingly being viewed as an instrument through which effective competition as well as various other socio-economic and political goals can be achieved. The overriding theme that has emerged in this thesis is that the attainment and maintenance of effective competition in the South African market is being unduly hampered by increasing attempts to use the provisions of the Competition Act to achieve Government's political goals which, it has been submitted, can be better achieved through policy instruments designed specifically to address these particular goals.

The empowerment of those discriminated against by the apartheid regime was, and has remained, a primary concern of Government post-1994. Affirmative action has been placed at the centre of competition regulation through its specific inclusion in the goals listed in section 2 of the Act as well as through the exemption provisions contained in section 10.[1295] The problem that has arisen is that it appears that Government and the Commission share the view that the Act should be used as a mechanism through which specific competitors are to be protected at the expense of the promotion and protection of competition itself. This belief however, is in stark contrast to the settled position that competition law is not intended to protect competitors but to rather protect competition within the market.[1296] While this has been highlighted on numerous occasions in the previous chapters, the decision of the US Supreme Court in *Spectrum Sports, Inc. v. McQuillan*[1297] clearly underlines this point:

"The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[1298]

[1295] See previous discussion in Chapter 2 at par 3.1 and Chapter 8 at par 1.3.
[1296] See Chapter 5 at par 4.1 and *Nationwide Poles CC v Sasol Oil (Pty) Ltd* 72/CR/Dec03.
[1297] 506 U.S. 447 (1993).
[1298] *Spectrum Sports, Inc. v. McQuillan* at 458.

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It cannot be said that the Competition Act has not contributed to better achieving effective competition within the South African market. The provisions of the Act prohibiting horizontal restrictive practices have been instrumental in rooting out collusion in various industries and in some cases, industries that serve the poorest segments of the economy.[1299] In the case of abuse of dominance, although there have been few successes in the prosecutions of such allegations, such failures have not been due to any flaw in the Act. Rather, the failures in this regard have been due to the fact that both the Commission and the complainants have failed to prove any anti-competitive effects stemming from the alleged conduct.[1300] If anything, the Act has saved firms accused of abusive conduct from unfair prosecution.

Merger regulation on the other hand appears to be a bit of a mixed bag. It is accepted that the public interest concerns listed in the Act must be merger specific in order to find application in merger proceedings.[1301] Nevertheless, public interest concerns have unduly complicated and delayed the approval of various mergers in circumstances where public interest concerns have not been relevant to merger in question.[1302] Despite public interest concerns providing Government and labour with a podium on which to grandstand during merger proceedings, the Tribunal and the CAC have ensured that these concerns find no application in merger proceedings where they are not substantial, not strictly merger specific, and fall outside of the scope of the public interest concerns listed in the Act.[1303]

Despite the Act's positive contributions to the attainment of effective competition in the South African market, it is submitted that assigning competition regulation a dual purpose as contained in the Act is proving to be detrimental to the attainment of allocative efficiency.[1304] However, it should be noted that the argument could be made that the divergence in decisions between the Commission, Tribunal and CAC point towards a system that ensures a somewhat focused goal of competition regulation. Nevertheless, competition authorities remain faced with the dual task of achieving allocative efficiency

[1299] For example, the market for bread and wheat products as discussed in Chapter 4 at par 4.1.
[1300] See the discussions in Chapter 5.
[1301] See the discussions in Chapter 6 at par 5.
[1302] See the Massmart and SAB mergers as discussed in Chapter at pars 5.2 and 5.3.
[1303] See each of the mergers discussed in Chapter 5 and Chapter 8.
[1304] See the discussions in Chapter 8.

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while trying to simultaneously achieve various political goals of a socio-economic nature which are alien to traditional competition law. History has thus far proven this to be an extremely difficult, if not an impossible, task. Rather than understanding how this dual purpose of the Act is needlessly complicating the attainment of effective competition and also taking into account the wide array of international jurisprudence on this issue,[1305] the Government has used the 2018 Amendment Act as a means of further protecting small and medium sized firms and those owned and controlled by historically disadvantaged persons, whether they be competitive or not, instead of using the said Amendment Act to strengthen the Competition Act's ability to achieve effective competition. It is submitted that there are however several amendments that could actually be made to the Act which will counteract the potential negative effects on competition that the Act's substantial focus on attainment of political goals may have. These recommendations are aimed at strengthening the Act's ability to achieve effective competition regulation through prioritising the attainment of allocative efficiency and consumer welfare. Despite South Africa's many socio-economic ills, it is submitted that the Act's role in addressing these difficulties should be strictly indirect through the attainment and maintenance of a competitive market space.

2. Achieving Effective Competition Law: Proposed Solutions

2.1. Horizontal Restrictive Practices

As discussed at length in this thesis, there little to no opposition to the elimination of collusion between competitors.[1306] However, and for purposes of this study, the focus will now be placed on the remedies currently provided for in the Act that be imposed by the Tribunal where collusion has shown to occurred.

2.1.1. The Problem with Administrative Penalties

The primary purpose of administrative penalties in competition regulation is to create a credible threat of punishment so as to deter firms which seek to breach a particular country's competition laws from engaging in such conduct. Deterrence is accomplished in two ways: firstly, by deterring a firm that that has been found guilty of breaching

[1305] The various discussions contained in Chapter 8.
[1306] See Chapter 4 and Chapter 8.

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competition rules from engaging in similar conduct in the future and secondly, by deterring other firms from engaging in similar conduct. To achieve this goal of deterrence, Wils indicates that the perception needs to be that the costs to a firm occasioned by these administrative penalties should generally outweigh the benefit derived by such firm through engaging in anti-competitive conduct.[1307] There are however limits to the extent of fines that competition regulators can impose against offending firms and there are generally a variety of factors that must be taken into account when determining appropriate penalties.[1308]

Firstly, a firm's ability to pay must be borne in mind.[1309] Wils argues that it would serve little purpose to bankrupt a firm and forcing its foreclosure simply for breaching the competition rules of a particular jurisdiction. Authorities should be particularly mindful on how administrative fines will affect smaller firms within the market and should endeavour to avoid adversely affecting the current structure of the market. Secondly, authorities must consider the socio-economic effect penalties may have. An excessive fine imposed on a firm may have substantial consequences throughout the entire value chain and may even result in the additional costs occasioned by the fine being passed on to consumers. Lastly, authorities must ensure that penalties are proportional and reflect the doctrine of equal treatment.[1310]

There is however a growing debate within competition circles on whether administrative penalties actually serve as an effective deterrent against anti-competitive conduct, especially in light of the record value of administrative fines levied globally in recent times.[1311] In light of the extent of the collusion problem worldwide and its general nature as the most egregious form of anti-competitive conduct,[1312] it would certainly appear as though the mere threat of administrative penalties do not pose a sufficient enough deterrent to dissuade firms from engaging in such conduct.[1313] This debate has grown

[1307] See Wils "Optimal Antitrust Fines: Theory and Practice" (2016) *World Competition* 17 at 18.
[1308] See Wils "Optimal Antitrust Fines: Theory and Practice" at 18 – 22.
[1309] See section 59(3) of the Act.
[1310] Wils "Optimal Antitrust Fines: Theory and Practice" at 20.
[1311] See Bonakele & Mncube as well as Connor & Lande "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines", 80 *Tulane Law Review* (2005) 513 at 514.
[1312] See the discussions at Chapter 4 and Chapter 8 at paragraph 1.1.
[1313] See Ratz *Competition Law Damages and their Quantification in South African Law* at 30.

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ever wider to also question the potential effect that these administrative penalties may have on consumers as well as on the firm upon which they are imposed.

2.1.1.1. The Potential Effects on Consumers

The argument goes that the cost of the fine imposed on the particular firm will in all likelihood be passed through to consumers in the form of higher prices. At first glance, this argument would appear fairly logical. A firm would want to recoup the substantial loss suffered as a result of having to pay an administrative penalty and the easiest solution available to the firm would be to increase its prices. Aproske and Goga however argue that the reality of the economics of such an increase in price would be disastrous for the firm in question.[1314] The reason being that the administrative penalty constitutes a "sunk cost"[1315] for the firm in question which will not affect the firm's marginal cost and marginal revenue.[1316] Should the firm raise its prices above the competitive price level, that firm will price itself out of the market and would no longer be able to compete with its rivals. A firm's profitability, in Aproske and Goga's view, will remain solely dependent on the business strategies and decisions taken by that firm and will remain largely unaffected by the imposition of an administrative fine.[1317] It follows that the imposition of administrative fines would have little to no effect on consumers because it would be unlikely, for the reasons set out above, that those costs are then passed onto consumers in the form of higher prices.

