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THE GOALS OF COMPETITION LAW FOR MERGER ANALYSIS IN DEVELOPING JURISDICTIONS: A CRITICAL APPRAISAL OF MERGER ANALYSIS UNDER KENYAN COMPETITION LAW

by

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SUMMARY

There is today, greater global consensus on the value of free markets, competition and competition law than has been at any other time in history. The last decade has seen an increasing number of countries in developing jurisdictions adopt competition law. The increased global incidence of competition law has been accompanied by a push towards convergence of general principles and themes, usually towards the welfare model applied in developed jurisdictions.

After adoption of competition law by developing jurisdictions follows the question of the ultimate ends of the law and the manner of enforcement to achieve the same. A connected question is whether these ends should be any different from those of developed jurisdictions. Especially in the light of the distinctive needs of developing countries, the most significant of which is inclusive economic development. As with the other components of competition law, merger regulation and within it analysis of proposed transactions to establish whether if effected they will enhance or diminish the economic performance of an industry is subject to these questions.

This thesis considers whether jurisdictional exigencies should influence competition law enforcement, with a specific focus on merger analysis. It examines various approaches and schools of thought regarding the goals of competition law and how these play out within jurisdictional parameters. The history of enforcement of American antitrust is scrutinised to establish the nature of the interplay between greater economic policy direction and the goals of competition law. The study also explores the issue of convergence and whether developing jurisdictions should align their competition law to that of developed jurisdictions with mature competition law.

The purpose of the study is to identify the most appropriate and pragmatic object of competition law for developing nations and establish the nature and elements of the merger analysis that would resonate best with the identified object.

The study is concluded with recommendations for future reform and research.

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LIST OF ABBREVIATIONS

Herewith a list of the main abbreviations used in this thesis in alphabetical order:

Words in Full	Abbreviation
African National Congress	ANC
Center for Competition Regulation, Economics and Development	CCRED
Competition Act No. 12 of 2010	2010 Competition Act
Competition Act No. 89 of 1998	1998 Competition Act
Competition Authority of Kenya	CAK
Consumer Unity & Trust Society	CUTS
Department of Trade and Industry	DTI
European Union Merger Regulations	**EUMR**
Foreing Direct Investment	FDI
Gross National Product	GDP
Gross National Income	GNI
National Economic and Labour Council	NEDLAC
Growth Employment and Redistribution: A Macroeconomic Strategy	GEAR
International Competition Network	ICN
Kenya Institute for Public Policy Research and Analysis	KIPPRA
Organisation for Economic Development	OECD
Reconstruction and Development Programme	RDP
Small and Medium Enterprises	SMEs
United Nations Conference on Trade and Development	UNCTAD
United States of America	United States

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CHAPTER 1

BACKGROUND TO THE STUDY

1.1 Introduction

1.2 Why merger control?

1.3 Competition regulation in Kenya

1.4. Focus of the study and hypothesis

1.5. Research questions

1.6. Research Methodology

1.7. Limitations and delineations of the study

1.8. Comparative jurisdiction selection

1.9. Proposed structure

1.10 Reference Techniques

1.1 Introduction

The truism that a competitive market environment boosts economic growth is beyond dispute. Numerous empirical studies have found a direct link between robust competition and productivity.[1] By the same token, effective regulation which facilitates and reinforces proper functioning of markets positively affects economic performance.[2] Small wonder then, that in recent times competition law has experienced phenomenal growth of the kind seldom witnessed in any other branch of law.[3] There has probably never been greater global consensus on the desirability of competition and free markets than there is today.[4]

[1] See International Competition Network (ICN) website for a comprehensive list of recent studies at http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/benefits/messages/productivity.aspx (accessed 24/09/2018 and Kitzmuller M and Martinez M 'Competition Policy: Encouraging thriving markets for development for a summary of some findings on developing countries. Available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf (accessed 24/09/2017).

[2] For a review of selected studies for impact of competition law and policy on development see UNCTAD "The Role of Competition Policy in promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy" *Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* (2010) hereinafter UNCTAD (2010)(a), at 14. Available at http://unctad.org/en/Docs/tdrbpconf7d3_en.pdf (accessed 23/09/2017).

[3] Dabbah MM *International and Comparative Competition Law* (2010) hereinafter Dabbah (2010) 2.

[4] Whish R and Bailey D *Competition Law* (2018) hereinafter Whish & Bailey (2018) 17.

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As such competition law is considered by many as the silver bullet that would regulate exercise of market power, safeguard competition and thereby buttress the free market.[5] On the grand scale, the increased global incidence of competition laws has been accompanied by a resolute push towards greater convergence of general principles and themes across jurisdictions.[6]

Competition law had its formal origins in the United States of America (hereafter United States) with the enactment of the Sherman Act in 1890,[7] a statute passed against the backdrop of the industrial revolution and the attendant ills that characterised that era.[8] From these early beginnings over a century ago, antitrust law, known today more generally as competition law, developed. In essence competition law proscribes a range of conduct seen as a threat to efficient markets and that typically includes anti-competitive horizontal and vertical agreements, abuse of dominant market power and anti-competitive mergers and acquisitions.[9]

1.2 Why merger control?

The term merger is generally used to describe the consolidation of companies or assets through various types of financial transactions including mergers, acquisitions, consolidations, tender offers, purchase of assets, and management acquisitions with the net result of two or more companies with separate ownership beginning to operate under one roof to obtain some strategic or financial objective. Mergers play an all-important role

[5] Neuhoff M (ed.), Govender M, Versfeld M, and Dingley D A *Practice Guide to the South African Competition Act* (2017) hereinafter Neuhoff (ed.) (2017) 7.
[6] Fox EM and Trebilcock MJ "The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project" 2012 *New York University Law and Economics Working Papers* hereinafter Fox & Trebilcock (2012) *New York University Law & Economics Working Papers* 1, at 75. See also Dabbah MM *The internationalisation of Antitrust Policy* (2003) hereinafter Dabbah (2003) 5. For detail on convergence see generally Duns J, Sweeney B and Duke *A Comparative Competition Law* (2015) herafter Duns et al. (eds.) (2015) and Terhechte JP "International Competition Enforcement Law between Cooperation and Convergence - Mapping a New Field for Global Administrative Law" 2009 The University of Oxford Centre for Competition Law and Policy Working Paper CCLP(L), hereinafter Terhechte 2009, 26.
[7] (15U.S.C.A. § 1 et seq.) Actually Canada's Competition Act was passed in 1889, a year before Sherman Act. However, Canada's competition law only became active in 1986 after the passing of a new Competition Act following a 20 year reform process. See Goldman CS and Bodrug JD "Competition Law of Canada" in Goldman CS and Bodrug & JD (eds.) *Competition Law of Canada* (2013) hereinafter Goldman & Bodrug (eds.) (2013) 1-15 for a summary.
[8] To take advantage of economies of scale, competing businesses either merged or acquired assets of defeated rivals. The result was fewer and fewer businesses controlling large industries and markets. Competition Law was an attempt to control formation of 'trusts', late-nineteenth-century corporate monopolies that dominated United States manufacturing and mining. For a summary of the business environment of the industrial revolution and impact on the market see Sagers C *Examples and Explanations for Antitrust* (2014) hereinafter Sagers (2014) 5-7. Also see Chapter 2 par 2.2.1.
[9] Whish & Bailey (2018) 4.

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in economic growth and the benefits of a strong merger regime cannot be overstated.[10] As a matter of fact, Clarke points out that the leverage to be earned by an economy from prevention of anti-competitive mergers has contributed significantly to the recent adoption of competition law in many developing jurisdictions.[11] For businesses, Whish and Bailey observe that mergers can be an efficient means of achieving beneficial goals such as economies of scale and scope, enhancing shareholder value, reducing risk and responding to tax incentives.[12] On the other hand, a market can be significantly impaired by a merger that creates or enhances the incentive and ability to exercise market power, to the detriment of other players.[13]

Merger regulation is of singular significance to nascent competition agencies working to establish a prominence. Lewis debunks the commonly held myth that mergers should be low on the list of priorities of new competition authorities, preference being given to advocacy and cartel dismantling. He posits that, to the contrary, mergers are a particularly effective platform for building capacity in a new authority. He argues further that merger analyses tend to be relatively uncomplicated and involve parties who have no interest in stalling the process. Accordingly Lewis submits that, if done well, mergers can help a budding competition agency build a reputation for thoroughness, increase visibility and build a competition culture.[14] Given the contribution of mergers to economic growth and merger control for launching competition law enforcement in nascent jurisdictions, a study of how merger analysis is carried out and how that contributes to the overall goals of competition law in a jurisdiction such as Kenya is well merited.

The question of what merger regulation should aim to achieve is an often asked one, and one that justifies a closer look at merger assessment. Per the International Competition Network (hereafter ICN), protection of competition is the only valid goal for competition

[10] See ICN 'ICN Merger Guidelines Workbook' 1 Available at. www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf (accessed 28/1/2017).
[11] Clarke J *International Merger Policy: Applying Domestic Law to International Markets* (2014) hereinafter Clarke (2014) 75.
[12] Whish & Bailey (2018) 856-858.
[13] Whish & Bailey (2018) 859.
[14] Lewis D *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table: A Personal Account* (2012) hereinafter Lewis (2012) 76-78.

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law and merger review law should not be used to pursue other goals.[15] Whish and Bailey accordingly remark that: "To devise a system of merger control that allows intervention for non-competition reasons; in so far as it does so, the law in question can hardly be called 'competition' law; indeed, prohibiting mergers on social grounds or for reasons of industrial policy may be directly antagonistic to the process of competition."[16] Monti too considers that the aim of merger policy is to promote or ensure the maintenance of rivalry in the market.[17] As emphasised by Kolasky, a competition policy that extends to cater for political and social values may retard growth and undermine faith in free markets.[18]

A contrary view is held by Fox and Gal who assert that in developing countries in particular, the overarching goal of competition law should be to help markets work, which in the long run will result in efficient inclusive development.[19] Those who would justify inclusion of public interest considerations in merger regulation and in the goals of competition policy in general agree. They contend that as important as competitive markets are, it is simplistic to overlook the reality that they function within social and political contexts.[20] Depending on the context, competition law will inevitably accommodate a number of 'extra-competition policies' or 'non-competition law proper' policies.[21] Brassey argues that where necessary, competition law could and should be used to achieve socio-political purposes in order to produce results that give proper effect to the "complex matrixes of needs, aspiration and ideals operating within a society at a given time."[22] The arguments on both ends are cogent and call for further examination.

[15] Comment 1 ICN Recommended Practices For Merger Analysis available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (accessed 22/04/2017) and J Clarke 'Current issues in merger law' in J Duns et al. (eds.) *Comparative Competition Law* (2015) 174.

[16] Whish (2018) 825

[17] Monti G *EC Competition Law* (2007) hereinafter Monti G *EC Competition Law* (2007) 291. For an analysis and conclusions on the apparent tensions between industrial policy and European Union competition law and the pros and cons of pursuing public interest concerns under European Union Merger regulation see Galloway J "The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy" 2007 *European Competition Law Review* 172.

[18] Kolasky W "The Role of Competition in Promoting Dynamic Markets and Economic Growth" Address before the Tokyo America Center Tokyo, Japan November 12, 2002. Available at https://www.justice.gov/atr/speech/role-competition-promoting-dynamic-markets-and-economic-growth (accessed 12/01/ 2017.

[19] Gal MS and Fox EM "Drafting Competition Law for Developing Jurisdictions' in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) hereinafter Gal & Fox in Gal et al. (eds.) (2015) 36.

[20] Rodger B and MacCulloch A *Competition Law and Policy in the EU and UK* (2014) hereinafter Rodger & Mac Culloch (2014) 13.

[21] Rodger & MacCulloch above.

[22] See Brassey M (ed.), Campbell J, Legh R, Simkins C, Unterhalter D and Wilson D *Competition Law* (2002) hereinafter Brassey (ed.) (2002) 8. This approach informs the South African Competition policy. See preamble to Competition Act 1998. See further Chapter 4 par 4.2.6.

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Merger law is generally forward-looking and pre-emptive. It bars transactions that may lead to harmful effects through use of *ex ante,* as opposed to ex *post,* regulation.[23] This advance notice prevents the need for difficult and potentially ineffective 'unscrambling of the eggs' once an anti-competitive merger has been completed.[24] Merger regulation, also referred to as merger control, is the broader concept of which merger analysis to establish whether to approve a merger or not is a fundamental part. This research will focus on that specific component of the larger concern of merger regulation. There will be reference to the other aspects, such as notification and remedies, except, only in an introductory sense.

Regulation of mergers is directed towards ensuring that a competitive economic environment is maintained by preventing creation of entities that have the incentive and ability to exercise market power.[25] Pre-merger notification obligations in competition law make it possible for intended mergers to be investigated before they can be executed.[26] Agencies may also challenge already concluded mergers that are found to be anti-competitive but pre-merger notification is more the norm. The notified transaction is assessed to answer the question of whether if effected it will enhance or diminish the economic performance of an industry. The answer is arrived at through careful analysis of the proposed transaction where the evidence pertaining to its possible impact is weighed.[27] It is this exercise that is the focus of this study. Merger analysis involves a counterfactual comparison of the market situation before and after the proposed or completed merger in order to assess the potential effect on competition.[28] For this, one needs a good understanding of the markets the merger will affect. Sound analysis must also be informed by any expected efficiency effect which could fully offset otherwise anti-competitive effects.[29]

[23] Though *post ante* regulation has been used in some jurisdictions. See Knox R "An Anxious Transition" 2012 15(6) *Global Competition Review* 15 hereinafter Knox (2012)15(6) *Global Competition Review.*
[24] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (accessed 17/02/2017.
[25] Clarke J *International Merger Policy: Applying Domestic Law to International Markets* (2014) hereinafter Clarke (2014) 47.
[26] De Pamphilis D *Mergers and Acquisitions Basics: All You Need to know* (2010) 123, Whish & Bailey (2018) 859 and 870.
[27] Whish & Bailey (2018) 869, Clarke (2014) 81
[28] Whish & Bailey (2018) 863.
[29] Clarke (2014) 26 and 73.