2.1.1.2. The Potential Effect on the Firm in Question

Aproskie and Goga remark that there are two potential effects that an administrative penalty may have on the firm in question namely: the firm could be forced to exit the market altogether or, the firm's finances could be impacted to such an extent that its capital expenditure decisions would be affected.[1318] European authorities have established guidelines to the extent that a firm can only succeed in proving that the

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[1314] Aproskie & Goga "Administrative Penalties – Impact and Alternatives", Fourth Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy, 25 August 2010, available at http://www.compcom.co.za/wp-content/uploads/2014/09/Aproskie-and-Goga-Administrative-Penalties-Impact-and-Alternatives.pdf (last accessed on 16/01/2019) at 2.
[1315] See Mankiw *Principles of Microeconomics* (5th ed.) (2009) at 296–297 where Sunk is defined as an expense already incurred by a firm that it would not be able to recover.
[1316] Aproskie & Goga "Administrative Penalties – Impact and Alternatives", at 2.
[1317] Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 2.
[1318] Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 3.

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penalty will force it to exit from the market, if that firm can prove an immediate risk of bankruptcy and that its bankruptcy would have a negative effect on employment as well as on the structure of the market.[1319] In these cases however, a firm will not be exempt from sanctions but the European competition authorities will consider reducing the value of an administrative penalty. The potential effect that a firm no longer being able to carry out its planned expenditure, may have on competition or consumer welfare will be a question dependent on prevailing circumstances of the market in question. This will obviously always be a question of fact and the onus will rest on the firm in question to prove any negative effects occasioned by the penalty.

2.1.2. A Price Reduction Commitment

The belief has long been that because administrative penalties are paid into the public purse, these funds will undoubtedly be used for the public benefit and in this way will indirectly compensate consumers for the harm caused by anti-competitive conduct.[1320] There now appears to be support for the idea that a price reduction by a firm would be a more appropriate remedy for consumers rather than the payment of administrative penalties by the firm itself.[1321] Aproskie and Goga however argue that imposing a price reduction on a firm found to have contravened the Act may have several unintended consequences for both consumers and competitors.[1322]

They argue that where a firm is forced to reduce its price below the competitive level, competitors may be prejudiced for three reasons.[1323] Firstly, firms will be forced to match the reduced price imposed on the guilty firm which may have the consequence of subjecting them to the same penalty in circumstances where they may not have been party to collusive conduct or cooperated with the Commission in terms of its leniency programme. Secondly, the penalty imposed on a firm may become excessive and disproportionate in circumstances where the price reduction does not directly correspond with the level of profitability derived through the anti-competitive conduct. Lastly, a price

[1319] See "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003", *Official Journal of the European Communities*, 2006/C 210/02. Also see the decision of *Copper Plumbing Tubes,* Case COMP/E-1/38.069.
[1320] Wils "Optimal Antitrust Fines: Theory and Practice" at 11.
[1321] See Bonakele & L. Mncube and Polinsky & Rubinfeld "A Note on Optimal Public Enforcement with Settlements and Litigation Costs" (1986) NBER Working Papers 2114. Also see Lande "How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines, 80 *Tulane Law Review* (2005) 513.
[1322] Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 4.
[1323] Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 4.

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reduction may soften the market to such an extent that smaller competitors can no longer compete and larger producers may find themselves in violation of the Act for predatory pricing.[1324] Similarly, consumers may not enjoy the full benefit of price reductions in situations where a firm supplies its products to its own downstream retail operations who only then service end level consumers or in situations where that firm supplies industrial producers who use its products as inputs in the production of their own products.[1325] There obviously is no guarantee in these situations that these price reductions will in fact be passed on to consumers or that, if they are passed on to consumers, t it will be to the extent contemplated by the competition authorities.

2.1.3. A Combination Approach

One cannot help but agree with the arguments by Aproskie and Goga that it is highly unlikely that administrative fines will lead to an increase in prices for consumers or potentially lead to the foreclosure of the firm on whom the penalty has been imposed. An increase in price will in all likelihood lead to a situation where consumers begin to move away from the products offered by that firm in favour of a competitor's products.[1326] As pointed out in Chapter 6[1327], administrative penalties are also currently limited by section 59 of the Competition Act to 10% of a firm's turnover in South Africa or exports from South Africa in that firm's preceding financial year with an upper limit of 25% for repeat offenders. It would be highly unlikely that a firm that has benefited from excessive profits will suddenly be rendered insolvent by the imposition of penalty equal to 10% of its turnover. The purpose of administrative fines in terms of the Act have clearly been developed with the aim disgorging some of a firm's illicit profits without removing it from the market altogether.[1328] However, increasing administrative fines to 25% as envisaged in section 59(2A) the 2018 Amendment Act may pose an increased risk of foreclosure for the firms in question. Whether fines to this extent will be imposed in practice and what their effects will be remains to be seen but such a large fine certainly does not bode well for a firm's profitability and sustainability.

[1324] See Chapter 2 at par 3.2.
[1325] See Aproskie & Goga "Administrative Penalties – Impact and Alternatives" at 12.
[1326] See the discussions at Chapter 5 at par 3.2.1.
[1327] At par 3.
[1328] See Ginsburg & Wright "Antitrust Sanctions" (2010) *Competition Policy International* 3 at 5 – 6.

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On the issue of a price reduction commitment, the writer must however disagree with Aproskie and Goga. There are several reasons for this: firstly, they assume that a price reduction would set prices below the competitive level. There is nothing to support the assumption of the Tribunal subjecting a firm to a reduction in price that is below the competitive level, which would be in violation of the Act in itself. There is even less to support the idea that a firm would agree to consent orders that would subject it to such a detrimental penalty. A price reduction commitment would need to be referenced against some level of what the competitive price for a particular product should be based on; some sort of determination with reference to the relevant factors on what a firm's true costs of production are, measured against those of its competitors, together with the level of profitability derived through excessive pricing.[1329] Secondly, it is difficult to argue against the notion that a price reduction will not always be an appropriate remedy where the firm concerned does not produce products intended for end level consumers.

But, it precisely for these reasons that a price reduction should not be viewed as a "fit-all" remedy applicable in all instances of collusion. Instead, such remedy should be reserved for particular circumstances where it will clearly result in a direct benefit for consumers. The construction industry cartel is a prime example of a situation where a price reduction commitment would have little benefit for consumers in light of the fact that the majority of the firms concerned do not deal with ordinary consumers. In the same breath, the bread cartel is a prime example of the perfect situation where a price reduction would be the ideal remedy.[1330] In the US, collusive and abusive conduct often result in civil litigation in terms of which the parties affected by the conduct attempt to recoup their losses from the firms that engaged in such conduct.[1331]

However, in South Africa and many other jurisdictions, civil litigation for anti-competitive conduct is extremely rare.[1332] The Act instead "apparently" seeks to redress consumer

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[1329] See the previous discussions in Chapter 4 at par 5.1.1.
[1330] See the previous discussions in Chapter 2 at par 4.1.
[1331] Bonakele & Mncube at 9 and see also Ratz *Competition Law Damages and their Quantification in South African Law* at 32.
[1332] There have only been three instances of civil litigation being instituted against a firm for breaching the Act. The first matter was instituted by Nationwide Airlines against SAA for its abusive conduct that had the effect of foreclosing it from the market. The matter however settled very early on. The second case was that *Comair Limited v South African Airways (Pty) Ltd* (2017) All SA 78 (GJ), where Comair was successfully awarded R1.16 billion in compensation for SAA's abusive conduct. The last matter has been instituted by the City of Cape Town against WHBO for its involvement in the construction industry cartel

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harm indirectly through the process of subjecting offending firms to administrative penalties. Section 59(4) states that all administrative fines paid in terms of the Act are to be paid directly into the National Revenue Fund.[1333] It is submitted that the consequence of the payment of these penalties into the National Revenue Fund is that they will then form part of the *fiscus* and in theory this will allow government to appropriate these funds to be used to the advantage of the poor and those affected by the anti-competitive conduct.

There are however two serious problems with this approach especially from a South African perspective. First of all, one would need to assume that these funds would in fact be used to the advantage of those affected by the anti-competitive conduct. This however is far from what happens in reality. The National Treasury derives and appropriates funds for the national budget from the National Revenue Fund which means those funds will be used for *whatever* purpose the government deems appropriate for the furtherment of their particular policy goals.[1334] This is also compounded by the fact that the *fiscus* has been under severe pressure for several years now,[1335] which obviously means that any additional funds that find their way into the National Revenue Fund will first be used to fill these holes in the fiscus. There are also the numerous bailouts to various parastatals, specifically the recent bailout intended for Eskom, SAA and the State arms manufacturer Denel, the funds for which have also been appropriated from the National Revenue Fund.[1336]

The second problem is the high level of public sector corruption that exists in South Africa. It has been estimated that South Africa loses between 20-40% of its annual procurement

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particularly for the construction of the Greenpoint Stadium. Also see See Ratz "Competition Law Damages and their Quantification in South African Law" at 32 and section 65 of the Competition Act.

[1333] Section 213 of the Constitution states that all monies received by the State are to be paid directly into the National Revenue Fund and can only be withdrawn by an act of Parliament.

[1334] section 213 of the Constitution.

[1335] GDP growth been extremely low for several years now with public sector debt increasing from 27.8% of GDP in 2008 to a record high of 51.6% in 2016. This has further been compounded by the increased costs of servicing this debt, amounting to about R4 billion a year, occasioned by the recent down grades. See World Bank "South Africa Economic Update" (2018) available at http://pubdocs.worldbank.org/en/798731523331698204/South-Africa-Economic-Update-April-2018.pdf (last accessed 13/08/2019).

[1336] In terms of the Eskom Special Appropriation Bill [B16-2015] and Eskom Subordinated Loan Special Appropriation Amendment Bill [B17-2015], Eskom is slated to receive R26 billion in the 2019/2020 financial year and a further R33 billion in the 2020/2021 financial year. Is this in addition to the R23 billion pledged to Eskom over a three-year period in the 2019/2020 budget.

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budget to corruption each year.[1337] Although it is impossible to establish the true extent of corruption in South Africa, the perception has long been that corruption remains rife.[1338] Administrative penalties will have little effect in addressing the damage caused by anti-competitive conduct in a situation where it cannot even be guaranteed that the funds derived through administrative penalties will be actually used for a legitimate purpose.

Some may attempt to argue that the settlement agreements negotiated in both the bread and construction industry cartels can be seen as an attempt to avoid these pitfalls. There is however one problem with this argument. Most of the funds paid as administrative penalties in the bread and construction cartels have been used for the furtherance of the government's transformative agendas through the establishment of the Fund and the Trisano Trust.[1339] The aim of the Fund and Trisano Trust respectively, is to alter the structure of the market by attempting to subject these markets to increased competition from smaller black owned enterprises. The hope, it would appear, is that this increased competition will eventually lead to greater benefits for consumers. But it is submitted that this appears to be nothing more than an assumption based on little evidence which supports the theory.[1340] These firms will still need to employ business decisions that will enable them to be successful in their respective industries. Furthermore, these remedies appear solely intent on altering market structure with no appreciation for the potential effect that these remedies may have on consumer welfare. It does appear as though these remedies fall short of addressing harm to consumer welfare.

It is conceded that there appears to be no miracle remedy that can cure the effects of anti-competitive conduct in each and every instance. However, it is submitted that the possible solution could be to adopt a more flexible approach through the inclusion of additional remedies in the Act. This would entail allowing for imposition of a price reduction as an alternative to administrative penalties where appropriate to do so. For example, in instances where collusion or abuse of dominance directly affects end user consumers, a price reduction commitment will clearly be a better alternative to an

[1337] Munzhedzi, 'South African public sector procurement and corruption: Inseparable twins?'(2016) *Journal of Transport and Supply Chain Management* Art. 197.
[1338] In 2016 South Africa scored 45 on Transparency Internationals Global Corruption Perception Index, where 100 represents the least corrupt and 0 represents the most corrupt, a substantial drop from an all-time high of 56 in 1996. Available at https://www.transparency.org/en/cpi/2016/index/table (last accessed on 30/09/2020).
[1339] See previous discussions in Chapter 4 at par 5.
[1340] See the previous discussions in Chapter 7 at par 1.1.

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administrative fine. To implement this effectively and avoid detrimental price reductions, guidelines will need to be developed for the determination of a price that is not below the competitive pricing level and that limits the price reduction solely to the purpose of "compensating" consumers for the losses suffered as a consequence of excessive prices. Placing the burden on the guilty firm to provide evidence on its costs of production or placing a further burden on that firm to prove that its revenue does not exceed its average avoidable costs[1341] will certainly assist such an enquiry.[1342]

It would also be important to ensure that a price reduction would aid in stimulating competition within the industry but, it must be stressed that a price reduction should not be limited by the need to protect inefficient competitors from competition. In instances, such as the construction cartel, where collusion results in an added burden to the public purse, the possible development of a rebate by the firms guilty of such conduct in terms of which the affected government department, institution or municipality can recoup funds on future projects, could be a solution to redress the harm caused by such conduct. This would allow the relevant government institution to potentially reclaim the funds lost through collusion without the need of engaging in expensive and lengthy litigation and would enable them to use such funds for the better fulfilment of their departmental mandates.

Both of these potential remedies will certainly require further refinement that falls outside the scope of this thesis. But it would be difficult to argue with the fact that, properly formulated, these remedies provide a much more effective solution for undoing the harm caused to consumers by anti-competitive conduct. Streamlining the purpose of the Act, as will be recommended below, and its remedies will make it extremely difficult for government to use the Act as a means of attaining its own political goals that fall outside the scope of ordinary competition law. This will aid in limiting the scope of competition

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[1341] Average avoidable costs refer to the costs that a firm could have avoided by not engaging in a predatory strategy. See Organisation for Economic Co-operation and Development (OCED), Directorate for Financial and Economic Affairs Competition Committee– "Roundtable Discussion on Predatory Foreclosures", 21 September 2004 available at https://ec.europa.eu/competition/international/multilateral/2004_oct_predatory_foreclosure.pdf (last accessed on 18/11/2021).

[1342] See *Media 24 Proprietary Limited v Competition Commission of South Africa* (146/CAC/Sep16) at par 58.

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enforcement to enable the promotion of effective competition within the South African market through allocative efficiency and also the promotion of consumer welfare.

2.2. Further Amendments to the Competition Act

2.2.1. Abuse of dominance

2.2.1.1. Amendment of Section 7

To begin with, it is submitted that the manner in which dominance is established in the Competition Act should be amended. The purpose behind suggesting this amendment is to move the inquiry away from a structuralist approach and more towards one concerned with the possession of substantial market power. As was discussed at length in the previous chapters,[1343] where a firm's market share exceeds 45%, that firm is irrebuttably presumed to be dominant in the relevant market. It is widely accepted that extremely high market shares are indicative of dominance however, both the US and EU authorities have accepted that this assumption only applies where market shares are generally in excess of 60%.[1344] By international standards, the threshold for a finding of dominance set by the Act is significantly low. A more cynical observer may argue that this is by design to enable government to more easily target the firms it perceives as dominant in key industries and subject them to the consequences of breaching the Act.

The Explanatory Note prepared by the Department of Economic Development to the 2017 Amendment Bill provided some evidence for favouring such a low threshold given the fact that it states that several key industries are to be dominated by a single dominant firm with a market share between 50% and 65%.[1345] What is interesting to note though, is that several of the industries identified in the 2018 Amendment Bill are dominated by parastatals such as the energy sector where Eskom and PetroSA dominate the landscape; the transport sector previously dominated by SAA prior to it entering business rescue, Transnet and Metrorail; and the communication sector where Telkom remains

[1343] See Chapter 5 at par 3.1.3 and Chapter 8 at par 1.2.
[1344] See Chapter 5 at par 3 and *United States v United Shoe Machinery Corp* 110 F.Supp 295 (D.Mass 1953) and *Akzo v Commission* (1991) ECR I – 3359 at par 60. Interestingly enough, the ECJ was of the opinion that a market share between 40 and 50% would not be sufficient for a finding of dominance.
[1345] See the 2017 Amendment Bill, Table 1 at 10.

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the biggest player.[1346] Nevertheless, this low threshold simplifies the Commission's task and dispenses with the need to engage in a complicated and prolonged enquiry to establish whether the firm in question does in fact possess market power.

But, as the US and EU experience has shown, a high market share (60% in these cases as opposed to the 45% threshold of section 7) cannot alone be indicative of market power in all circumstances.[1347] Although the CAC never went as far as to pertinently state it, the *Nationwide Poles* matter can be seen as a reminder of the potential dangers associated with an approach that determines dominance on market share alone.[1348] We cannot however blind ourselves to the various structural problems faced in the South African market, especially when it pertains to those firms that have directly benefitted from the exclusionary laws of the past as well as from years of state assistance that shielded them from ordinary competition.