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It is apposite to point out that tests applied in legal analysis of mergers fall into two broad categories: the Substantial Lessening of Competition test, also referred to as the Significant Impediment to Effective Competition in the European Union;[30] and the Market Dominance test. There is also a hybrid which combines the standards of both substantial lessening of competition and dominance but which is increasingly less applied.[31] Under the substantial lessening of competition test, a merger is anti-competitive if it significantly reduces competition in particular but not only as a result of creation or strengthening of a dominant position. Substantial lessening of competition is best exemplified by the European Union's test.[32] The dominance test on the other hand, prohibits a merger which creates or strengthens a dominant position such that effective competition is impeded.[33] Public interest considerations (also referred to as public interest concerns) may be incorporated alongside either of the two tests.

There is a difference in the scope of the dominance test and substantial lessening of competition-standards and assessment of certain situations could lead to different outcomes depending on which test is applied.[34] Significantly, many jurisdictions have changed and others are moving their legal analysis standard from dominance tests and hybrid tests to a pure substantial lessening of competition-standard.[35] There are those though who argue that there is not much difference in results between the tests and that any move is unwarranted.[36] One sure benefit of adopting a pure substantial lessening of competition-test by a developing country such as Kenya is that the courts and agencies

[30] Article 2(3) European Union Merger Regulations (EUMR).

[31] See generally OECD Policy Round Tables: Standard for Merger Review 2009 'The Standard for Merger Review, with a particular Emphasis on Country Experience with the change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test'. Available at https://www.oecd.org/competition/mergers/45247537.pdf (accessed 20/10/2017). Hereinafter OECD (2010) Standard for Merger Review.

[32] Article 2(3) EUMR A concentration that significantly impedes effective competition in the common market or in a substantial part of it, particularly as a result of the creation or the strengthening of a dominant position, shall be declared incompatible with the common market.

[33] See Article 2(3) European Commission Merger Regulations (ECMR). Also see Heimler (2008) 4(1) *European Competition Journal* 85 at 85-86.

[34] OECD (2010) Standard for Merger Review at 5. Closing the so called 'oligopoly gap was one of the main objectives of the shift from the Dominance Test to the SIEC. SIEC, unlike the dominance test would net mergers which though not leading to dominance are capable of harming competition. See Commission decision of 26 April 2006, Case COMP/M.3916 – *T-Mobile Austria/Tele.ring.*

[35] By way of example, South Africa moved its merger regulation from the hybrid test under the Maintenance and Promotion of Competition Act Act 96 of 1979 to the currently applied SLC, Australia moved from dominance test to SLC 494 Trade Practices Legislation Amendment Act (1992).

[36] Monti G "The New Substantive Test in the EC Merger Regulation - Bridging the Gap between Economics and Law?" 2008 LSE Legal Studies Working Paper No 10/2008 July 30, 2008 hereinafter Monti LSE Legal Studies Working Paper 2008 at 5-7. See also Heimler (2008) 4(1) *European Competition Journal* 85 at 90 where he argues that whichever test is applied will produce the same result and Röller LH & De La Mano M "The Impact of the New Substantive Test on European Merger Control" 2006 (2)1 *European Competition Journal* 9 hereinafter Roller & La Mano (2006) (2)1 *European Competition Journal,* at 27.

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may rely on international judgements and laws which are usually far more developed that those available locally.[37]

Where after analysis a merger is found to be anti-competitive, the options available are prohibition of the merger in its entirety, dissolution in the case of a consummated merger and ordering divestiture to undo the anti-competitive effects of a merger while allowing it to continue.[38] The agency may also make orders regarding the conduct of the merged firm to prevent anticipated anticompetitive effects. The first lot of remedies are structural and the latter behavioural.[39]

1.3 Competition regulation in Kenya

1.3.1 General background

Kenya is a developing country and one of Africa's 'lion economies', a nickname given to the continent's economies which had a collective Gross Domestic Product of $1.6 trillion by 2008.[40] According to the World Bank, the country has emerged as one of Africa's key growth centres, driven by a stable macroeconomic environment, positive investor confidence and a resilient services sector.[41] In 2015, the economy grew at a rate of 5.6%,[42] exceeding the then average growth rate of 4.6% for Africa's middle income countries.[43] In the subsequent two years, the economy grew at 5.8% in 2016,[44] and 4.9% in 2017,[45] compared to the average Sub Saharan Africa rates of 1.4% in 2016 and 2.9%

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[37] See generally OECD (2010) Standard for Merger Review. Examples of recent case law in the EU include *CK Telecoms UK Investments / Commission* T-399/16; *Wieland-Werke AG/ Commission* Case T-251/19; and *Thyssenkrupp Tata / Commission* T-584/19.

[38] Whish & Bailey (2018) 824.

[39] Clarke (2014) 126.

[40] These include Ethiopia, Ghana, Kenya, Mozambique, Nigeria, and South Africa. For perspectives into the challenges and prospects of six of these economies. See generally Bhorat H and Tarp F (eds.) *Africa's Lions: Growth Traps and Opportunities for Six African Economies* (2016). For Kenya specifically see Kimenyi M, Mwega F and Ndung'u N "Kenya: Economic Growth, Labor Market Dynamics, and Prospects for a Demographic Dividend" in Bhorat H and Tarp F (eds.) (2016). *Africa's Lions: Growth Traps and Opportunities for Six African Economies* Brookings Institution Press.

[41] World Bank Group *Kenya economic update: anchoring high growth - can manufacturing contribute more? (2014)* Available at http://documents.worldbank.org/curated/en/652361468043487766/Kenya-economic-update-anchoring-high-growth-can-manufacturing-contribute-more (accessed 23/10/ 2018 and World Bank Group The World Bank in Kenya available at https://www.worldbank.org/en/country/kenya/overview (accessed 18/06/2019).

[42] Kenya Institute for Public Policy Research and Analysis (KIPPRA) Kenya Economic Report 2016 xvi available at https://kippra.or.ke/wp-content/uploads/2021/02/ker2016.pdf (accessed 11/03/2017).

[43] World Bank Group 'Africa's Pulse' (2015) 12 Growth in Africa's middle income countries where Kenya now falls, excluding South Africa and Nigeria) averaged 4.6 per cent and 2.6 per cent in 2014 and 2015, respectively. Available at http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol12.pdf (accessed 30/10/2017.

[44] Kenya Institute for Public Policy Research and Analysis (KIPPRA) "Kenya Economic Report 2016" xiii available at https://kippra.or.ke/wp-content/uploads/2021/02/ker-2017.pdf (accessed (11/03/2017).

[45] Kenya Institute for Public Policy Research and Analysis (KIPPRA) "Kenya Economic Report 2017" xv available at https://kippra.or.ke/wp-content/uploads/2021/02/ker-2018.pdf (accessed (11/03/20170.

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in 2017.[46] Challenges to growth include poverty, inequality, and vulnerability of the economy to internal and external shocks. Poverty levels especially, remain high in Kenya with close to 40% of the population living in poverty at 2016.[47] Though this figure had declined to 36.1% in 2019, not every segment of the population benefited from the growth. The urban poverty rate remained unchanged, and actually, the absolute number of urban poor increased by 1.5 million people.[48] The most daunting obstacle to progress, however, remains corruption.[49]

These challenges notwithstanding, Kenya's economy has consistently expanded over the last decade. The economy experienced a robust growth averaging 3.9% between 1997 and 2016 increasing to and 6.3% in 2018[50] and 5.4% in 2019.[51] The country's medium term growth prospects are favourable.[52] Vision 2030, the country's long-term national planning and strategy development blueprint, aims at making Kenya a newly industrializing middle income country by the year 2030.[53] At the core of this plan is the goal of providing prosperity for all Kenyans through an economic development programme that should achieve an average Gross Domestic Product growth rate of 10% per annum over the period of 25 years that started from 2007. The value of a sturdy competition regime in such an ambitious scheme is undeniable and has been expressly acknowledged.[54]

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[46] "Table 2.1: GDP growth in selected African countries 2014-2017" Kenya Institute for Public Policy Research and Analysis (KIPPRA) "Kenya Economic Report 2017" 5 available at https://kippra.or.ke/wp-content/uploads/2021/02/ker-2017.pdf (accessed Kenya Economic Report 2017.

[47] University of Oxford 'Kenya country briefing: Multidimensional Poverty Index' available at: http://www.ophi.org.uk/multidimensional-poverty-index/mpi-2015/mpi-country-briefings/ (accessed 12/11/2017) Percentage of poor people at 39.9% Oxford Poverty and Human Development Initiative (2016).

[48] Pape & Mejia Mantilla World Bank Group 'More than just growth: Accelerating poverty reduction in Kenya'. Available at https://blogs.worldbank.org/africacan/more-than-just-growth-accelerating-poverty-reduction-in-kenya (accessed 01/03/2017.

[49] The country has continued to rank low in corruption indices over the last many years in spite of a variety of interventions aimed at curbing the endemic vice. The country ranked at 139 out of 168 countries in 2015 and 144/198 in 2018 in Transparency International's corruption index. http://www.transparency.org/cpi2014/results (accessed 12/11/2017) and https://www.transparency.org/en/cpi/2018/results/ken (accessed 11/03/2019).

[50] Kenya Institute for Public Policy Research and Analysis (KIPPRA) Kenya Economic Report 2018 Kenya available at https://kippra.or.ke/wp-content/uploads/2021/02/Kenya-Economic-Report-2019.pdf (accessed 12/11/2019).

[51] World Bank Group The World Bank in Kenya. Available at https://www.worldbank.org/en/country/kenya/overview (accessed 16/07/2019) and Kenya Institute for Public Policy Research and Analysis "Kenya Economic Report 2020" hereinafter KIPPRA 2020 available at https://www.kippra.or.ke/images/kenyaeconomicreport/Kenya_Economic_Report_2020.pdf (accessed 14/04/2020).

[52] KIPPRA 2020 and World Bank Group: Kenya – An overview available at https://www.worldbank.org/en/country/kenya/overview (accessed 13/07/2019).

[53] Preamble 'Vision 2030 popular version' available at http://www.vision2030.go.ke/resources/ (accessed 2/10/2019).

[54] "Sound economic management, free markets, liberalization, promotion of the private sector and regulated market behavior are the engine of growth for this country." Kenyatta (2014) Speech of the President of Republic of Kenya, Uhuru Kenyatta at the Annual Competition Day 9 December 2014 par 6 http://www.cak.go.ke/images/docs/Cabinet%20Secretary%20National%20Treasury%20Speech%20-World%20Competition%20Day%202014%20(2).pdf (accessed 12/11/2018).

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Historically, competition regulation in Kenya can be divided into three phases, each with corresponding legislation to cater for the prevailing economic philosophy of the time.[55] The first phase covers the period between independence and the mid-1980s with the relevant legislation being the Price Control Act of 1956. This period was characterised by a country trying to find its footing in the global economy following years of colonial rule. The second phase, running from the early 1980s to late 1990s, was marked by a struggling economy emerging from protectionism but with the government still holding a relatively tight rein on conduct of trade. The legislation of the moment was the Restrictive Trade Practices and Monopolies Act passed in 1989 .[56] The current phase, ushered in at the beginnings of the 21st century, is that of an economy in take-off, adopting virtually fully the policies of a free market economy. The attendant regulation is the Competition Act 10 of 2010 .[57]

The 2010 Competition Act is archetypal competition legislation, save for the inclusion of a handful of consumer protection provisions, to be enforced concurrently with competition law by the Competition Authority of Kenya. Inspiration for this hybrid law appears to have sprung from Australia's composite Competition and Consumer Protection Act of 2010 whose section 2, stating the object of the law, is mirrored verbatim in section 3 of Kenya's 2010 Competition Act.[58] Over the past decade, several European Union Member States have opted to integrate their competition authorities and consumer protection agencies with the claimed objective of taking advantage of the synergies between the two areas of policy.[59] Cseres asserts that in reality, these 'experimental rather than programmatic' integrations have been driven by political and budgetary considerations.[60] Gorecki, in the

[55] For a summary of the three major policy regimes that have influenced Kenya's Industrial Policy since independence see Chege J "Learning to compete: Scoping Paper on Kenyan manufacturing" 2013 *Brookings Institution* Working Paper No. 25. See also chapter 5 pars 5.1 and 5.2.
[56] Chapter 504 Laws of Kenya.
[57] Chapter 504 of the Laws of Kenya. Effective August 2011.
[58] Section 2 Competition and Consumer Protection Act 2010 'The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' Compare with Kenya section 3 2010 Competition Act ' The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct.
[59] Jenny F "The Institutional Design of Competition Authorities: Debates and Trends" in Jenny F and Kastuolacos Y *Competition Law Enforcement in the BRICS and in Developing Countries. Legal and Economic Aspects* (2016) 8 Institutional reorganizations have taken place in several European Union Member States including Denmark, Netherlands and Finland.
[60] Cseres K "Integrate or Separate - Institutional Design for the Enforcement of Competition Law and Consumer Law" 11 April 2013 *Amsterdam Law School Research Paper* No 03 *at* 6 hereinafter Cseres (2013).

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same vein, refers to the combination of Irish competition and consumer administration as a 'shotgun marriage'.[61]

Granted, institutional integration may be justifiable on grounds of increased efficiency as a result of streamlined administration.[62] Still, the inescapable reality is that there are significant differences in the substance and implementation of competition law and consumer law.[63] Competition law is complex and specialized, which makes it unfit for a generic agency, not to add that vesting a competition agency with extra functions may burden the agency and be adversative to promoting competitive markets.[64] According to Huffman, this integration of the two areas within one scheme is "neither realistic nor desirable".[65]

In brief, in so far as competition law is concerned, Kenya's 2010 Competition Act prohibits certain horizontal and vertical restrictive trade practices and abuse of dominant power. It also makes provision for merger control. The Act establishes a Competition Authority of Kenya (hereafter CAK), an autonomous body with power to regulate its own procedure.[66] Appeals from decisions of the Authority lie with the Competition Tribunal[67] which may either determine a petition substantively[68] or exercise power of review.[69] Appeals from decisions of the Tribunal go to the High Court[70] which is a part of the judiciary and is not a specialised tribunal for competition law.[71] There is no provision for a dedicated Competition Appeal Court.