For this reason, it is submitted that the presumption of dominance should remain - however, the market share threshold to qualify for dominance should be significantly increased. The proposed amendment would therefore entail that a firm will be a dominant firm for purposes of the Act where its market share exceeds 60%. The remainder of section 7 can then be amended to indicate that where a firm's market share is between 60% and 45%, that firm will have the onus to prove that it in fact does not possess market power. Where a firm's market share is below 45% then the onus should be on the Commission to prove that the firm does indeed possess market power. This proposed amendment would also entail the insertion of a new sub-section to section 7 which would require the Tribunal and CAC, when assessing whether or not a firm does in fact possess market power, to specifically take into account a variety of factors including: the potential barriers to entry and expansion that exist in the particular market; the countervailing buying power of consumer; and various other structural factors that may exist in or be relevant to the market in question. This would be in accordance with international best practice.[1349]

[1346] Although Telkom is no longer a parastatal, the South Africa government remains the single biggest shareholder with a 40.5% stake. See https://www.marketscreener.com/quote/stock/TELKOM-SA-SOC-LIMITED-1413419/company/ (last accessed on 18/11/2021).
[1347] See Chapter 5 at par 3.1.
[1348] See the previous discussions in Chapter 5 at par 4.1.
[1349] See the previous discussions in Chapter 5 at par 3.

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In the South African market, the need for simplicity and certainty in the test for dominance is a must. However, it is widely accepted that market power will not always last forever and that a dominant firm can over time be challenged by smaller and newer entrants into the market, especially when the smaller competitor is more innovative or efficient than the incumbent dominant firm.[1350] The new test for dominance proposed in this thesis will take these circumstances into account and potentially minimise the risk of incorrect findings of dominance being made. It can also limit the potential for frivolous prosecutions of abuse of dominance which achieves nothing more than to waste time and resources. At the end of the day, the proposed test follows the original formula as set out in section 7 but creates more flexibility with the aim of arriving at more accurate results which can hopefully direct scarce resources to where they are needed most. In this way, the test for the establishment of dominance contained in the Act will be realigned and reprioritised to the attainment and maintenance of effective competition. Unfortunately, in its present form, section 7 allows the abuse dominance provisions of the Act to be used to target certain firms that, within the context of the Act's stated goals, creates the potential for these provisions to be used for the furtherance of a political agenda rather than achievement of effective competition within the markets concerned.

2.2.1.2. Amendment of Section 8

There appears to be a growing sentiment within competition circles that no conduct can be regarded as an abuse of dominance or as anti-competitive per se and that much of the conduct that has previously been regarded as an abuse of dominance can in fact often be regarded as merely ordinary competitive conduct.[1351] Much has also been written on how the over-prosecution of these competitive acts as abuse of dominance may affect firms' willingness to engage in competitive acts for fear of prosecution.[1352] Section 8(1)(a), (b) and (d) of the Act seeks to prohibit various forms of conduct per se with section 8(1)(c) being a "catch all"-provision for any other forms of conduct that could be prohibited through the rule of reason approach.

[1350] See the LEAR Report at par 6.38.

[1351] See Hovenkamp "Post-Chicago Antitrust: A Review and Critique" (2001) at 269, Piraino (2007) at 347. Also see Piraino "A Proposed Antitrust Approach to Collaborations Among Competitors" (2001) *Iowa Law Review* 1137, Piraino "Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act" (1994) *Vanderbilt Law Review* 175, and, Piraino (1991) at 709.

[1352] See Lewis *Chilling Competition* at 12 as well as Buccirossi, Spangnolo & Vitale *The Cost of Inappropriate Interventions/Non Interventions under Article 82* at par 6.83 – 6.84.

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But given this growing sentiment that no conduct can be deemed an abuse of dominance per se, is it necessary for section 8 to prohibit so many forms of conduct and is it necessary for the 2018 Amendment Act to extend the list of prohibited practices?[1353] A potential solution could be to adopt an approach similar to the one laid down in the US in *California Dental*.[1354] According to this approach, anti-competitive conduct should be evaluated against a sliding scale. This entails that conduct must be evaluated against its likely effect on economic welfare only after which that conduct can presumed to either be legal or illegal. This allows the enquiry into abuses of dominance to be limited to the competitive effect of the conduct as well as its potential effect on consumer welfare.[1355] It is submitted that the entire section 8 could be amended to simply provide that a firm would be guilty of abusing if its dominant position within the market if its conduct has the *effect* of harming consumer welfare and/or foreclosing the market to its rivals. This would simplify the purpose of section 8 to the single goal of determining the substantive economic effect of the conduct in question.[1356]

A similar but less drastic amendment has previously been proposed in a working paper by Mackenzie who suggested that the previous section 8(d)[1357] be replaced with a more effects based provision in favour of the rule-based[1358] approach currently employed by section 8.[1359] Mackenzie's proposed amendment would entail the repealing of the old section 8(d) altogether as well as amending the wording of section the then 8(c) so that

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[1353] See the previous discussions in Chapter 7 at par 3.1.3.
[1354] See the previous discussions in Chapter 2 at par 7.
[1355] See Piraino "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century" at 351.
[1356] See Piraino "Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis" at 709.
[1357] The conduct listed in the previous section 8(d) included: requiring or inducing suppliers or customers not to deal with competitors; refusing to supply scarce goods to a competitor in circumstances where it would be economically feasible to do so; selling a product on condition that the purchaser buys a separate product unrelated to the object of a contract or forcing the purchaser to accept a condition unrelated to the object of a contract; predatory pricing; and the buying-up of scarce resources required by competitors.
[1358] See Crane *"Rules Versus Standards in Antitrust Adjudication"* (2007) *WASH. & LEE L. REV.* 49 at 55, the rule-based approach entails the establishment of predetermined set of rules in order to make a finding of dominance.
[1359] Mackenzie "Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision", *Centre for Competition Economics University of Johannesburg*, Working Paper 7/2012 available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/52d8ef10e4b0bd82f384cba8/1389948688828/REPLACING+SECTION+8%28D%29+OF+THE+SOUTH+AFRICAN+COMPETITION+ACT+WITH+AN+EFFECTS-BASED+EXCLUSIONARY+ABUSE+OF+DOMINANCE+PROVISI.pdf (last accessed on 24/10/2019).

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it no longer reads in the alternative to section 8(d).[1360] Mackenzie indicated at the time that his proposed amendment would also necessitate an amendment to section 59 that deals with administrative penalties due to the fact that in the Act's prior form, a first-time contravention of section 8(c) did not trigger an administrative penalty - but this has since been removed by the 2018 Amendment Act.[1361]

Mackenzie further argues that many of the perceived advantages of the rule-based approach enshrined in the previous section 8(d) are in fact impediments to effective competition regulation. More particularly, Mackenzie argued that the notion that some forms of abuse of dominance are more blameworthy than others does not hold weight as there are various forms of abusive conduct that exist that were not listed in section 8(d), more particularly, the exclusionary conduct of "margin squeeze" which has been recognised by the Constitutional Court and which has only recently been included by the 2018 Amendment Act.[1362] He continued by stating that old section 8(d) does not aid in simplifying the administrability of the Act in that referrals by and to the Commission often include allegations of breaches of various sub-sections of section 8, with these referrals often requiring amendment, which then exposes these allegations to a variety of technical defences by the dominant firms in question.[1363]

Lastly, Mackenzie argued that the construction of section 8(d) can be regarded as a by-product of international best practice due to the fact that it represents a static representation of international best practice at the time the provision was drafted, in this case back in the 1990's. The problem however is that the Act appears "frozen in time" and does not take into account international developments since its drafting.[1364] This can certainly be seen in the growing acceptance in both the US and EU that no form of

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[1360] Mackenzie "Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision*"*, at 13. This proposed section 8(c) would have read as follows: *"engage in an exclusionary act if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain."*
[1361] See Chapter 7 at par 3.1.2.
[1362] See See *Competition Commission of South Africa v Senwes Ltd*; 2012 (7) BCLR 667 (CC).and Mackenzie "Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision*"* at 14 – 15.
[1363] Mackenzie "Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision*"* at 16 – 18.
[1364] Mackenzie "Replacing Section 8(d) of the South African Competition Act with an "Effects-Based" Exclusionary Abuse of Dominance Provision*"* at 20 – 22.

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conduct should be regarded as abusive per se.[1365] The 2018 Amendment Act also clearly fails to take these developments into account and instead seems to favour the implementation of an even more rigid framework for the evaluation of abuse of dominance. In contrast to the arguments by Lewis[1366], Mackenzie argues that the rule-based approach adopted in the Competition Act creates a greater possibility for under-enforcement than a more effects-based approach would create, specifically in the case of South Africa.

The Amendment Act does appear to take into account the deficiencies of the previous section 8(d) as well as the difficulties presented by the previous section 8(c) through extending the list of abusive conduct listed in the new section 8(1)(d) as well the removal of the so-called "yellow card" for first time offenders of section 8(1)(c). However, simply expanding the list of prohibited practices will maintain the static nature of the Act and in all likelihood, not provide an effective solution to the under-enforcement of abusive conduct nor will it aid in rectifying the low levels of success in the prosecution of such matters. The Amendment Act also moves the goal posts in respect of abusive conduct in that the amendments appear to prioritise the protection of small and medium sized businesses, especially those owned by historically disadvantaged individuals, rather than the protection of competition itself.[1367] This shifts the purpose of the abuse of dominance provisions of the Act further away from the achievement of pure competition goals in favour of achieving the Act's political goals.

2.2.2. Proposed amendments regarding Merger Regulation and the role of Public Interest

Looking back at the BIAC and OECD's primary concerns on how the inclusion of public interest concerns may affect effective merger regulation, namely the chilling effect that uncertainty in merger regulation could have on future investment activity and the potential for political interference in merger regulation[1368], two measures are proposed to potentially alleviate this concern: firstly, the BAIC proposes that because public interest

[1365] Further evidence can be seen in the Act's definition of market power which is premised on an older definition used by European authorities. The term "market power" in the EU has since evolved to mean the ability to raise prices above the competitive level. See Chapter 5 at par 3.3.2.
[1366] See Lewis *Chilling Competition* at 12.
[1367] See Chapter 8 at par 3 in its entirety.
[1368] See the previous discussions in Chapter 8 at paragraph 1.5.2.

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is such a broad concept that will always be influenced by a variety of underlying historical, social, economic and political considerations, the public interest concerns that should be considered during merger regulation should be confined to a closed list of defined considerations.[1369] This will provide the parties to a merger with a degree of certainty on the public interest considerations that will be relevant during merger proceedings. The merging parties can then ensure that transactions are structured in such a manner that these considerations can be properly addressed and also ensure that the intended merger does not fall foul of these considerations.

Secondly, to avoid the potential of political interference in merger regulation, state involvement in the assessment of public interest concerns should be limited and instead, the consideration of same should vest in an independent regulatory authority.[1370] Rather than create a situation where two different regulatory processes are placed on a collision course with one another, a measure of this nature will ensure that competition concerns will remain at the heart of merger regulation while public interest concerns are still taken into account.

The BAIC specifically acknowledges the Act as a prime example of structuring public interest concerns in merger regulation in such a way that these two concerns are taken into account.[1371] As has been discussed at length, the evaluation of public interest concerns during merger regulation is strictly confined to the grounds listed in section 12A.[1372] It is trite that both the Commission and the Tribunal cannot deviate from this closed list and consider any other interests that may be argued as public interest concerns during merger regulation.[1373] This ensures a level of certainty because all parties are well informed of the specific public interest concerns that may be relevant to the particular merger.

The same can be said of the manner in which mergers are assessed. Merger regulation falls within the exclusive jurisdiction of both the Commission and Tribunal.[1374] Although the ultimate approval for large mergers rests with the Tribunal, the Commission is still

[1369] The BAIC's "Public Interest Considerations in Merger Control" (June 2016) at 6.
[1370] The BAIC's "Public Interest Considerations in Merger Control" (June 2016) at 8.
[1371] The BAIC's "Public Interest Considerations in Merger Control" (June 2016) at 6 – 7.
[1372] See the previous discussions in Chapter 6 at pars 4 & 5.
[1373] See *Anheuser-Busch InBev SA/NV & SABMiller plc* 211/LM/Jan16.
[1374] See the previous discussions in chapter 6 at pars 3 & 4.

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tasked with assessing the merger and providing its recommendations to the Tribunal on whether the merger should be approved, denied, or approved with conditions. In terms of the Act, both the Commission and Tribunal are independent regulatory authorities tasked with a very specific mandate.[1375] This, at least in theory, detaches them from political interference in the fulfilment of their respective mandates. From a public interest point of view, both the Tribunal and the Commission are the only regulatory authorities empowered to assess these issues and to balance public interest concerns with pure competition concerns in merger regulation.

It does appear as though Parliament was careful in developing the Act to avoid political interference in merger regulation while still creating a mechanism through which the Act could be used to address the many social ills resulting from South Africa's discriminatory past. But, from a practical point of view, it may be asked whether the Act has been successful in ensuring certainty and avoiding political interference while still being able to address public interest concerns in merger regulation? When looking back at the *Massmart* merger there does appear to be evidence that merger regulation is not safe from these potential pitfalls.[1376] When the Commission first considered the aforesaid merger, it recommended to the Tribunal that the merger be approved without any conditions. It was only after Government and the various trade unions got involved in the approval process that the Commission then resolved to change its recommendation to the merger only being approved subject to various public interest conditions.[1377] While the Commission stated that the reason for its change in recommendation was due to the fact that it did not previously consider the various public interest concerns raised by Government and organised labour, it does raise a degree of doubt on whether the Commission truly is immune to political influence. This is especially true given the fact that these various public interest concerns raised were found by the Tribunal not to be merger specific or substantial enough to warrant intervention in terms of the Act.[1378]

This too raises doubt on whether the Act can ensure certainty in merger regulation. *Massmart* was unique in that the merger presented no anti-competitive effects and, in many respects, would actually increase competition in the retail market. Even so, various

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[1375] See previous discussions in Chapter 3 at pars 3.4.1 & 3.4.2.
[1376] See Chapter 6 at par 5.2.
[1377] *Walmart Stores Inc & Massmart Holdings Limited* at par 25.
[1378] *Walmart Stores Inc & Massmart Holdings Limited* at par 66 – 70 & 99.

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concessions were agreed to by the merging parties to ensure that public interest concerns in terms section 12A were properly catered for. One would therefore assume that the merger's approval would have been a foregone conclusion. Instead, the merger was subjected to substantial opposition and its approval was challenged all the way to the CAC. This resistance stemmed directly as a consequence of the inclusion of public interest concerns in merger regulation. If the merging parties in a transaction of this nature can be subject to this level of opposition and uncertainty, it is clear that the inclusion of the public interest concerns listed in section 12A does bring with it a level of unpredictability in merger regulation. If anything, section 12A has provided certainty on one aspect, namely that organised labour will find some way to object to mergers on the basis of public interest, especially when foreign acquiring firms are involved.[1379]

The merger of *Shell South Africa (Pty) and Tepco Petroleum (Pty) Ltd* is another example of how the Commission may be influenced politically in carrying out its mandate. The Commission sough to use the merger as a mechanism by which it believed various empowerment goals could be achieved through the use of the Act. While the Commission sought to have various conditions imposed on the merger to advance this empowerment agenda, the Tribunal ultimately rejected the Commission's arguments on the basis that they fell outside of the jurisdiction of the Act.[1380]

The Amendment Act, rather than seeking to achieve greater certainty in merger regulation, appears instead to create potential for both greater political interference and for uncertainty in merger regulation.[1381] With public interest now being brought to the forefront of merger regulation and through the inclusion of an additional public interest concern, authorities may find it difficult to balance competition goals with public interest concerns. Furthermore, on a simple reading of the amendments, mergers will need to be affirmatively approved on both competition and public interest grounds before they can be finally approved. This will create a great degree of complexity in merger regulation and give rise to uncertainty as to what conditions firms would now be required to consent to in order for mergers to be approved.

[1379] See the previous discussions in Chapter 6 at par 5.2 & 5.3.
[1380] See the previous discussions in Chapter 8 at par 1.4.
[1381] See section 12A & 18A of the Amendment Act.

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The amendments are further undoubtedly motivated by larger political aspirations for what the Act should be seen capable of achieving. This can also be true of the proposed empowerment to enable the President to refuse a merger involving a foreign owned acquiring firm on certain national security grounds.[1382] As pointed out, the amendment follows from developments in various other jurisdictions such as Canada, Germany and Australia to name but a few.[1383] However, these are vastly different markets from the emerging South African market and what could be termed "national security interests" in these markets may not be comparable to more simple national security interests in South Africa. Additionally, as a developing nation, foreign direct investment plays a significant role in South Africa's economic development and the consequential social upliftment that should follow.[1384] Once the amendment is passed into effect, government should be careful to ensure that this amendment does not hamper or serve as a deterrent to future foreign direct investment in the market.