The *raison d'être* of the 2010 Competition Act as declared in the preamble, is to promote and safeguard competition in the national economy and to establish a competition authority and tribunal. Section 3 on its part declares the object of the Act as being to

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[61] Huffman M "Bridging the Divide? Theories for Integrating *Competition* Law and Consumer Protection" 2010 (6) *European Competition Journal* 7 hereinafter Huffman (2010) 6 *European Competition Journal,* at 34.
[62] Cseres (2013) *at* 26.
[63] Monti (2007) 100-101.
[64] Trebilcock MJ and Lacobucci EM "Designing Competition Law Institutions: Values, Structure, and Mandate" 2010 41(3) *Loyola University Chicago Law Journal* 455 at 465.
[65] Huffman (2010) 6 *European Competition Journal* at 8.
[66] Sections 7 and 8. The Schedule to this section limits itself to provisions regarding matters of tenure of board members, vacation of office and conduct of meetings.
[67] Section 71 2010 Competition Act.
[68] Section 74(3) 2010 Competition Act.
[69] Section 75 2010 Competition Act.
[70] Sections 40(2), 49(2), 54(2) and 77 for restrictive trade practices and abuse of dominance, mergers, control of unwarranted concentration of economic power and the Authority's right to appeal respectively.
[71] Article 165 Constitution of Kenya 2010.

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promote and protect effective competition in order to achieve specified ends which include: increasing efficiency in the production, distribution and supply of goods and services, promote innovation; maximization of efficient allocation of resources; protection of consumers; creation of an environment conducive for investment; and promote the competitiveness of national undertakings in world markets.[72] From a plain combined reading of the preamble and section 3,[73] the goal of competition legislation in Kenya is a combination of efficiency outcomes as well as public interest considerations.

1.3.2 Kenyan Merger Regulation

Kenya has experienced heightened activity in mergers and acquisitions in recent years. A report on transaction fees earned by the Common Market for East and Southern Africa (COMESA) between December 2015 and October 2016 revealed that Kenya and Zambia accounted for a significant percentage of merger and acquisition transactions in the region.[74] A 2016 report by the Mergermarket Group, identifies East Africa as the second most attractive region for in-bound mergers and acquisitions after South Africa. In both 2018 and 2019, the Country ranked as the third most popular target for overseas dealmakers after the two large economies of South Africa and Nigeria respectively with the highest number of reported merger transactions in the Eastern African region.[75] Statutory changes on the domestic front have also contributed to the upsurge in mergers and acquisitions. For example, following 2015 amendments to the Kenyan Insurance Act,[76] players in the market had until 2018 to comply with higher capital requirements. For most small insurance companies, there was little in the way of choice other than to merge. To demonstrate the growth in mergers, the CAK adjudicated 65 mergers in the 2012/2013, a number which had more than doubled to 148 in 2014/2015, increasing to

[72] Section 3(a)-(h) 2010 Competition Act.
[73] Under Kenyan law, the preamble and objects sections of statute are considered an extension one of the other in interpreting the purpose of the statute. *R v Council of Legal Education & Another Ex-Parte Mount Kenya University* Misc Civil Application 16 of 2016 [2016] eKLR.
[74] Mutegi "Kenyan companies lead merger and acquisition deals in Comesa region" 06 November 2016 Business Daily available at http://www.businessdailyafrica.com/corporate/Kenyan-companies-lead-merger-and-acquisition-deals/539550-3442964-l9ptabz/index.html (accessed 12/10/2017.
[75] Merger Market Group (2016) Available at http://mergermarketgroup.com/wp-content/uploads/2016/02/Deal-Drivers-Africa_2016_FINAL_LR.pdf (accessed 14/10/2017; Kenya had 72 reported transactions in the year and Uganda, Tanzania, Rwanda and Ethiopia recorded 13, 18, seven and six deals respectively. Deal Makers Africa Volume 11 No. 4, 2018 available at https://72ae49e5-7e26-4590-a77c-4a336e8b8f29.filesusr.com/ugd/cf215e_94190b8d92a045ba97d39a247acc8a82.pdf (accessed 13/11/2020 and Deal Makers Africa Volume 12 No. 4 available at https://72ae49e5-7e26-4590-a77c-4a336e8b8f29.filesusr.com/ugd/cf215e_4c0c23e56a2d437f85e34aa814f974c1.pdf (accessed 13/11/2020.
[76] Cap 486 Laws of Kenya.

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150 in 2017/2018and 162 in 2018/2019.[77] The number of merger applications dropped to 126 in 2019/2020 attributable to new merger thresholds exempting small and medium enterprises from notifying mergers to the Authority.[78]

Kenya's law on mergers is contained in the 9 sections of Part IV of 2010 Competition Act under the title 'Mergers'. No proposed merger may be implemented except with the approval of the CAK.[79] A merger as contemplated by the Act is broad and includes the purchase or lease of shares, acquisition of an interest or purchase of assets of an undertaking, acquisition of a controlling interest in a section of a business capable of itself being operated independently, acquisition of an undertaking under receivership, acquisition of controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya, vertical integration, amalgamation, takeover and generally any other combination. All mergers are notifiable.[80] Once notified, substantive analysis of the proposed merger follows. Section 46(2) provides that the CAK may base its determination on "any criteria which it considers relevant to the circumstances" including a list of eight factors. These factors are not tiered and neither is there an analytical progression for analysis. The first consideration relates to the extent to which the proposed merger would be likely to prevent or lessen competition.[81] Second, is a consideration of the extent to which the proposed merger would be likely to result in acquisition or strengthening of a dominant position.[82] Third is an assessment of the extent to which the proposed merger would result in a benefit to the public that outweighs any detriment caused.[83] Considerations four to seven are all public interest considerations.[84] The Authority is required to look into the possible effect of a proposed merger on a particular industrial sector or region; the extent to which it would be likely to affect employment; the extent to which it would be likely to affect the ability of small undertakings to gain access to or be

[77] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* 18, Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* (2015) 21 and Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2017/2018* 35 and Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2018/2019* (2019) 53.
[78] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2019/2020* (2020) 51.
[79] Section 41 2010 Competition Act.
[80] The Authority may by notice declare a class of mergers excluded from the blanket notification requirement Sec 42(1).
[81] Section 46(2)(a) 2010 Competition Act.
[82] Section 46(2)(b) 2010 Competition Act.
[83] Section 46(2)(c) 2010 Competition Act.
[84] Section 46(2)(d)-(g) 2010 Competition Act.

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competitive in the market; and how far it would be likely to affect the ability of national industries to compete in international markets. The eighth consideration is an appraisal of potential efficiency benefits from the proposed merger.[85]

On the face of it, Kenya's merger analysis process is a hybrid made up of the SLC and dominance tests. To which are added public interest considerations. The CAK's Merger Guidelines of 2013 divide the set of eight factors under section 46(2) into two groups - a 'Competition Test', meaning the combination of the substantial lessening of competition and dominance tests; and a 'Public Interest Test'.[86] The Authority uses a "balancing approach" in applying the two while maintaining merger specificity.[87] With regard to the combined substantial lessening of competition and dominance tests the CAK applies "the dominance test within the analytical framework of the substantial prevention or lessening of competition test."[88] The overarching purpose of the public interest test is to ascertain whether otherwise anti-competitive or pro-competitive mergers will conflict with the relevant government agenda as articulated in Vision 2030.[89]

In assessing public interest considerations the CAK will take into account the need to enhance and sustain employment, guard against substantial job losses, salvage failing and dormant firms and encourage mergers of media firms that will enhance production of local content'.[90] Mergers involving small and medium enterprises will be fast-tracked,[91] and those involving sectors which have high impact on the poor such as provision of utility services will receive in-depth scrutiny.[92] The Authority promises "relatively less SLC scrutiny" to mergers that enable national firms to gain access to. or be competitive in, international markets.[93]

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[85] Section 46(2)(h) 2010 Competition Act.
[86] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) 4.
[87] Competition Authority of Kenya above par 4.
[88] Competition Authority of Kenya above par 5.
[89] Competition Authority of Kenya above par 41.
[90] Competition Authority of Kenya above par 210.
[91] Competition Authority of Kenya *Public Interests Test in Merger Determinations* (2013) pars 4 and 5.
[92] Competition Authority of Kenya above par 7.
[93] Competition Authority of Kenya above par 21.

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In terms of actual application of public interest considerations, the CAK is at liberty to add to the four listed factors and has gone on to do so.[94] Impact of a merger on the poor is one such example.[95] Where a failing or dormant firm is involved in a merger application, the merger will be fast-tracked and stands a good chance of success largely on that account. The 2010 Competition Act does not provide for a failing firm defence[96] but according to the Merger Guidelines, the presence of a failing firm is a consideration in determining whether to approve a merger or not.[97]

The process of merger analysis, though independent, is undergirded by the overall purpose and tenor of the statute.[98] How the goal of competition policy as stated in the Act is given life in merger analysis, will be investigated in this thesis.[99]

1.4. Hypothesis and focus of the study

The hypothesis underlying this study, which focuses on the merger control regime in Kenyan competition law, is that "Merger regulation in a developing country is most beneficial when the analysis of mergers takes into account the socio-economic context without sacrificing the competitive market structure".

1.5. Research questions

This study will seek to answer the following research questions:

a) Are competition law goals immutable or adaptable?

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[94] See chapter 5 par 5.3.4

[95] Competition Authority of Kenya *Public Interests Tests in Merger Determination Guidelines* (2013) pars 7 and 23.

[96] The failing firm doctrine typically permits approval of mergers whose possible anticompetitive effects are outweighed by the damage to the competitiveness of the relevant market by the exit of a struggling firm and its assets. Nzero I Corporate Restructurings in Zimbabwe: A Legal Analysis of the. Regulation of Corporate Mergers and Acquisitions in Zimbabwe *LLD Dissertation University of Pretoria* (2013) hereinafter Nzero (2013) and Nzero I "The Implications of Public Interest Considerations on the Interpretation and Application of the Failing Firm Doctrine in South African Merger Analysis" 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 602 hereinafter Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg.*

[97] The Merger Guidelines address themselves to a 'failing undertaking argument', an equivalent to SA's 'failing firm arguments'. Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 202.

[98] See the Court's dictum on the interaction between sections 2 and 12A of the Act in *Distillers (South Africa) Ltd v Bulmer (SA) (Pty) Ltd* 2002 2 SA 346 (CAC) 357-358

[99] See Lewis' criticism of the Competition Appeal Court at Lewis (2012) 109 for its failure to take account of the social content of competition law as mandated in the Preamble of 1998 Competition Act in reversing the decision of the Tribunal in *Medicross Healthcare Group (Pty) Ltd and Prime Cure Holdings Pty Ltd. v The Competition Commission* (55/CAC/Sept05/).

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b) What competition law goal(s) best serve(s) a developing country such as Kenya?

c) What is the nature of merger analysis that delivers the ideal goals?

d) Is it an efficient approach for Kenya to have merger analysis that is hybrid in nature, combining a substantial lessening of competition test and a dominance test?

e) Is a tiered approach to merger analysis, commencing with the substantial lessening of competition test and using public interest as a further filter more appropriate for Kenya than the current scheme set out in section 46(2) of the Kenyan Competition Act?

f) How should efficiency benefits be treated in Kenya's merger analysis?

g) Which public interest considerations should be considered under the Kenyan Competition Act as appropriate in the context of merger analysis?

h) Are there any aspects in section 46(2) of Kenya's Competition legislation that should be discarded or amended to increase effectiveness of the country's merger analysis?

i) What curative measures could be taken with regard to any apparent inadequacies?

1.6. Research Methodology

The methodology to be adopted is that of comparative desktop-based legal research. The researcher will carry out analysis of the relevant legislation via detailed literature review of books, journal articles, policy documents, reports, other legislation, theses and case law.

1.7. Limitations and delineations of the study

An all-encompassing inquiry into Kenya's 2010 Competition Act would be protracted and probably too superficial if attempted to be undertaken in a single thesis. Consequently, the scope of this research does not cover restrictive practices, abuse of dominance and

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unwarranted concentration of economic power. Neither will it cover the hybrid nature of the Act, exemptions and the penalties system.

As the focus of the study is merger analysis specifically as the most essential component of merger regulation, the study will not cover in detail all aspects of merger regulation such as for instance merger notification thresholds, penalties for failure to notify and remedies available to agencies. These aspects will only be dealt with peripherally where relevant and to fit merger analysis within the overall framework of the law.

Kenya is a member of the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC). Both these regional economic bodies have competition legislation specifically the COMESA Competition Regulations of 2004 and the East African Community Competition Act of 2006. The merger regimes of the two statutes cover transactions with a regional effect, that is, cross-border mergers. This thesis will be limited to mergers and acquisitions whose effect is limited to Kenya and therefore will not make reference to the two regional blocs' laws.

1.8. Comparative jurisdiction selection

For a meaningful appraisal of Kenya's merger analysis regime, a suitable benchmark is required. This researcher considers the South African Competition Act and specifically its approach to merger assessment as apt for this task. Occasional reference will be made to other jurisdictions as may be relevant but the core tool of comparison remains the South African experience.

South Africa has a longer tradition of competition law enforcement than Kenya and has had the opportunity to refine its legislation. Accordingly, the country has ample jurisprudence with settled legal approaches. African countries follow the lead of South Africa and one looking at the various competition laws and merger regimes of these countries sees the footprint of South Africa.[100] There is in addition a growing consensus that Kenya's enforcement is not far behind that of South Africa. In an analysis of the

[100] Chapter 2 par 2.1.

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performance of selected African competition agencies, Fox and Bakhoum observe that Kenya's competition agency has been reasonably successful in building a competition culture where there was virtually none. They especially laud the proactive enforcement against abuse of dominance and anti-competitive agreements which has cleared the path for access by traders to financial services featuring mobile money.[101]

South Africa's location and economic conditions make it a most suitable jurisdiction for comparison. As already stated above, competition law takes cognisance of unique circumstances and peculiarities of each jurisdiction and the fact that South Africa is a developing economy, albeit the most developed in Africa, makes it ideal for this task. In actual fact, that South Africa is more advanced makes it even more appropriate because Kenya will benefit from the lessons of South Africa in the merger realm and how the Country has used vibrant but regulated markets to leverage itself. Given this, it would unlikely add much value to this venture to look into any other comparators on the continent beyond South Africa and this study will retain South Africa as the only comparator.

For the purpose of establishing the nature of and trends in competition law goals, the experience of American antitrust shall be used. Though a markedly different jurisdiction from Kenya, the United States has had the longest experience in enforcement of competition law which have presented the opportunity for the law to evolve with the United States various eras. The path taken in enforcement of antitrust from its inception to date will be used to reveal the shifts in goals that the law has been used to serve. The enforcement patterns will help answer the question of whether goal(s) of enforcement should be fixed or they are flexible enough to fit the demands of a particular jurisdiction.

1.9. Proposed structure

To respond adequately to the research questions, this study is structured as follows:

[101] Fox EM and Bakhoum M *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (2019) hereinafter Fox & Bakhoum (2019) 66.

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Chapter 1 is introductory, outlining the background to the study, the objectives and scope of the research, delineations and limitations, the method through which the research is conducted and the chapter lay-out.

Chapter 2 will examine the various approaches and schools of thought regarding the ends to the goals of competition law, how these play out within given jurisdictional parameters. The American experience will be used to illustrate how goals of competition law are essentially the outcome of the part of greater policy direction.

Chapter 3 will address the question of whether developing jurisdictions should align their law to that of developed jurisdictions with mature competition law, identify the most appropriate and pragmatic object(s) of competition law for developing nations and address the nature and elements of the merger analysis that would resonate best with the identified object(s).

Chapter 4 will examine the merger regime of South Africa and more specifically the Country's merger analysis in order to identify areas of learning. The chapter will present an historical overview of competition law and its intended goals in the jurisdiction, and how these impact upon its merger analysis.

Chapter 5 will investigate merger analysis as applied in Kenya. This will entail a historical overview of the competition law and its goals. A detailed evaluation of the law and the manner in which mergers are analysed will be carried out as well as identification of the shortcomings of the current law, their implications and possible solutions.

Chapter 6 will provide a compilation of all the findings of the study together with conclusions on these principal findings and suggestions for further research.

1.10 Reference Techniques

In this work, reference will be made to legislation, organisations and policy documents on repeated occasions. Where a frequently used term is referred to for the first time, the reference will be in full followed by the abbreviation in brackets, preceded by the word 'hereafter'. For example: Competition Authority of Kenya (hereafter CAK).

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Where a source is referred to, the full reference will be reflected in the relevant footnote. For sources referred to more than once, the first full reference will be accompanied by an abbreviated citation. For the sake of brevity, further citations to the source will use the abbreviated citation in place of the full reference. Where an abbreviated citation is used, the full reference can be quickly accessed by consulting the bibliography at the end of this thesis. The bibliography is displayed in table format. In the table, each full reference of a source is accompanied by its citation in a separate column alongside the full reference.

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CHAPTER 2:

GOALS OF COMPETITION LAW: THE AMERICAN EXPERIENCE

2.1 Introduction

2.2 The nature of competition law

2.3 Goals of competition law

2.4 Trends in American antitrust enforcement

2.5 Conclusion

2.1 INTRODUCTION

> Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete . . .[102]
>
> (Justice Thurgood Marshall 1908 - 1993 96th Associate Justice of the Supreme Court of the United States)
>
> "The shepherd drives the wolf from the sheep's throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty . . . Plainly the sheep and the wolf are not agreed upon a definition of the word liberty . . ."[103]
>
> (Abraham Lincoln 1809 - 1865 16th President of the United States of America)

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[102] *United States v Topco Associates Inc.* 405 US (1972) 596 at 610. See also *Verizon Communications Inc. v Law Offices of Curtis v Trinko* LLP 540 US (2004) 398 at 415-16 and *United States v Topco Associates* 405 US (1972) 596 at 611-12 where horizontal restraints were declared unlawful because they limited the freedom of traders. The constitutional nature of antitrust, in the sense that it would confer rights is itself a contentious issue. See generally Crane DA "The Magna Carta of Free Enterprise" Really?" 2013 (99) *Iowa Law Review* 17 at 18 and 23; Alan M "Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It" 1999 (79) *Boston University Law Review* 1 at 6 and 8; Fox EM "Modernization of Antitrust: A New Equilibrium" 1981 (66) *Cornell Law Review* 1140 at 1147 and Nachbar TB "The Antitrust Constitution" 2013 99 *Iowa Law Review* 57.

[103] Address at a Sanitary Fair in Baltimore, April 18 1864, reprinted in Basler RP (ed.) *Abraham Lincoln: His Speeches and Writings* (1946) 749.

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Freedom is relative. The promotion of one person's freedom characteristically involves a trade-in for another's.[104] With regard to 'freedom to compete', the place of competition law has been one of both hero and villain, oppressor and liberator - all at the same time and dependent on which side of enforcement the speaker stands.[105] Two parties negotiate a merger which in their estimation is certain to raise economies of scale to enable them compete more profitably. Only to have it disallowed by a competition agency on grounds that it poses possible harm to competition. Such a pair is likely to read nothing from the agency's action but curtailment of their right to compete more efficiently. That exact pronouncement to the small player, striving to maintain a profitable profile in the same market rings of nothing but protection of his freedom to compete - an entitlement that the proposed merger had real potential to upset. For the one party, competition law is a malevolent curtailer of liberty, for another competition law is a knight in shining armour.

On 25 June 2017, the European Commission fined Google a record 2.42 billion Euros, the biggest fine the European Union has ever imposed on a single company in a competition law case.[106] Google's offence was abusing market dominance by prioritising its own comparison shopping service in search results while pushing further down the results of competitors, thereby denying them the chance (that is to say the freedom) to compete.[107] The firm rejoined that the Commission's sanction was nothing short of a penalisation of "hard work and constant innovation."[108] As expected, reactions to the

[104] Stucke ME "Reconsidering Antitrust's Goals" (2012) 53 *Boston College Law Review* 551 hereinafter Stucke (2012) 53 *Boston College Law Review,* at 592. On the concept of freedom see generally Raz J *The Morality of Freedom* (1986).
[105] Edlin A and Farrell J "Freedom to Trade and the Competitive Process" in Blair RD and Sokol DD (eds.) *The Oxford Handbook of International Antitrust Economics: Volume 1* (2014). The American Supreme Court appreciated early in the history of antitrust that every contract among market participants is bound to restrain trade and so the Sherman Act "must have a reasonable construction or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it". *Hopkins v United States* 171 U.S. (1898) 578 at 600.
[106] Before then the largest fine was that imposed on the American chipmaker Intel at 1.06 billion Euros in 2009 for abuse of a dominant position, followed by an 899 million Euros fine on Microsoft in 2008. For the Intel decision see Commission Press Release IP/09/745 of 13 May 2009 "Antitrust: Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices" available at http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en (accessed 15/08/2018). A summary has been published in the Official Journal C 227 of 22 September 2009 at 13. For a summary of the Microsoft decision see Commission Press Release IP/08/318 of 27 February 2008 "Antitrust: Commission imposes € 899 million penalty on Microsoft for non-compliance with March 2004 Decision" available at http://europa.eu/rapid/press-release_IP-08-318_en.htm?locale=en (accessed 15/08/2018).
[107] "Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service" available at http://europa.eu/rapid/press-release_IP-17-1784_en.htm (accessed 27/7/2017.
[108] Kent W "Google in Europe: The European Commission decision on online shopping: the other side of the story" Available at https://www.blog.google/topics/google-europe/european-commission-decision-shopping-google-story/ (accessed 13/6/2017). Also see Kent W "Google in Europe: Improving quality isn't anticompetitive: Part I" August 27, 2015 available at https://europe.googleblog.com/2015/08/improving-quality-isnt-anticompetitive.html (accessed 27/07/2018 and "Google in Europe:

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ruling, though expressed in sundry ways, coalesce into two neat blocs. On the one hand is a group that finds it unconscionable that bureaucrats with little appreciation of the intricacies of the market and who seem to have a penchant for picking on the efficient, get to make key decisions which impact on the liberty of market players.[109] On the other hand is a group whose view is that the Commission actually deserves credit for tackling the increasingly imperative question of the responsibility of dominant online firms when direct competitors offer products and services on their platforms. The law, they say, must be engaged to ensure that so called 'super-platforms' such as Google and Facebook adhere to a principle of neutrality.[110]

At the foundation of both these views is a shared belief in the entitlement to freedom to compete. The parting of ways happens at the point of whose freedom to prioritise. For the pro-smaller players group, there must be accorded to all a fair field within which to play. If need be, the law should come in to level the field and shield the small player from the tyranny of the strong. For the pro-Google team, big players too must be allowed the freedom to innovate and use their innovation to benefit both themselves and their consumers. It is unconscionable that a firm is punished for being ahead of the pack through their own effort. In order to comply with the EC's ruling, Google changed the shopping box displayed at the top of search results. It now shows its own ad results but also gives space to other shopping comparison services, which can bid for advertising slots.

The end of this matter may be far. Shortly after the Commission's decision, the search giant filed an appeal to the Luxembourg-based General Court, triggering a process that could easily take upward of a decade for final resolution.[111] The appeal was argued in

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Improving Quality Isn't Anticompetitive: Part II" available at https://blog.google/topics/google-europe/improving-quality-isnt-anticompetitive-part-ii/ (accessed 27/07/2017.

[109] Martínez (2017) The Guardian 2 July 2017; Akman P "The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law" 2017(2) *Journal of Law, Technology and Policy* 301 and Sokol D "Pinar Akman Initial Reactions to the Infringement Decision in Google Search" (27 June 2017) Antitrust and Competition Policy Blog available at http://lawprofessors.typepad.com/antitrustprof_blog/2017/06/pinar-akman-initial-reactions-to-the-infringement-decision-in-google-search.html (accessed 20/08/2017).

[110] Stucke (2017) The Economist July 1 2017. For reading on virtual competition and on super-platforms see Ezrachi A and Stucke M *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (2016).

[111] Toplensky R "Google appeals €2.4bn EU antitrust fine" Financial Times September 1 2017 available at https://www.ft.com/content/8016cf66-9f97-3ce4-8d40-9b9dc16c7459 (accessed 13/08/2017). In September 2017, the European Court of Justice set aside the judgment of the General Court which had upheld the €1.06 billion fine imposed on Intel in 2009 referring the case back to the General Court in order for it to examine some of the arguments put forward by Intel. See Court of Justice of the European Union Press Release No 90/17 Luxembourg, 6 September 2017 "Judgment in Case C-413/14 P *Intel Corporation Inc. v*

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February 2020 and a ruling dismissing Google's case delivered on 11th November 2021.[112] The General Court dismissed for the most part the appeal brought by Google and upheld the fine imposed by the Commission. It agreed with the Commission's finding on the anticompetitive nature of the practice at issue and further that the Commission correctly found harmful effects for competition.[113] The losing side can appeal to the European Union Court of Justice Europe's top court.

The questions that are raised in the domain of goals of competition law are not only multi-faceted but also protean. Who or what should competition law seek to protect? Should antitrust facilitate and enhance competition through maintaining an atomistic structure in which numerous small businesses participate or should the aim be to maximize market efficiency without caring about the number, let alone size, of the players in the field? Is there a finitude to goals of competition law? Or is the law elastic so that there is room to accommodate an assortment of ends? And if this be so, is there any room for non-economic objects such as equity, distribution of wealth and protection of employment? Or is competition law built like a fortress within which only card-carrying economic considerations may come in? What are the dimensions of this law? Is it a one size fits all vestment or are jurisdictions at liberty to tailor-make their own made-to-measure versions? This is the cauldron in which the developing country finds itself immersed upon adopting competition law - an atmosphere rife with dissidence over what exactly the ideal ends of competition law are and whether those ends should be standard across states. It is a conundrum which presents itself over again, even if subliminally, whenever a proposed merger is presented for review.

We seek in this chapter to give credence to the view that the ends of competition law and therefore of merger regulation, must of necessity be fitted to the needs of the jurisdiction within which the law is existent. This is of special relevance to the developing country.

Commission" Available at https://curia.europa.eu/jcms/jcms/p1_452379 (accessed 11/09/2018). For Full text of the judgement see Case number C-413/14 http://curia.europa.eu/juris/documents.jsf?num=C-413/14 (accessed 11/09/2018 (accessed 11.09.2018.

[112] Chee FY "EU court to rule on Google's $2.8 bln EU antitrust fine on Nov. 10" available at https://www.reuters.com/technology/eu-court-rule-googles-28-bln-eu-antitrust-fine-nov-10-sources-2021-07-20/ (accessed 17/07/2021).

[113] General Court of the European Union PRESS RELEASE No 197/21 Luxembourg, 10 November 2021 Judgment in Case T-612/17 *Google and Alphabet v Commission (Google Shopping)* The General Court largely dismisses Google's action against the decision of the Commission finding that Google abused its dominant position by favouring its own comparison shopping service over competing comparison shopping services available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf (accessed 12/11/2021).

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Ezrachi in his piece, 'Sponge' makes the case that there is no purity to competition law goals.[114] We are obliged to borrow this argument. A look through the history and experience of competition law in the United States gives credibility to this line of thinking. We see revealed in the United States' experience a reality that all through its existence, this branch of law has been moulded and adapted, from one epoch to the other, to suit already pre-determined ends. Ends adjudged the most appropriate for the county at that hour. It follows then, as we shall show in the next chapter, that to be of any usefulness and relevance to the developing country, competition law must be fluid enough to adjust to its jurisdiction. Our findings in chapters two and three will undergird the remaining part of this thesis.