How then should public interest be dealt with? To suggest something as simple as removing public interest concerns from merger regulation would be reckless - especially given the historical background of the South African market. One possible solution could be to adopt a "net benefit" test such as that contained in the Investment Canada Act.[1385] This test requires that all potential benefits of the merger be weighed against the potential negative impact on certain public interest grounds. These grounds, much like those in the South African Competition Act, include: the effect that the investment will have on economic activity in Canada including employment, the extent to which Canadians will participate in management of the business, the effect the investment will have on industrial efficiency, the effect the investment will have on competition in the particular industry, the compatibility of the investment with larger industrial policy, and the effect the investment will have on Canadian firms' ability to compete in international markets.[1386] This test could be a feasible alternative to the present construction of section 12A of the South African Competition Act.

[1382] See section 18A of the Amendment Act.
[1383] See the previous discussions in Chapter 7 at par 3.2.
[1384] See Organisation for Economic Co-operation and Development (OECD) "Foreign Direct Investment for Development – Maximising Benefits, Minimising Costs" (2002) (available at https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf (last accessed on 13/08/2019) at 5.
[1385] See section 21 of the Investment Canada Act.
[1386] See section 20 of the Investment Canada Act.

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However, in practice it could prove fairly difficult to measure the effect of a merger on competition against the potential negative effects of the merger on public interest. History has so far proven that there appears to be a lack of a clear, objective methodology for balancing these opposing interests.[1387] Given the settled consensus that public interest concerns and competition goals are by their nature often juxtaposed, it will prove difficult to determine an objective standard against which these effects can be weighed against one another. The publishing of the Commission's *guidelines on public interest grounds* certainly will aid in determining to what extent public interest concerns should feature in a particular merger.[1388] However, the unique nature of the problem may render it incapable of being resolved through a single standard. Needless to say, the inclusion of public interest concerns in merger regulation has given political goals a platform from which to find relevance in merger regulation. While thus far, public interest concerns can only be said to have unduly delayed merger proceedings rather adversely affect same, the potential has now arisen through the 2018 Amendment Act for merger regulation to be yet another tool through which the Act is used for the furtherance of political agendas at the expense of the attainment and maintenance of effective competition.

2.2.3. Refocusing the aims of the Act to better redress the damage of the Past

The writing appears to be on the wall that competition law and competition policy as a whole, are ill-suited to achieving the political goals contained in the Act. But, would simply removing these goals from the Act provide a more certain policy framework? From a purist point of view, most certainly, however, it would be reckless to completely ignore these political goals especially given our discriminatory past and the market evils that it helped to create. Perhaps the solution lies not in omitting these goals altogether but rather in refocusing the present goals of the Act. In this regard, it is submitted that section 2 should be amended to the extent that the purpose of the Act is limited to simply promote and maintain effective competition within the Republic in order to promote efficiency and

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[1387]Morphet & Konstant *Heal the World…. Competition Law and Public Interest Issues*, The 5th Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa and Celebration of 10 years of the Competition Act and Competition Authorities available at https://www.google.com/search?q=L.+Morphet+%26+A.+Konstant+Heal+the+World%E2%80%A6.+Competition+Law+and+Public+Interest+Issues%2C&rlz=1C1CAFA_enZA634ZA634&oq=L.+Morphet+%26+A.+Konstant+Heal+the+World%E2%80%A6.+Competition+Law+and+Public+Interest+Issues%2C&aqs=chrome..69i57.413j0j9&sourceid=chrome&ie=UTF-8 (date of last access 06/01/2019).

[1388] See Chapter 6 at paragraph 7.

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adaptability within the economy, and to promote consumer welfare through providing consumers with competitive prices and product choices. A further subsection should be added in terms of which the Commission, Tribunal and CAC, when seeking to achieve the aforementioned goals, will be required to take into account various other relevant factors including: the ability of local firms to compete in international markets, the ability of small and medium sized entities ability to compete in the market, and the promotion of a greater spread of ownership especially amongst previously disadvantaged persons to the extent that these factors remain compatible with the overall objectives of the Act.

This proposal appropriately places pure competition goals at the forefront of competition regulation while also forcing competition authorities to take into account the various public policy considerations that underpin South African society. This should, in theory, simplify the mandate of competition authorities toward the attainment of allocative efficiency and the promotion of consumer welfare. However, in carrying out this mandate, authorities will still be obliged to take in account the wider public policy together with Government's economic policy and align their decisions, where practical, with these political goals. The primary goal that should be sought to be achieved through this proposal is to narrow the scope of the competition authorities' mandate by avoiding the potential for conflict and instead, remove the conflict between two different sets of goals that are by their nature incompatible with one another. In this way, political goals should only be sought to be achieved where they do not interfere with the primary goals of allocative efficiency and consumer welfare. This will ensure that the attainment of effective competition remains the single goal of competition regulation within South Africa.

Another proposal would be to include the promotion of innovation as a primary goal of the Act. As explained by Christensen, innovation usually takes two forms: evolutionary innovation which involves the dynamic process of constantly advancing technology; and revolutionary innovation which involves the introduction of new technologies that are often disruptive in their nature.[1389] In revolutionary innovation lies the potential catalyst through which the Act can be used a means to achieve widespread structural changes within the South African market. One need only look at the demise of global leviathans

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[1389] See Christensen *The Innovator's Dilemma: When Technologies Cause Great Firms to Fail* (1997) at xvii.

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such as Kodak, Blockbuster, Nokia and Blackberry[1390] where new revolutionary technologies made these enormous firms unable to effectively compete with the new innovative market entrants in an extremely short period of time.

It has been repeatedly indicated in this thesis that many large dominant firms in the South African market owe their position of strength to years of state support and/or policy insulation.[1391] Breaking down these structural barriers will always prove difficult especially when state owned enterprises are involved. There is evidence to suggest that the formation of new industries which directly compete with these existing industries will provide the best mechanism through which issues such as market concentration and the racial spread of ownership can be adequately addressed.[1392] The irony however is that government may well prove to be the biggest opponent to innovation. Take for example a state-owned entity such as Eskom.[1393] Eskom enjoys a legislated monopoly over the supply of electricity in South Africa. Together with this, the vast majority of its power is generated through coal fired power stations. When the need arose for additional capacity to be added to the grid, Eskom elected to commission two vastly expensive coal fired stations namely, Medupi and Kusile.[1394] The dire need for new capacity presented the perfect opportunity for greater participation of independent power producers in the national energy mix.

In addition to this, the need for cleaner, more renewable forms of energy necessitates a move away from such large-scale coal fired power stations. The argument against the wide scale use of renewable energy has been the perceived prohibitively high costs in

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[1390] Kodak was a firm that specialized in the film and camera market commanding a market share in excess of 70%, following the advent of the digital camera, a technology ironically invented by Kodak, Kodak soon found itself unable to compete in the market with the firm today being a mere shell of its former self. Blockbusters was global VHS and DVD rental change that too has found itself no longer able to compete as a consequence of the advent of online streaming and downloadable content. Nokia and Blackberry were both at some point in time the largest mobile phone producers in the world. However, following the advent of the "smart phone" popularized by Apple and Samsung, Nokia has been unsuccessful in breaking into this market with Blackberry almost disappearing from the market altogether. See Anthony "Kodak's Downfall Wasn't About Technology" *Harvard Business Review* (15 July 2016) available at https://hbr.org/2016/07/kodaks-downfall-wasnt-about-technology (date last accessed 16/04/2019).
[1391] See the previous discussions in Chapter 3 at par 2.1 and Chapter 4 at par 4.
[1392] See Christensen *The Innovator's Dilemma: When Technologies Cause Great Firms to Fail* (1997).
[1393] For a breakdown on who and what Eskom is see https://www.eskom.co.za/about-eskom/company-information/ (last accessed on 19/11/2021).
[1394] See Department of Public Enterprises "Strategic Important Developments: Eskom, PBMR and Transnet" May 2007, available at https://www.gov.za/sites/default/files/gcis_document/201409/strategically-important-development0.pdf (last accessed on 08/03/2022).

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comparison to fossil fuels. This argument, perhaps once true, now appears false in light of the fact that renewable energy sources such as wind and solar power are fast becoming much cheaper than their fossil fuel alternatives with the continued downward trend in their costs set to continue as technology advances.[1395]

Despite this, there has been little investment in such technologies in South Africa.[1396] Organised labour has also strongly opposed a greater inclusion of renewable energy in the national power mix for fear of the consequences same may have on the coal mining industry.[1397] Government in turn shuns innovation despite the huge potential it has to both strengthen competition in a variety of markets while also providing a platform to achieve various socio-economic goals. One need only think about the benefits that a cheap and abundant power supply would present for the continued growth of the economy. Certainly, this would have a much more dramatic impact on social upliftment than trying to prioritise the achievement of socio-economic goals in competition policy.