This chapter comprises three parts. The preliminary segment is dedicated to a basic overview of the nature of competition law, our intention being to place merger control in its rightful locus in the universe of antitrust while at the same time launching us into the remainder of the work. Thereafter we delve into a study of the goals of competition law with a specific focus on merger regulation and bring up for examination a divide that has long been part of the discourse. The intention is to reveal the context within which competition law and therefore merger regulation operates and consider the options available for a developing country in its merger analysis. Third and finally, we audit the trends in antitrust goals in the United States in order to first, prove the veracity of the thesis regarding purity of competition law goals and secondly, support our assertion that the circumstances of a jurisdiction should frame the goals of its merger regime.

One would be forgiven for querying the wisdom of poring over material on the American experience of antitrust for a study on the merger analysis of a developing jurisdiction in Africa. We have in response what we consider to be good reason. A study of the normative foundations of competition law is essentially a journey through America's antitrust over the last century or so. Add to this the fact that, competition legislation across jurisdictions typically takes the prototype of American law, more so with regard to the theoretical foundations of the law. This includes that of the European Union. While there

[114] Ezrachi A "Sponge" 2016 (5) 49 *Journal of Antitrust Enforcement* 49 hereinafter Ezrachi (2016) 5 *Journal of Antitrust Enforcement*.

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are today marked differences between antitrust and the European Union's competition law, the United States antitrust statutes had considerable influence on the development of European Community competition laws after the Second World War.[115] Owing to this background, many cases are resolved in much the same way that an analogous American case would have been.[116]

American antitrust has been a reference source for many countries and United States' antitrust authorities have offered technical support to various nations in the development of their competition law regimes.[117] Developing economies have been known to borrow competition law regimes from a combination of American antitrust and European Union law.[118] As an example, the structure and language of South Africa's competition statutes and case law is said to have benefited from those of the United States and the European Union. Munyai observes that the country's first comprehensive competition legislation far back in 1955, drew lessons from American antitrust.[119] The Act that followed in 1979 was similarly the product of a survey of the thinking in the United States as well as other jurisdictions.[120] He goes on to observe that "the philosophy underpinning the South Africa's Competition Act is substantially the same as that on which the Sherman Act was premised",[121] and further, with regard to enforcement, that "our case law is replete with generous quotations from foreign competition law decisions, particularly those of American and European law."[122]

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[115] Wood DP "The U.S. Antitrust Laws in a Global Context" 2004 *Columbia Business Law Review* 265 at 266.
[116] Wood (2004) above.
[117] Geradin D "Competition Law" in Smits JM (ed.) *Elgar Encyclopedia of Comparative Law* (2014) 177.
[118] As an example, India's now repealed Monopolies and Restrictive Trade Practices Act 1969 borrowed heavily from American antitrust. See Singh R "India's Tryst with "the Clayton Act Moment" and Emerging Merger Control Jurisprudence: Intersection of Law, Economics and Politics" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Singh in Sokol et al. (eds.) (2014) 249 and 253. Israel's first competition legislation, the Restrictive Business Practices Law 1959 was modelled in a large part on the existing UK system of competition law, in particular the UK Monopolies and Restrictive Practices Act 1948 and the Restrictive Trade Practices Act 1956. See Dabbah MM *Competition Law and Policy in the Middle East* (2007) 35 and Shahein H "Designing Competition Laws in New Jurisdictions: Three Models to Follow" in Whish & Townley C (eds.) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (2012) hereinafter Shahein in Whish &Townley (eds.) (2012) 35, 43-44.
[119] Munyai PS A Critical Review of the Treatment of Dominant Firms in Competition Law: A Comparative Study *LLD Dissertation University of South Africa* (2016) hereinafter Munyai (2016) 17.
[120] Munyai above at 18.
[121] Munyai above at 18. For an overview of influence of the jurisprudence of the United States and the European Union on South African competition law see Munyai (2016) 16-19. See also Botchway FN "Mergers and Acquisitions in Resource Industry: Implications for Africa" in Botchway FN (ed.) *Natural Resource Investment and Africa's Development* (2011) hereinafter Botchway in Botchway (ed.) (2011) 33.
[122] Munyai (2016) 17. See Singh in Sokol et al. (eds.) (2014) 257-258 for the Indian experience.

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In turn, Kenya, Botswana and Namibia, among other African countries, have been inspired by the values of the South African system.[123] And it is not just the laws that developing countries borrow, but also accompanying enforcement paradigms and institutions for administration.[124] With this reality, it is reasonable to expect valuable pertinent lessons from the trajectory of antitrust. As Munyai observes, a clear understanding of the principles of current law is dependent on appreciation of how the borrowed principles developed.[125]

There is also the truism that there is nothing new on the face of the earth. Contemporary competition law scholarship has been accused of naively responding with much excitement at the 'discovery' of 'new' theories that in reality already had shelf-lives in earlier seasons of the antitrust cycle.[126] With competition law, what has been done in the United States, sooner than later reaches the European Union (or at least causes a stir there) and in due course, everywhere else - including the shores of the developing world. In recent times, current European Union academic discourse has been caught up in a debate at the core of which is the appropriateness or otherwise of the Union's competition law and merger analysis - taking what appears to be an unmistakably American more-economic inclination.[127] We thus have reason to believe that there are important lessons to be picked from the trends of goals of competition law abroad. Room must of course be made for nuances, the fairly unique elements of implementation in the two diametric arenas - the developed West and the developing world. An apt example would be the greater attention to equity evident in more prominent ways in developing countries than in the West.[128]

On this matter of objectives of competition law, we have little choice but to paint with broad strokes. It is difficult; nay, impossible, to do justice in the space permitted to a matter as catholic as the ends of competition law. The breadth and depth of arguments that have

[123] Botchway in Botchway (ed.) (2011) 34; Raslan (2016) *CLES Research Paper Series* at 2.
[124] Botchway in Botchway (ed.) (2011) 32; Singh in Sokol et al. (eds.) (2014) 253.
[125] Munyai (2016) 17.
[126] Crane DA "All I. Really Need to Know About Antitrust I Learned in 1912" 2015 (100) *Iowa Law Review* 2025 hereinafter Crane (2015) 100 *Iowa Law Review* 2025 at 2025-2026.
[127] See generally Gormsen LL"The Conflict Between Economic Freedom and Consumer Welfare in the Modernisation of Article 82" 2007 (3) *European Competition Journal* 329 and Jones A, Sufrin B and Dunhe N *EU Competition Law: Text, Cases, and Materials* (2019) 42-46.
[128] Botchway in Botchway (ed.) (2011) 35. See chapter 2 par 2.5.5.

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been raised on the subject are the substance of entire texts.[129] Attempting to fit them completely into a chapter of a thesis would be a tad ambitious.

2.2 THE NATURE OF COMPETITION LAW

2.2.1 Historical background

The foundations of competition law, both intellectual and conceptual, are to be found in the neo-classical microeconomic theory which succeeded the classical economics theory. Adam Smith's *magnum opus*, "The Wealth of the Nations",[130] published in 1776, is considered the epic treatise of classical economics.[131] Smith's fundamental message was that the wealth of nations proceeds from free trade and not stocks of gold as per the prevailing reasoning of the time. Free exchange of things of value between traders increases the total wealth of the nation. Smith and fellow classical economists argued for minimal interference with markets by government, their approach best capsulised in the phrase "open the doors of opportunity and trust the results".[132]

Neo-classical theorists in turn taught that competition, when functioning optimally, would produce a perfectly competitive market - one marked by three efficiencies; allocative, productive and dynamic. Competitive markets allocate scarce resources between competing end users based on the price they are prepared to pay, a benefit known as "allocative efficiency". Goods and services are produced at the lowest possible cost meaning that as little possible of society's wealth is consumed in production, an effect known as "productive efficiency". These two efficiencies have the combined effect of stimulating innovation. Competitors strive to produce newer and better products for consumers leading to "dynamic efficiency". Dynamic or innovation efficiency refers to the extent to which a firm innovates by introducing new as well as improving existing products or processes of production. It differs from static efficiencies in that it possesses a temporal

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[129] See for instance Zimmer D "The Basic Goal of Competition Law: To Protect the Opposite Side of the Market" in Zimmer D (ed.) *The Goals of Competition Law* (2012) and Andriychuk O *The Normative Foundations of European Competition Law: Assessing the Goals of Antitrust through the Lens of Legal Philosophy* (2017).

[130] Smith A in Cannan E. (1922). *An Inquiry into the Nature and Causes of the Wealth of Nations* (1922) available at https://www.ibiblio.org/ml/libri/s/SmithA_WealthNations_p.pdf (accessed 23/07/2017.

[131] Also known as liberal economics. Other economists in this league include William Dyer Grampp, Jean-Baptiste Say, David Ricardo and Thomas Robert Malthus. See Grampp (1965) chapter 2.

[132] Sutherland PJ and Kemp K *Competition Law of South Africa* (2017) hereinafter Sutherland & Kemp (2017) 25.

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dimension. Whereas static efficiencies relate to a fixed point in time and therefore a given technological know-how, the concept of dynamic efficiency acknowledges the fact that technology and know-how are in a process of constant evolution through research and development (R&D), learning by doing and entrepreneurial activity. Dynamic efficiencies theoretically bear greater potential than static efficiencies.[133] The three efficiencies working together produce lower prices, better products, wider choice and greater efficiency than would obtain under circumstances of monopoly.[134] Social welfare and societal wealth are then maximised. A means to ensure the continued existence of that perfectly competitive market was necessary.[135] The means agreed upon was competition law which, it was expected, would regulate market power, thereby safeguarding competition.

Competition law in the form that we know it today originated in the United States with the enactment of the Sherman Act in 1890.[136] Though Canada's Competition Act was passed the year before, it only became active close to a century later in 1986 after the passing of a new Competition Act.[137] The later Act followed a twenty year reform process.[138] Older legislations prior to the American and the Canadian ones, though passed to regulate market conduct, do not fit into the mould of competition law in the modern sense.[139]

The Sherman Act was passed against the backdrop of the industrial revolution and the attendant ills that characterised that period. To take advantage of economies of scale, competing businesses would either merge or acquire assets of defeated rivals. The resultant landscape was one with fewer and fewer businesses controlling large industries

[133] Chalmers D, Davies G and Monti G *European Union Law: Text and Materials* (2014) 945-946; Orbach B "The Antitrust Consumer Welfare Paradox" 2011 7(1) *Journal of Competition Law and Economics* 133 hereinafter Orbach (2011) 7(1) *Journal of Competition Law and Economics,* at 141 and Schwalbe U and Zimmer D *Law and Economics in European Merger Control* (2009) 3-10.
[134] Whish & Bailey (2018) 5-7. See Cseres K "The Controversies of the Consumer Welfare Standard" 2007 3(2) *Competition Law Review* 121 Cseres (2007) 3(2) *Competition Law Review* 121 at 126.
[135] Sutherland & Kemp (2017) at par 1.4.1 for the hallmarks of a perfect market.
[136] 15 U.S. Code § 1.
[137] R.S.C., 1985, c. C-34.
[138] See Goldman & Bodrug (eds.) (2013) 1-15 for a summary of the 20-year reform process culminating in the Act.
[139] The earliest known enactment against monopolistic tendencies is the *Lex Julia Annonna* from the time of Julius Caesar. Statutes from around the 10th century in England prohibited certain business combinations and practices such as forestalling, the practice of buying off goods on their way to a market and regrating, the practice of buying up of goods from a market for resale in the same market or another market. The protection of freedom of trade largely remained the preserve of the restraint of trade doctrine. See for instance *Dr. Miles Medical Company v John D Parkie & Sons Co* 220 US 373 (1911). Common law did also attempt to deal with market distortions evident for instance in *Darcy v Allein* (The Case of Monopolies) (1603) 11 Coke 84 (77 ER 1260). The doctrine of conspiracy was used to deal with what are today known as restrictive trade practices.

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and markets.[140] The Act was intended as a comprehensive charter of economic liberty to preserve free and unfettered competition as the rule of trade.[141] It would set and enforce fair rules for the game and thus protect economic and political liberalism.[142] Antitrust law was so named because, stripped of all pretensions, the Sherman Act was essentially procured to rein in "trusts", the powerful monopolies that dominated manufacturing and mining scenes in Post-Civil War late-nineteenth-century America.[143]

The Sherman Act, short and succinct, contains only two prohibitions: one against conspiracies in restraint of trade, the other against abusive practices to gain or maintain a monopoly.[144] In 1914, Congress would pass two additional antitrust laws; the Clayton Act[145] and the Federal Trade Commission Act.[146] The former addresses specific practices that the Sherman Act does not plainly proscribe such as mergers and interlocking directorates.[147] It forbids mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly".[148] The latter Act created the Federal Trade Commission (FTC), the United States antitrust enforcement agency.[149] The three Acts form the core of federal antitrust laws today.[150]

[140] For a summary of the business environment of the industrial revolution and impact on the market see Sagers (2014) 5-7. Also see generally Porter G *The Rise of Big Business: 1860–1920* (2005).
[141] *Northern Pacific Railway Co. v United States* 356 U.S. 1 (1958) at 356 par 4.
[142] Sutherland & Kemp (2017) par 1.2.
[143] Trusts got their name from the legal device of business incorporation called trusteeship which consolidated control of industries by transferring stock in exchange for trust certificates. Among the most notorious of the trusts were the Sugar Trust, the Whisky Trust, the Tobacco Trust, John D. Rockefeller's Oil Trust, and J. P. Morgan's Steel Trust (U.S. Steel Corporation). See generally Orbach B and Rebling GEC "The Antitrust Curse of Bigness" (2012) 85 *Southern California Law Review* 605 and Gerber (2010) 123.
[144] Section 1 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . or by both said punishments, in the discretion of the court. Section 2; Monopolizing trade a felony; penalty - 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 felony, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . or by both said punishments, in the discretion of the court.
[145] 15 U.S. Code § 12 amended by the Robinson-Patman Act of 1936 (15 U.S. Code § 13).
[146] 15 U.S. Code § 45.
[147] Interlocking directorates is the practice of membership on the boards of directors of two or more firms by the same individual. They are not illegal except where the firms are mutual competitors when it is considered undesirable because it allows firms to exchange privileged information and thus may hinder fair competition.
[148] Section 7. The Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants.
[149] Joelson MR *An International Antitrust Primer: A Guide to the Operation of United States, European Union, and other Key Competition Laws in the Global Economy* (2017) hereinafter Joelson (2017) 10. I used the 2006 edition, see if need to update to current and change all through. Although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The Supreme Court has held that all violations of the Sherman Act also violate the FTC Act. *Federal Trade Commission v R. F. Keppel & Bro.*, 291 U.S. 304 per Justice Stone par 8. The Act also reaches other practices that harm competition but that may not fit neatly into categories formally prohibited by the Sherman and the Clayton Acts.
[150] In addition to these federal statutes, most states have antitrust laws which are for the most part based on the federal antitrust laws and are enforced by state Attorney Generals or private claimants.