There is little opposition to the notion that the attainment of effective competition within the market will indirectly have a net positive effect on social welfare. Both the Tribunal and CAC were awake to this possibility in the *Massmart* merger where evidence was accepted that a reduction in consumer prices had the potential to have a significant effect on employment within the market.[1398] Government has long viewed competition policy as an important weapon in its arsenal to combatting the systemic structural impediments that exist in the post-apartheid market. To enhance the effectiveness of this weapon, the Department of Trade and Industry has adopted the view that the goals of competition policy should be aligned with those of Government's industrial policy.[1399] This perhaps may be the root of the present problem. While competition policy will certainly be an important part of industrial policy, its role is both extremely specialised and limited.

[1395] See the International Renewable Energy Agency's report: *Renewable Power Generations Costs in 2017* (available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2018/Jan/IRENA_2017_Power_Costs_2018.pdf last accessed on 12/12/2018).
[1396] See "International Investment in South African Renewable Energy Market" *Energize RE 4: Renewable Energy Supplement* (March 2016) available at https://www.ee.co.za/wp-content/uploads/2016/03/Energize-RE-4-Vol-4-pg-21-22.pdf (last accessed on 16/04/2019).
[1397] See news article by Singh "Numsa's Irvin Jim: IPP's will cripple Eskom, destroy almost 100 000 jobs" *News24* (18 November 2018) available at https://www.fin24.com/Economy/numsas-irvin-jim-ipps-will-cripple-eskom-destroy-almost-100-000-jobs-20181118 (last accessed 16/04/2019).
[1398] See Department of Trade and Industry "Proposes Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development".
[1399] See the DTI's "Proposed Guidelines for Competition Policy" (1997).

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Competition policy and particularly competition law, regulates a very specific and limited *niche* within markets. When the role of competition law is extended to cover up for the deficiencies in other pieces of legislation, this is where, as some authors have argued, the "soul" of competition law is lost.[1400] As argued in this thesis, the 2018 Amendment Act also appears to take the Competition Act further away from what its true purpose should be. The fact remains that the role of the Act in the context of the achievement of larger industrial policy objectives should be narrowed rather than expanded.

3. Concluding Remarks

Competition regulation is unique. It represents a melting pot between both law and economics. However, this presents a problem. Law and economics can rarely be deemed as complimentary policies with their respective objectives often being at cross purposes with one another. South Africa is a prime example of this conflict. The Competition Act seeks to achieve a few ordinary competition goals together with a variety of political goals of a socio-economic nature. The historical development of competition regulation appears to further highlight this conflicted relationship. Proponents of the Harvard theory favoured substantial state intervention in markets with the aim of dismantling market structures that they deemed to be an impediment to effective competition. The Chicago theory scholars have instead preferred a more economic orientated approach which shuns state interference in markets and instead place their faith in the market's ability to self-correct any imbalances.[1401] The lasting legacy of these various schools of thought is the realisation that both economics and law have their own distinct roles to play in competition regulation.[1402]

The economic principle of allocative efficiency has grown to be accepted as one of the foundational goals of competition policy. In the same breath, there is a new-found acceptance that certain forms of conduct must be prohibited and that state interference is often required to remedy the anti-competitive consequences that these forms of conduct create. Competition has accordingly developed as a policy instrument that

[1400] See Fox "The Battle for the Soul of Antitrust" (1987) *California Law Review* 917 at 923.
[1401] See Chapter 2 at par 3.2 and 3.3.
[1402] See Chapter 2 at par 5.

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ensures the promotion and maintenance of competitive markets while seeking to achieve the goals of consumer welfare and allocative efficiency.

The development of South African competition policy is certainly no different. While competition regulation prior the enactment of the Competition Act was largely ineffective, the introduction of the Act in 1998 represented a new dawn for South African competition policy and regulation. However, the post 1994 market was beset with numerous structural issues that were a direct result of the discriminatory laws of the previous regime. Together with these numerous structural issues, the South African market was characterised by an ownership profile largely skewed along racial lines. These concerns were of particular importance to authorities in the development of the Competition Act. This culminated in the Act being enacted with a variety of different goals in mind. The preamble of the Act recognised South Africa's difficult past and the need to right many of the wrongs of the previous dispensation. This can be seen in the stated goals in section 2 of the Act. The Act seeks to achieve various goals that can be regarded as being within the realm of traditional competition law but also various other political goals that fall far outside the scope of traditional competition law. As a result, the Act seeks to achieve the promotion and maintenance of effective competition while at the same time trying to redress some of the damage of the past. The question that this thesis has sought to answer is whether or not these different goals can be realised at the same time while still achieving the principal aims of competition law.

The South African experience this far appears to cast some doubt on competition law's ability to achieve political goals which are being forced onto the market. When the Commission has been faced with determining allegations of firms engaging in collusive conduct, there appears to be a distinct political undertone in the manner in which these cases have been dealt with. While no one will doubt the anti-competitive consequences of collusive conduct, the remedies selected to address these consequences give one cause for pause. As explained in Chapter 4, both the Fund in the bread cartel and the Trivano Trust in the construction cartel were designed *not* for the achievement of a competitive goal, but rather as a tool through which the empowerment objectives of the present administration could be achieved. While the Fund's intended purpose was to stimulate competition within the agro-processing industry, this was to be achieved within the prism of empowering firms owned by historically disadvantaged persons. Whether

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the Fund will have a measurable effect on the agro-processing industry awaits to be seen. The VRP on the other hand is nothing more than a tool through which the ownership of the construction industry can be redistributed to previous historically disadvantaged individuals. From a competition perspective, the VRP does nothing to promote or maintain competition within the construction industry. The fear is that the success government has had in achieving its empowerment goals through the use of the Act, and subsequently through the VRP, has potentially set a dangerous precedent.

Government certainly has made no secret of its ambitions to form a state-owned bank to assist in its empowerment goals.[1403] Could this be the tool it needs to achieve this goal? The probe into the banks is certainly far more complex than any other collusion investigation undertaken by the Commission but, only time will tell if government will attempt to use this probe to further its own agenda. It appears apparent that the Act is being used as a tool through which these political objectives can be achieved instead of the advancement of effective competition within the market which, should remain the Act's principal aim.

Moving on, the abuse of dominance provisions of the Act appear to not have been used in a manner as sinister as the provisions dealing with collusion. However, politics certainly has found its way into the construction of these provisions. This can be seen in the manner in which dominance is established. The extremely low thresholds contained in section 7 appear to aim these provisions squarely at the perceived white owned firms in the market regardless of whether their conduct results in any real anti-competitive effect.[1404] Unlike the US and the EU,[1405] it is irrelevant whether or not a firm actually possesses market power for the purposes of establishing dominance, despite it being an essential component for the concept of dominance. Instead, market power is assumed based on a firm's market share. As pointed out, there is however a growing belief that such a formalistic approach to establishing dominance has a greater potential to lead to an over-inclusive regulatory model which can result in various forms of conduct being prosecuted as abuse of dominance even though they have no anti-competitive effect.[1406]

[1403] See the ANC Discussion Document on Economic Transformation at 5, the Banks Amendment Draft Bill, and Cull, Peria & Venter "Bank Ownership: Trends and Implications" *IMF Working Paper* WP/17/60 at 14 – 15, 21 – 22, & 26 – 27. as discussed in Chapter 4 at par 5.3.
[1404] See Chapter 6 at par 3.3.3.
[1405] See Chapter 6 at pars 3.3.1 and 3.3.2.
[1406] See Chapter 8 at par 1.2.

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While authors such as Lewis praises the model adopted by the Act,[1407] especially within the context of the South African market, *Nationwide Poles*[1408] certainly serves as an example of how certain forms of conduct may be regarded as anti-competitive abuses of dominance when in fact they are nothing more than ordinary competitive actions by the firm in question.