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From these early beginnings a century and a quarter ago, competition law spread across the globe. Across jurisdictions, competition law is typically the body of rules set up to safeguard and support a market where vigorous yet fair competition results in the most effective allocation of economic resources. In such a market, the production of goods and services at the lowest price is possible. Put differently, good competition law should essentially be about ensuring that markets operate effectively and efficiently for the benefit of society.[151] Economists initially argued for “workable competition” as the standard to which the law would be held, a theory later refined into “effective competition”. This latter notion is defined as the best imperfect competition achievable in a market and is the pragmatic position followed within competition law.[152]

Unrestrained free enterprise has latency for abuse. Market economies left to their own devices invariably breed monopolies and cartels, which hurt the market while giving an illusory sense of choice.[153] That notwithstanding, it would be foolhardy to attempt to remedy the ills of free enterprise by suppressing individual initiative.[154] The more worthwhile approach is the invigoration of the inherent strength of the market in a set-up where competition is allowed free rein and legislation comes in only to deal with anti-competitive conduct that could unfairly eat into competition.

2.2.2 Scope of competition law

Competition legislation tends to be very broad, proscribing conduct that dominant and non-dominant players alike could partake of as part of the daily engagement of business.[155] Blanket application of the law has the potential to outlaw swathes of legitimate business behaviour and features of economic life that are not only inevitable but also desirable. The idea of market failures has been crafted as a filter to limit the scope of operation of the law to activities that are actually or potentially harmful to the

[151] Neuhoff (ed.) (2017) 12. Competition policy includes both the economic policies adopted by a government for enhancing competition within the economy and the instrument through which the administration intervenes to achieve efficiency of the markets within that economy by correcting market failures. Jones et al.(2019) 1-2; Medalla EM “Perspectives in Competition Policy: An Overview of the Issues” in Medalla E M (ed.) *Perspectives on Competition Policy: An Overview of the Issues in Competition Policy in East Asia* (2005) 5; Brassey (ed.) (2002)1 and Taylor MD Taylor *International Competition Law: A New Dimension for the WTO?* (2006) 8.

[152] Dunne N Competition *Law and Economic Regulation: Making and Managing Markets* (2015) hereinafter Dunne (2015) 18. Isser SN “What Is Workable Competition, Anyway and Why Should We Care” (4 December 2016) 1. Available at SSRN: https://ssrn.com/abstract=2880147 (accessed 19/09/2017).

[153] Joelson (2017) 6-7.

[154] Joelson above.

[155] Dunne (2015) 26.

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competitive process.[156] Archetypal competition law proscribes a range of conduct that comprises anticompetitive agreements, abuses of market power and anticompetitive mergers; else rendered as collusion and cartels, monopolies and dominance, and mergers and acquisitions respectively.[157]

2.2.2.1 Collusion and cartels

Competitors sometimes need to collaborate in order to achieve ambitions such as financing innovation, expansion into foreign markets and lowering costs. Risk to antitrust arises when the interaction is such that the competitors stop to act independently or when acting together gives erstwhile competitors the ability to wield market power together.[158] Anticompetitive arrangements among competitors are referred to as "horizontal" agreements, a term which encompasses conduct such as price-fixing, bid rigging (collusive tendering), joint ventures and joint advertising or marketing. Arrangements between upstream and downstream firms are 'vertical" agreements and include market allocation and recommendation of minimum resale price.[159]

Collusive agreements such as cartels may be intentionally engineered to eliminate competition, restrict output and raise prices. Then again, co-operation between competitors may foster efficiencies thereby enhancing the competitive functioning of a market or creating new improved products that benefit the consumer.[160] A competition agency must be able to distinguish between agreements that reduce competition and those that, on a balance, promote competition.[161] A policy that is too restrictive will preclude competitively beneficial conduct while one that is too lax will allow suppression of competition, injuring consumers and the economy.

Broadly, courts and agencies place collusive conduct on two levels of seriousness. Certain arrangements among competitors such as price fixing, bid rigging, market and/or customer allocations, group boycotts and tying arrangements are considered so harmful

[156] A market failure is a situation where free markets fail to allocate resources efficiently. The principle indicator for market failure is presence of market power, defined as the ability to set prices above marginal cost. The way in which firms act is what can cause market failure and the greater the market power, the greater the capacity to cause market failure. Monti (2007) 68-69.
[157] Whish & Bailey (2018) 5.
[158] Neuhoff (ed.) (2017) 62.
[159] Neuhoff (ed.) (2017) 86. For detailed reading on cartels and collusion see Utton MA *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies* (2011).
[160] Stucke (2013) 1 *Journal of Antitrust Enforcement* 162 at 165.
[161] *Chicago Board of Trade v US* 246 US 231,238(1918).

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to competition and consumers that they deserve to be prohibited outright. The court does not have to proceed to any further analysis once the plaintiff proves that the restraint occurred. There is also no investigation into their effect. Such infractions are *per se* illegal, because they will always or almost always result in consumer harm.[162] On the other hand are agreements, such as restraints in the supply chain and exclusive dealing, whose effect on competition and consumers is not conclusively evident at first glance. They may be anticompetitive, pro-competitive, competitively neutral or a hybrid of both pro and anti-competitive outcomes. Establishing where they fall requires deeper analysis. To assess these kinds of restrictions, courts tend to use the "rule of reason", thus named since it requires full deliberation on and a weighing up of the harms and benefits of the conduct in question before making a determination.[163] Under this rule, courts will look at a number of factors in deciding whether the particular agreement unreasonably restricts competition - a burden that is for the competition agency to establish.[164] As the law has developed, however, the frontier between the two categories has become progressively blurred. Often today, there is no bright line separating *per se* from rule of reason analysis.[165]

Competition Authorities may alternatively elect to apply a 'quick look' rule which truncates the examination of competitive effects and is applicable when ". . . an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[166] Such conduct is presumed to be illegal, shifting the burden of proof to the defendant to demonstrate that its pro-competitive effects outweigh the anti-competitive ones. If the harms outweigh the benefits, the agreement may be deemed an illegal restraint of trade.

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[162] For instance, section 4(1)(b) South Africa Competition Act 1998 and section 25 Botswana Competition Act 2009.
[163] For instance, section 21 Kenya's Competition Act 2010 and section 27 of Botswana Competition Act 2009. For History and current issues on the *per se* and rule of reason rules see generally Hovenkamp H "The Rule of Reason" 2018 (70) *Florida Law Review* 81 hereinafter Hovenkamp (2018) 70 *Florida Law Review.*
[164] *Monsanto Co. v Spray-Rite Service Corp.* 465 U.S. 752 (1984); *Arizona v Maricopa County Medical Society* 457 U.S. 332 (1982) and *Muenster Butane, Inc. v Steward Co.* 651 F 2d 292 (5th Cir. 1981). For development and criticism of the rule of reason see Stucke (2009) 42 (5) *UC Davis L Rev* 101 available at https://ssrn.com/abstract=1267359 (accessed 12/08/2017.
[165] Jones el al (2019) 25; *NCAA v Board of Regents of University of Oklahoma* 468 US 85, 104 and *Polygram Holding Inc., v Federal Trade Commission* 416 F.3d 29, 35 (D.C. Cir. 2005).
[166] *California Dental Association v FTC* 526 US 756, 770 (1999). See generally Hovenkamp (2018) 70 *Florida Law Review* for use of the truncated, or 'quick look' analysis as an alternative to the rule of reason and the per se rule.

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Notably, the rule of reason is today the general rule of analysis of collusive conduct and the *per se* rule the exception.[167] Courts are reluctant to extend use of the *per se* rule to new categories of conduct.[168]

2.2.2.2 Monopolies and abuse of dominance

In the strict economic sense, a market with a monopoly occurs when there is only one provider of a product or service and/or a where there is a product that is unique or has no close substitute and a prohibitive barrier to entry exists.[169] Monopoly status in and of itself is not illegal. What is unconscionable is the abuse of the power such status may confer, for example through exclusionary practices.[170] Size alone does not determine liability because a monopoly position may after all be ". . . the result of a single firm's superior skill, foresight and industry and . . . [t]he successful competitor, having been urged to compete, must not be turned upon when he wins".[171]

Dominance is an economic concept referring to a disparity and a lack of equality, principally in a way that is not fair to other participants in a market. Market dominance is the control of an economic market by a firm. A dominant firm possesses the power to affect competition and influence market price. A firms' dominance is a measure of the power of a brand, product, service, or firm, relative to competitive offerings, whereby a dominant firm can behave independent of their competitors or consumers, and without concern for resource allocation. For purposes of competition law, a firm is said to be dominant when it enjoys a position of economic strength such that it can behave independently of competitors and customers and can use that power to lock out effective competition.[172] Jurisdictions provide for thresholds or market share to determine if a

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[167] Vakerics TV *Antitrust Basics* (2020) hereinafter Vakerics (2020) 1-16; *Bunker Ramo Corp v United Business Forms Inc*. 713 F.2d 1271 (7th Cir. 1983). For a summary of advantages of either rule see Neuhoff (2017) 16-17.

[168] Jacobson JM American Bar Association - Section of Antitrust Law *Antitrust Law Developments Eighth* (2017); Vakerics (2020) 1-18. In the European Union the common approach is that a contractual obligation restriction does not necessarily result in automatic restriction of competition Case 23/67 *Barasserie de Haecht v Wilkin* [1967] ECR 407 and Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR 1-935.

[169] Neuhoff (ed.) (2017) 36.

[170] "The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Communications Inc. v Law Offices of Curtis v Trinko* LLP 540 US (2004) 398 at *823* and *Standard Oil Co. v United States* 221 US 1 62 (1911).

[171] *United States v. Aluminum Co. of America* (ALCOA) 148 F.2d 416 (2d Cir. 1945). Neuhoff (2017) 127. For a detailed reading on treatment of dominant firms in United States, European Union and South Africa, see Munyai (2016) chap 2.

[172] Case 85/76 *Hoffmann-La Roche & Co AG v Commission*, [1979] ECR 461, par 38; Case 2/76 *United Brands v EC Commission* [1978] ECR 207 par 65 and *United Brands v Commission*, Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429.

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player is a monopoly or has dominance.[173] Common abuse of dominance includes imposing excessive prices, price discrimination, refusals to deal and predatory pricing.[174]

The identification of the kind of conduct that amounts to abuse of dominance and anti-competitive monopoly is, and continues to be, a difficult issue.[175] One source of difficulty is the fact that competitive and exclusive conduct tend to look alike and the risk of confusing real competition with exclusion is high.[176]

2.2.2.3 Mergers and acquisitions

It would not be an overstatement to say that mergers impelled antitrust law. The Sherman Act was, after all, provoked by the flagrant combination of firms, especially in the railroad and oil industries using the trust device to control markets.[177] According to Clarke, today, like in the United States of yore, it is principally the economic benefits associated with averting anti-competitive mergers that have inspired the proliferation of competition laws.[178]

Mergers are the subject of several disciplines, spanning corporate law, economics, and competition law. From whichever angle, the sum effect of the transaction involved is to concentrate economic power in the hands of fewer than previously.[179] For corporate law, a merger is generally defined as a fusion between two or more enterprises previously

[173] Section 23 Competition Act 2012 Kenya places the threshold at 50% and section 7 South Africa's Competition Act 1998 at 45%. American courts typically have required a dominant share to infer monopoly power but have not yet identified a precise level at which monopoly power will be inferred. The percentage has ranged from 50 to 70%. United States Department of Justice "Competition and Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act" Chapter 2. Available at https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 (accessed 15/07/2018). See also OECD Policy Round Tables "Abuse of Dominance and Monopolisation 1996" hereinafter OECD Abuse of Dominance and Monopolisation 1996, at 60 and Price RG "Market Power and Monopoly Power in Antitrust Analysis" 1989 75(1) *Cornell Law Review* 189.
[174] Fumagalli C, Calcagno C and Motta M *Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance* (2018) hereinafter Fumagalli et al. (2018) 3.
[175] OECD Abuse of Dominance and Monopolisation 1996 at 60. For detailed reading on this subject see Fumagalli et al. (2018).
[176] Easterbrook FH "When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?" 2003 *Columbia Business Law Review* 345 at 345.
[177] See chapter 2 par 2.2.1.; Hughes OE and O'Neill D *Business, Government and Globalization* (2008) 93. The tenor of section 1 of the Act, which points towards the coming together to do business in a manner injurious to welfare via contracts, combinations or otherwise, or conspiracies in restraint of trade or commerce covers mergers.
[178] Clarke J "Current Issues in Merger Law" in Duns J, Sweeney B and Duke *A Comparative Competition Law* (2015) hereinafter Clarke in Duns et al. (eds.) (2015) 175. See however Dabbah who observes that many policies are intended for a broader spectrum of values in Dabbah (2010) 28.
[179] Whish & Bailey (2018) 852-853 and Jones et al.(2019) 1085. Because of the width of potential transactions that fall within the definition, each jurisdiction needs to come up with a definition for purposes of its own merger control regime. UNCTAD "Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation" Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices Geneva, 8–12 November 2010 (2010) https://unctad.org/system/files/official-document/tdrbpconf7L2_en.pdf (accessed 17/05/2018) hereinafter UNCTAD (2010)(b), at 3. Available at https://unctad.org/system/files/official-document/tdrbpconf7L2_en.pdf (accessed 13/06/2017)