Certainly, the starkest example of political interference in merger regulation is the inclusion of public interest concerns in merger regulation.[1409] However, the effect that these concerns can have on merger regulation has been limited strictly to those concerns listed in the Act and only those that can be regarded as being substantial and can be regarded as being merger specific.[1410] Perhaps this was a potential blow to the political ambitions behind the inclusion of these concerns in merger regulation. When looking back at the Tribunal and CAC's decisions in the *Massmart* merger, the vast majority of the public interest concerns raised by the various government Ministers and organised labour were dismissed as either being not substantial enough or were not merger specific to warrant regulatory intervention.[1411] The same can be said of the *Shell Tepco* merger in which the Commission sought to advance an empowerment agenda rather than seeking to advance competition within the market.[1412]

The construction of section 12A has ensured that the principal concern for the Commission and Tribunal will be the effect that the merger will have on effective competition within a particular market and whether there are any substantial public interest concerns that warrant the merger being refused.[1413] Prior to the Amendment Act it was trite that for a merger to be approved it is not necessary that the merger be approved on both competition and public interest grounds.[1414] The Amendment Act however seems intent on addressing this issue and it would appear from its construction that mergers would now need to be approved on both competition and public interest

[1407] See Chapter 8 at par 1.2.
[1408] See Chapter 5 at par 4.
[1409] See discussions in Chapter 6 at par 5.
[1410] The Decisions of *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 43/CAC/Nov04, *Metropolitan Holdings Limited and Momentum Holdings Limite*d 41/LM/Jul10 and *Walmart Stores Inc & Massmart Holdings Limited* 73/LM/Dec10.
[1411] See Chapter 6 at par 5.2.
[1412] See Chapter 8 at par 1.4.
[1413] See *Gold Fields Ltd v Harmony Gold Mining Co Ltd* 43/CAC/Nov04.
[1414] See *Metropolitan Holdings Limited and Momentum Holdings Limite*d 41/LM/Jul10 and *Metropolitan Holdings Limited and Momentum Holdings Limite*d 41/LM/Jul10.

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grounds.[1415] This will certainly complicate merger regulation in the future but more worryingly, it will also open the door for greater political interference in merger regulation in the future. Potentially, merging firms would now need to be required to make larger concessions on these public interest grounds to ensure that the firms meet these new thresholds for mergers to be approved. This too may give Government that tool that it so desperately seeks, namely, to use competition law as means of achieving its empowerment objectives.

While there are numerous voices that have advocated for the inclusion of public interest concerns in merger regulation, especially from the perspective of South Africa being an emerging market, there is also a large number of commentators that are staunchly opposed to the idea of including public interest concerns in merger regulation.[1416] The reason for this opposition is simple. As emphasised by Fox, competition policy is not the appropriate forum within which to deal with these issues and achieve the advancement of political goals of a socio-economic nature.[1417] The current administration however appears intent on using competition policy and law precisely for this goal regardless of its consequences on competition. Nevertheless, public interest remains a part of merger regulation in South Africa and following from the 2018 Amendment Act, appears poised for increased role going forward.

The conclusion that can be drawn from the evaluation of the various decisions of the Commission, Tribunal and CAC as well as from the provisions of the Act itself, as discussed in this thesis, is that the construction of section 2 has placed the Act at cross purposes with itself. The goals of the Act can be reduced into four simple goals namely, the promotion and maintenance of effective competition, lower consumer prices, the advancement of local industries, and the empowerment of historically disadvantaged individuals. While the goals of effective competition and lower consumer prices generally go hand-in-hand with one another, the remaining two goals certainly do not complement these goals or each other for that matter. Herein lies the patent defect of the Act.

[1415] Oxenham at 234 and Magana *Public interest versus competition considerations: A Review of the Merger Review Guidelines in terms of section 12A of the Competition Act, 1998* (LLM dissertation, Unisa, 2021) 54 to 60.
[1416] See the previous discussions in Chapter 8 at par 1.5.2.
[1417] See Fox "Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia" at 587. Also see Areeda & Hovenkamp *Antitrust Law* at 100.

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Competition authorities have been given the impossible task of trying to balance these conflicting goals while still being required to advance each specific goal.

The unfortunate reality is that the Act cannot be expected to achieve all these objectives on its own because competition law is not the appropriate vehicle for achieving goals that fall outside the ambit of pure competition goals. Yes, competition policy remains an important component of industrial policy as a whole however, it has a very limited and very specific role within same. While Government has accepted the reality that the objectives of competition policy and industrial policy may often conflict, its solution has been to simply ensure that competition policy goals are aligned with those of industrial policy.[1418] This is evident from the various goals that were included in section 2 as well as the public interest concerns contained in section 12A. This approach however appears misguided.

The 2018 Amendment Act should give both competition commentators and competition authorities cause for concern. While the Competition Act so far has been immune to Government's attempts to use it to achieve its socio-economic objectives, this has only been at the expense of achieving effective competition. The reason for this is simple: when faced with the issue of promoting effective competition or achieving alien political goals, authorities have had no option but to side with the competition side of the coin. This is plain to see in merger regulation as well as the Commission's marginal successes in prosecutions of allegations of abuse of dominance. This has only been as a consequence of public interest concerns falling outside the scope of, or not being substantial enough, to find consideration in terms of the public interest concerns listed in section 12A and in the case of the abuse of dominance, the Commission and/or complainants being incapable of proving any anti-competitive effects of the conduct complained of. Decisions of this nature can be regarded as confirmation of the *de facto* alignment with international best practice, but the 2018 Amendment Act appears intent on *not* strengthening the ability of competition authorities to promote and maintain effective competition, but rather their ability to achieve the Act's political goals, especially transformative goals. Couple these amendments with the goals listed in section 2 and

[1418] See the DTI's Proposed Guidelines for Competition Policy (1997).

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provisions such as the exemptions listed in section 10, a new dawn of competition regulation may be on the horizon in South Africa.

Section 2, section 10, and section 12A are clear evidence of the Competition Act often attempting to protect competitors rather than protecting competition. The protection of small and medium sized firms owned by those classified as historically disadvantaged persons is a primary goal. Section 10 further creates the potential for these firms to exist in a legislative bubble isolated from interference by competition authorities. The hope here is that this may provide them with the necessary tools to become competitive in their respective markets. This principle has clearly been imported from the Harvard theory of competition regulation and its obsession with dealing with market structures that it perceives to be anti-competitive. This notwithstanding the widely held belief that the structure of a particular market, while often a contributing factor, cannot in itself lead to ineffective competition, and that it should not be used as an excuse to interfere in markets with the intention of protecting specific competitors.[1419] This structuralist approach to competition law moves the purpose of regulation away from preventing anti-competitive conduct and rather towards the prevention of market concentrations.[1420] But it is submitted that market concentrations in themselves cannot be generically branded as evil.

While some Chicago and Post-Chicago influence has found its way into the foundations of the Competition Act, the Tribunal and CAC have certainly accepted these principles and rejected the notion of protecting specific competitors and have rather restated the fact that principal aim of the Act remains the protection of competition itself.[1421] The 2018 Amendment Act however appears intent on strengthening this ill-founded goal and seeks to empower authorities with the necessary tools to manipulate markets for the sake of achieving these goals. More worryingly, the Amendment Act has the potential to undermine effective competition regulation and return us to a similar situation as existed under the Maintenance and Promotion of Competition Act.[1422] With the 2018 Amendment Act's mechanisms for increased state interference and influence in competition

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[1419] See *Nationwide Poles CC v Sasol Oil (Pty) Ltd* 72/CR/Dec03.
[1420] Turner "The Definition of an Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal" at 655.
[1421] See *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/April05.
[1422] See Chapter 3 at par 1.2.

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proceedings as well as a placing such a large focus on affirmative action, it is conceivable, especially in the current political climate, that competition law could be used as a mechanism to protect the politically connected and elite.[1423]

The fact however remains that competition law is the inappropriate forum in which to achieve political goals of a socio-economic nature. It is not a tool that will achieve a redistribution of income or empowerment of the disenfranchised majority.[1424] What competition law will do however, is indirectly contribute to the achievement of these goals by creating the level playing field necessary for the achievement of these goals. Government should accept this reality rather than ignore it. The inclusion of various political goals in the Act has needlessly complicated competition regulation in South Africa. Perhaps it can still be argued that these political goals have not entirely succeeded in undermining the Act's principal goal of the achievement of effective competition which can be seen in the decisions of the Tribunal and the CAC. Save for the drastic remedy imposed in the construction industry cartel (the VRP) and some drastic or unnecessary public interest concessions that firms have made during merger proceedings[1425], the promotion and maintenance of effective competition have remained the core goal of the Act.

Government needs to accept that competition law's role in socio-economic development is merely a small cog in greater policy and legislative engine. It is time to recognise that competition law cannot be seen as the grout with which to fill the gaps in economic policy and Government's various other pieces of legislation. Perhaps the solution, as suggested, is to relegate these political goals to mere factors that should be taken into when achieving pure competition goals and not have them listed as primary goals of the Act. But there is a storm brewing in South African competition regulation and where the lightning will finally strike remains to be seen. With the 2018 Amendment Act now cresting over the horizon, the outlook for the future of competition law and enforcement is worrying.

[1423] See the previous discussions in Chapter 3 at par 1.2 and Smit "The Rationale for Competition Policy: A South African Perspective" at 12.
[1424] See Areeda & Hovenkamp *Antitrust Law* at 101.
[1425] See the conditions discussed in *Walmart Stores Inc & Massmart Holdings Limited* in Chapter 6 at par5.2.

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