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independent of each other, whereby the identity of one or more is lost and the result is a single enterprise.[180] It also includes hostile takeovers where the takeover by a "predator" company has been resisted by the "target" company.[181] On their part, economists distinguish different types of mergers based on their motivation.[182] Industrial mergers are those motivated by *inter alia*, diversification of a company's portfolio, geographic expansion, consolidation of market position and greater production efficiency through economies of scale and scope. They may also be intended to present a means of exit from a given market because a firm is failing or wishes to restructure its activities. Non-industrial mergers and acquisitions are those carried out for purely investment purposes. For instance, investment banks and private equity funds acquire firms with the aim of enhancing shareholder returns in the short-term and profitably reselling the business, or parts of it, in the medium term.[183]

In the arena of competition law, the expression 'merger' is more expansive, broadly referring to any situation where two or more formerly independent entities unite.[184] The term caters for acquisitions or takeovers, joint ventures and other procurements of control such as interlocking directorates. An acquisition or takeover of one enterprise by another usually involves the purchase of all or a majority of shares of the other, or even the purchase of a minority shareholding sufficient to exercise control and substantial influence.[185] Where a merger occurs without consent of the target company it is known as a 'hostile' acquisition or takeover. Joint ventures are "agreements between firms to engage in a specific joint activity, often through the creation of a jointly owned and controlled subsidiary, to perform a task useful to both or to realize synergies from the parents' contributions."[186] Though innocuous in appearance, they may injure competition when used to disguise collusive conduct such as market division or price fixing.[187] The

[180] Hannigan B *Company Law* (2018) 645 and UNCTAD (2010) 3.
[181] Neuhoff (ed.) (2017) 177.
[182] UNCTAD (2010)(b) 2.
[183] UNCTAD above.
[184] Whish & Bailey (2018) 853 and Neuhoff (2017) 177.
[185] UNCTAD (2010)(b) 4. The acquisition of substantial assets of another company, for instance acquisition of a production site or another functional unit of another company may also qualifiy as a notifiable transaction if it allows the acquirer to enter into the related market position of the seller
[186] UNCTAD (2010)(b) 4; Fox EM "Competition Law" in Lowenfeld AF(ed.) *International Economic Law* (2008) 445. Alliances are a form of joint venture and often the preferred structure for mergers in the airline and telecommunications industries.
[187] As will be the case when the common links of the two parent companies to the joint venture lead to collusion outside the scope of the joint venture, what are known as 'spillover effects'. Reduction of actual or potential competition and foreclosure may occur.

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degree of integration between the two businesses is used to establish whether a joint venture will be reviewed as simply an agreement among competitors or as a merger.[188]

An interlocking directorship is the situation where an individual person is a member of the board of directors of two or more enterprises, or where the representatives of two or more enterprises meet on the board of directors of one firm. Competition concerns arise from the possibility of an interlocking directorship facilitating administrative control whereby decisions regarding investment and production facilitate cartel-like behaviour among otherwise competing enterprises.[189] Regulation of interlocking directorates is a uniquely American phenomenon not practised much elsewhere.[190]

A number of economic theories are employed to explain the rationale for merging and acquisitions among firms.[191] The merger control debate surrounds two motives: efficiency and market power.[192] The most prominent of the two is that firms merge to achieve efficiency - in other words to take advantage of economies of scale or of scope, or to reap from the benefits of synergy. Efficiency, though a notion with application and ramifications in varied disciplines, is at its essence a concept of economics.[193] Harmonisation of research and development, possibility of enhanced credit portfolio, and rationalisation of procurement and transportation are some of the areas of savings or increased efficiency in a merged operation. The increased efficiencies that firms gain from larger size are easier to come by through combining with other players than through internal expansion. Mergers enable firms to exploit economies of scale sooner than they could by internal expansion.[194] The benefits of efficiency are offset against possible deficits such as losses

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[188] Whish & Bailey (2018) 853, 870.
[189] See generally McChesney & Shughart (1995).
[190] There are though voices advocating for introduction of their regulation such as Petersen V "Interlocking Directorates in the European Union: An Argument for Their Restriction" 2016 27(6) *European Business Law Review* 821 and Thépot F, Hugon F & Luinaud M "Interlocking Directorates and Anti-Competitive Risks: An Enforcement Gap in Europe?" (2016) 1 *Concurrences.* Available at https://ssrn.com/abstract=2809099 (accessed 21/06/2017). But Stigler questions the effectiveness of barring interlocking directorates saying that empirical evidence does not prove a connection between existence of interlocking directorship and diminishing competition - Stigler G "The Economic Effects of Antitrust Laws" in McChesney FS and Shughart WF (eds.) *The Causes and Consequences of Antitrust: The Public-Choice Perspective* (1995).
[191] Whish & Bailey (2018) 857.
[192] Botchway in Botchway (ed.) (2011) 8 and Hylton K *Antitrust Law: Economic Theory and Common Law Evolution* (2003) hereinafter Hylton (2003) 312. For other reasons including entry into a new market and market diversification see Hylton (2003) 312-313 and Brealey R, Myers S and Allen F (eds.) P*rinciples of Corporate Finance* 792- 805.
[193] For a helpful introduction to economic approaches to law see Ippolito RA *Economics for Lawyers* (2005).
[194] "If improved efficiency was not the purpose of mergers, mergers would not take place. The fact that they do indicates that this is indeed the purpose that rational firms have in mind when consummating mergers." Adams W and Brock JW *Antitrust Economics on Trial: A Dialogue on the New Laissez-Faire* (1991) hereinafter Adams & Brock (1991) 45.

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in specialty of knowledge of the managers of the acquired firm and mark ups in the equity of the target, and sometimes the acquiring firm. If the benefits outweigh the cost of the transaction and any accompanying losses, the merger is efficient and will be pursued.

The efficiency rationale for mergers has been challenged and dismissed as made up of "mirages that tempt unwary overconfident managers into takeover disasters".[195] In fact, evidence is that merger waves have tended to accelerate on currents of stock price increases, circumstances in which there is no guarantee that the effect of the merger is a predictable improvement in efficiency. [196]

If not for efficiency then, firms merge to achieve dominance or monopoly status in the market.[197] It is said that mergers are more likely than not to be driven by a desire to increase or have the consequence of increasing market power.[198]

A peripheral hypothesis has it that mergers are incentivised by managerial vanity. The desire of managers and owners to expand and be bosses of a business empire may motivate them to acquire other companies.[199] It is difficult though to empirically ascertain this notion which is anchored in the realm of behavioural economics.[200]

Notably the impact of mergers and acquisitions is not limited to the merging parties. Their effects ripple across the economy in ways that are particularly significant to a developing country.[201] The effects of intra-country mergers are plain to see. Mergers enable firms to engage in efficient consolidation, increase productivity, and benefit from technological innovation. Effectual businesses grow economies.[202] Mergers concluded beyond the borders or through cross-border takeovers too present competition concerns. A merged entity exhibiting anti-competitive behavior where it is domiciled is likely to engage in similar, if not worse, behaviour in its developing country markets.[203] It is for this reason

[195] Adams & Brock (1991) 46-49.
[196] Botchway in Botchway (ed.) (2011) 13 and Brealey et al. (2011) 793.
[197] Van den Bergh R and Camesasca PD *European Competition Law and Economics: A Comparative Perspective* (2006) hereinafter Van den Bergh & Camesasca. (2006) 310-311.
[198] Scherer FM and Ross D *Industrial Market Structure and Economic Performance* (1990) 160.
[199] Botchway in Botchway (ed.) (2011) 172 and Hylton (2003) 312.
[200] Froud J, Johal S, Leaver A and Williams K *Financialization and Strategy: Narrative and Numbers* (2006) 116-117.
[201] See chapter 2 par 2.5.5
[202] Tehenib (2014) 69-78 and Table 4 at 75-76.
[203] Singh A and Dhumale R "Competition Policy, Development, and Developing Countries" in Arestis P, Baddeley M and McCombie J *What Global Economic Crisis?* (1999) hereinafter Singh & Dhumale (1999) 5.

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that countries reserve the right to protect their markets from welfare-reducing mergers originating abroad.[204]

In recent years, cross-border mergers and acquisitions have become an often used conduit for foreign direct investment (hereafter FDI).[205] Businesses seeking to invest abroad have two options before them. They may go the way of merging or setting up a joint venture with, or acquiring control of shareholding in, a business already existent in that country. Alternatively, they may opt to set up an entirely new business or subsidiary there.[206] The former option is usually preferred.[207] Indeed one of the factors that prompted adoption of some kind of competition policy for developing countries in the 1990s was the merger wave which gripped the world economy between 1990 and 1998. The aforesaid decade saw the value of worldwide mergers and acquisitions rise nearly fivefold.[208] A significant portion of these were cross-border takeovers and mergers bringing valuable FDI into developing countries, hence the need to adopt a law to harness the benefits.[209] FDI has been positively correlated with economic growth, exactly what the doctor ordered for the developing country.[210] Available evidence indicates fairly consistently that the productivity of domestically owned firms is positively related to the presence of foreign firms which help create a more competitive business environment.[211]

[204] *Boeing/McDonnell Douglas* Case No IV/M.877. Although both companies were located in the US, the Commission imposed conditions to deal with the merger's potentially competition-reducing effects in Europe.
[205] An OECD report noted that cross-border M&As represented an estimated 80 per cent of total FDI flows among OECD countries. See OECD 2007 International Investment Perspectives: Freedom of Invesment in a Changing World "Economic and Other Impacts of Foreign Corporate Takeovers in OECD Countries" hereinafter OECD (2007) International Investment Perspectives at 67.
[206] The OECD defines FDI as an investment that "reflects the objective of establishing a lasting interest by a resident enterprise in one economy (direct investor) in an enterprise (direct investment enterprise) that is resident in an economy other than that of the direct investor. The lasting interest implies the existence of a long-term relationship between the direct investor and the direct investment enterprise and a significant degree of influence on the management of the enterprise." Glossary of foreign direct investment terms and definitions, available at http://www.oecd.org/daf/inv/investmentfordevelopment/2487495.pdf. (accessed 20/10/2017.
[207] OECD (2007) International Investment Perspectives 6; Almunia, OECD SPEECH/13/360 "The evolutionary pressure of globalisation on competition control" ICN 12th annual conference, Warsaw, 24 April 2013 (FDI "passed from 6.5 % of world GDP in 1980 to over 30% before the onset of the financial and economic crisis"); Lim EG "Determinants of and the Relation between Foreign Direct Investment and Growth: A Summary of the Recent Literature" (November 2001) IMF Working Paper, Middle Eastern Department WP/OI/175 available at https://www.imf.org/en/Publications/WP/Issues/2016/12/30/Determinants-of-and-the-Relation-Between-Foreign-Direct-Investment-and-Growth-A-Summary-of-15435 (accessed 14/09/2020).
[208] Singh & Dhumale (1999) 3.
[209] Singh & Dhumale above.
[210] See chapter 3 par 3.2.4; OECD (2007) International Investment Perspectives 68-70. See also Nourry A and Jung N "Protectionism in the Age of Austerity– A Further Unlevelling of the Playing Field?" 2012 8(1) *Competition Policy International* 1 and conclusion that the macroeconomic benefits of inward FDI in most cases outweigh the costs in OECD Foreign Direct Investment for Development: Maximising Benefits, Maximising Costs: Overview" (2002) hereinafter OECD Foreign Direct Investment for Development 2002, at 4.
[211] OECD Foreign Direct Investment for Development 2002 at 5. For a discussion of some of the benefits which have resulted in the UK from high amounts of inward and outward FDI, see Speech by Alex Chisholm CMA Chief Executive at Fordham Competition Law Institute Annual Conference, 12 September 2014 8,9 availabel at https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control (accessed 23/10/2019).

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Consumer benefits such as lower costs, diverse product lines and wider geographic reach for products are frequently also the outcome of mergers. Consumers who are able to spend more and save more build economies.

There is, however, a downside to the business of merging. Even the largest firms in developing countries tend to be much smaller than the multinational that come in via mergers and acquisitions.[212] This raises the question of unequal competition between large multinationals and domestic corporations. This aside, those wary of mergers maintain that all round, it is preferable that firms grow through internal expansion which is more likely to be the result of increased demand for the company's products and to provide increased investment in greater output and more jobs. Expansion through mergers is liable to contract consumer choice without providing an increase in capacity, employment or output.[213] What is more, merging does not guarantee efficiency. Studies have shown that a low percentage of merged firms actually thrive, with some figures putting failure rates at as high as 70 per cent.[214] Sometimes, what mergers and acquisitions successfully create is an oligopoly dominated by horizontally and vertically integrated giants once defined as "helter-skelter consolidations devoid of operating efficiency."[215] Nevertheless, a cost-benefit analysis reveals that the gains from mergers are often considered too good to pass up from a business point of view.[216] No wonder then that merger regulation has been, and continues to be, core in the business of regulation of competition in the economy.

2.2.3 Merger control

The core question in merger analysis is whether a prospective or effected merger will enhance or diminish the economic performance of an industry.[217] As observed by Barzeva and Grimbeeck, authorities have a great responsibility in ensuring that merger decisions are as accurate as possible, given the significant effect that such

[212] Singh & Dhumale (1999) 5.
[213] *Brown Shoe Company v United States* 370 U.S. 294 (1962).
[214] Martin (June 2016) *Harvard Business Review*.
[215] Adams & Brock (1991) 47.
[216] Brito D and Catalao-Lopes M *Mergers and Acquisitions: The industrial Organization Perspective* (2006) 3-4.
[217] Trebilcock MJ, Winter RA, Collins C and Lacobucci EM *The Law and Economics of Canadian Competition Policy* (2003) hereinafter Trebilcock (2003) 38; Neuhoff (ed.) *(*2017) 179 and Sufrin (2016) 1085.

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determinations have on the market value of listed companies, and ultimately, on the wider economy.[218]

Sound merger enforcement is complex and ever evolving. Enforcement officials take great care in analysis in order to identify as precisely as possible those mergers likely to be harmful to consumers. Abbot remarks that the ideal regulation policy is one that can consistently prevent anti-competitive unions while allowing those that do not pose a risk to the market.[219] This is not an easy task. One needs a sophisticated grasp of the affected markets including *inter alia*, the market's dynamics, the position of each incumbent in the market and their ability to alter that position or make short term output responses to price changes.[220] Sound analysis must also be informed by the proposed mergers' expected efficiency effects, which may at times fully offset otherwise anti-competitive price effects.[221]

Three major approaches exist to merger control:[222] First is the "absolute value"-approach whose occupation is with the reduction in actual or potential competition that may result from a merger. The keystone is the philosophy that, as industries become more concentrated, firms within them are drawn to monopolistic or oligopolistic conduct. Market power must therefore be controlled by preserving a non-concentrated environment through prohibition of mergers beyond a specific market share size. Gal points out that this is the approach favoured in the European Union and Japan. Second is the "balancing approach" which weighs anti-competitive effects of a merger against possible efficiencies or other socio-political goals. Here, there is a neutrality towards mergers that create large firms with significant market shares. This is the approach of the US. The third approach is to leave merger control to the market, based on the premise that markets even themselves out when left to their own devices. This was the approach for many small economies which until recently did not have merger regulation in their competition law.[223]

[218] Barzeva K and Grimbeek S "The Effectiveness of Merger Control in South Africa: Selected Case Studies" 2016 (33) *Competition Commission South Africa Working Paper* 01 at 33.
[219] Abbott AF "Competition Law & Policy Guest Lecture Programme Paper (L) 01/05" (January 2005) 27 available at https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l_01-05_1.pdf (accessed 14 October 2017).
[220] Rodger & MacCulloch (2014) 29.
[221] Rodger & MacCulloch above.
[222] Gal MS *Competition Policy for Small Market Economies* (2003) hereinafter Gal (2003) 208-210.
[223] Gal (2003) 196 and 214.

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The rationale being that an "absolute value"-approach would have prevented many beneficial mergers and leaving merger control would produce more efficient results.

In essence merger regulation is directed towards ensuring that a competitive economic environment is maintained in the economy by preventing the creation of entities that have the incentive and ability to exercise market power either through unilateral or coordinated conduct.[224] It is the peculiar creature in the competition policy world in the sense that impetus for action is external. In the other engagements of a national competition agency, the institution deliberately goes out to investigate and follow through with appropriate action should the need arise. With market inquiries for instance, agencies of their own initiative, identify the sector to review for possible transgressions and embark on the task, typically with great panache and blowing of trumpets.[225] In contrast, with merger review others dictate the agency's workload in a regime made up of fairly tight rules and bounded by strict timelines.[226]

The chronological element of merger control is also substantially different from that of the other competition rules which are applied against past breaches. This is because merger control is forward looking. Competition concerns are consequently evaluated from an anticipatory angle.[227] Dunne observes that merger regulation and management of infractions of competition law such as abuse of a dominant position and cartelisation are really two sides of the same coin.[228] Both avail alternative mechanisms by which to manage market contraction. Rules on collusive conduct and monopolisation are intended for the more conventional business engagements of a firm and apply *ex post.* Merger review systems focus on the more extraordinary business, that of amalgamations, and works *ex ante.*[229]

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[224] Clarke in Duns et al. (eds.) (2015) 176; Clarke (2014) 47 and Whish & Bailey (2018) 860.
[225] Lehrell PC "Current Problems in European Merger Control" (2012) 19th *St Gallen International Competition Law Forum* at 1 hereinafter Lehrell (2012). For a definition of market studies see OECD (2016) The role of market studies as a tool to promote competition at 5, available at https://one.oecd.org/document/DAF/COMP/GF(2016)4/en/pdf (accessed 18/03/2018 and on market studies generally see OECD (2017) Market studies methodologies for competition authorities available at https://one.oecd.org/document/DAF/COMP/WP3(2017)1/en/pdf. (accessed 18/03/2018).
[226] See Section 44 Kenya's Competition Act 2012.
[227] Cave M and Crowther P "Pre-emptive Competition Policy Meets Regulatory. Antitrust" 2005 (26) *European Competition Law Review* 481 at 487.
[228] Dunne leaves mergers out of her text explaining that the exclusion does not compromise the coherence of assessment. Focusing on concertation and unilateral conduct brings out the issues that would arise at mergers. See Dunne (2015) 32 and 33.
[229] Ibid.

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Pre-merger notification requirements make it possible to have proposed mergers investigated before they can be effectuated, saving the need for difficult and potentially ineffective 'unscrambling of the eggs' - the difficulty, if not impossibility, of divestiture after the merger is effected.[230] Agencies of course may also challenge already concluded mergers that are found to be anti-competitive but pre-merger notification is more the norm. Complicated matters tend to be less common and so merger reviews are the bread and butter of many competition agencies.[231]

Today, decisions on merger cases follow upon careful economic analysis of the proposed merger, performed by highly skilled economists within the agencies themselves or otherwise contracted for that purpose.[232] Economic evidence pertaining to, for example the impact of a merger on prices and costs, is at the core of modern merger cases.[233] Econometric techniques are believed to help agencies to assess merger cases quickly and make better decisions given the ever increasing complexity of markets.[234] That is not to say that economics-centered analyses are without fault. Agencies and courts on occasion find themselves faced with divergent predictions which appear contrived to endorse either party's position. Protagonists will appear before the agency, each having employed sanctioned analytical models yet armed with a conclusion completely different from the other's. To illustrate, in 1997 the United States Federal Trade Commission challenged a proposed merger of two office supply superstores. The government and the merging parties each presented the District Court with results from econometric studies

[230] Schlossberg RS *Mergers and Acquisitions: Understanding the Antitrust Issues* (2008) hereinafter Schlossberg (2008) 572-573; See also *FTC v Swedish Match* 131 F. Supp. 2d 151, 173 (D.D.C 2000) granting the FTC's motion for a preliminary injunction in part because in the absence of the injunction, the "eggs will be irreparably scrambled".
[231] Lehrell (2012) 1.
[232] Gore D, Lewis S, Dethmers F, Lofaro A *The Economic Assessment of Mergers Under European Competition Law* (2013) hereinafter Gore et al. (2013) 12; Fotis PN and Polemis ML "The use of economic tools in merger analysis: Lessons from US and EU experience" 2011 7 (323) European *Competition J*ournal at 324 hereinafter Fotis & Polemis *European Competition Journal* (2011) at 323; For record of shifts in United States' merger policy see Remarks by Thomas Leary, prepared before Guidelines for Merger Remedies: Prospects and Principles, Joint US/EU Conference "The Essential Stability of Merger Policy in the United States" https://www.ftc.gov/public-statements/2002/01/essential-stability-merger-policy-united-states (accessed 23/10/2018).
[233] Trebilcock (2003) 38.
[234] Ezrachi (2016) 5 *Journal of Antitrust Enforcement* 49 at 58; Kovacic WE "The Federal Trade Commission and Congressional Oversight of Antitrust" 1992 (30) *Economic Inquiry* 294; Kovacic WE and Shapiro C "Antitrust Policy: A Century of Economic and Legal Thinking" 2000 *Journal of Economic Perspectives* 43 hereinafter Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives, at 43-60;* and Kovacic WE "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix" 2007 (1) *Columbia Business Law Review* 1 hereinafter Kovacic (2007) *Columbus Business Law Review*, at 35. In T-464/*04 Impala v Commission* [2006] ECR II-2289, the ECJ annulled a decision of the Commission approving a merger at certain concentration, finding that the Commission had not had a sufficient factual basis for its conclusion. The Commission then reassessed concentration by performing an extensive econometric analysis as required by the court to approve merger. See recitals 289-294 and 429.

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on the likely impact on consumer pricing. While the Government's study predicted a price increase of 8.6 per cent, that of the merging firms put the expected increase at only 0.9 per cent.[235]

Merger control by conducting economic analysis broadly falls into two main categories: *ex-ante* and *ex-post* merger analysis.[236] In *ex-ante* analysis, economic researchers try to evaluate possible anti-competitive effects of a proposed merger either by assessing whether the merger creates or strengthens a dominant position in the relevant market or significantly lessens competition by possible unilateral or coordinated effects. *Ex-post* assessment aims to establish after the fact, whether the market structure that would arise post-intervention on the part of the agency, is more appropriate to achieve a desirable market outcome than the market structures now existing following the conclusion of the merger. All the empirical and econometric techniques that can be employed for the *ex-ante* analysis of the effects of a merger are also applicable in the *ex-post* evaluation. The crucial difference lies in the amount of information available to an agency at the point of analysis. *Ex post* merger analysis, though favoured for saving firms from delays and cost of merger review, has been accused of facilitating mergers that are harmful to competition in two of the jurisdictions where it is applied; Brazil and Argentina.[237]

For purposes of enforcement, competition law divides mergers into horizontal, vertical or conglomerate mergers.[238] Horizontal mergers are consolidations that take place between actual or potential competitors in the same product and geographic markets and at the same level of the production or distribution chain. Such mergers present greater competition concerns than the other two by virtue of having potential to contribute most directly to concentration of economic power and acquisition of a dominant market position. Horizontal mergers lead to a reduction in the number of rivals in the market causing increased market concentration with the merged entity gaining a larger market

[235] *FTC v Staples/Office Depot* 1:15-cv-02115. For discussion of the econometric models used in the case and to show how differences between the models led to the discrepancy between estimates see Ashenfleter O, Baker JB, Gleason S & Hosken DS "Empirical Methods in Merger Analysis: Econometric Analysis of Pricing in *FTC v. Staples"* 2006 (13) *International Journal of the Economics of Business* 265. See also chapter 4, par 4.3.3.
[236] Fotis & Polemis *European Competition Journal* (2011) at 324-325.
[237] See Botta M *Merger Control Regimes in Emerging Economies: A Case Study on* Brazil *and Argentina* (2011) 139 for Brazil and 177 for Argentina. For the application of e*x post* regulation in Brazil see Knox (2012) 15(6) *Global Competition Review* 15.
[238] Van den Bergh & Camesasca (2006) 309-310.

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share by simple aggregation.[239] The larger combined market share in a market with a reduced number of competitors permits the firm to independently raise prices and restrict outputs, known as 'unilateral effects' of a merger. It also makes it easier for market players to coordinate and exercise joint market power by engaging in inter-dependent behavior, known as 'coordinated effects'.[240] From yet another angle, risk is increased of the new entity not needing to compete as intensely as the separate merging firms had done. Rivals respond in accordance with their unchanged self-interests.[241] The effect is reduced competition across the board.

Vertical mergers are those that occur between firms that operate at different levels of the production and distribution chain, for instance, a merger between a supplier and a distributor. They generally raise fewer competition concerns and may even prove beneficial if savings from synergies and efficiencies are passed on to consumers.[242] Nevertheless, vertical mergers may raise concern where they could lead to foreclosure. A vertical combination could give the joined entity the capacity to control the chain of production and distribution allowing it to drive existing competitors out of the market.[243] This incentive and capacity to exclude rivals from access to upstream input markets or from downstream customers or distribution channels, is the major potential problem with vertical mergers.[244]

Policy arguments about vertical mergers, though not settled, can be grouped into two: pro-competitive and anti-competitive theories.[245] For the first, a vertical merger is simply a type of exclusive dealing contract, the only difference being that in this case the contractual relationship is expected to last longer and the 'contract' agreed is not as

[239] Whish (2009) 779–800 and UNCTAD (2010)(b) 18.
[240] Schlossberg (2008) 135. See Whish (2009) 862 on theories of harm of horizontal mergers.
[241] Whish (2009) 800.
[242] Neuhoff (ed.) (2017)180.
[243] UNCTAD (2010)(b) 6. For an overview of economics of vertical mergers see Church J "Vertical Mergers Issues in Competition Law and Policy, Vol. 2*"* (2008). Available at https://ssrn.com/abstract=1280505 (accessed 13/08/2017). The writer supports a presumption that vertical mergers are welfare enhancing and good for consumers. See also Jaideep S "An Examination of the Efficiency, Foreclosure, and Collusion Rationales for Vertical Takeovers" (2012) 58(8) *Management Science* 1482.
[244] Bergman MA, Coate MB, Jakobsson M & Ulrick SW "Merger Control in the European Union and the United States: Just the Facts" April 2011 (7) *European Competition Journal* 89 hereinafter Bergman et al. (2011) 7 *European Competition Journal* 89 at 96. While in some cases, this control is worthless for instance because the cost of harming rivals is greater than the gains, in other situations, the merged firm benefits from vertical control. For example, the firm may profit by increasing barriers to entry into the related markets or by raising the costs of rivals in that market so that they will be less effective competitors.
[245] Hylton (2003) 333-335. For a survey of efficiency theories of vertical integration see Chen ACM and Hylton KN "Procompetitive Theories of Vertical Control" 1999 (50) *Hastings Law Journal* 573.

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detailed. Both phenomenon occur because organising the supply of goods and services within the firm rather than procuring them from the market can deliver savings in some instances. Additional transactions which could be transfers coordinated though the price mechanism are internally organised by the entrepreneur.[246] By this theory, an agency investigating a vertical merger must therefore see it first as efficiency inducing and beneficial to both the vertically integrating firm and consumers.[247] Anticompetitive theories approach vertical mergers from the point of their capacity to put potential competitors at a disadvantage by raising the costs of entry and of remaining in the market by forward and backward integration - basically the same reasons responsible for the blacklisting of collusive practices.[248] Their effect is to concentrate control over existing trade channels in the hands of a few vertically integrated firms. The effect is thinning of markets that formerly operated between these stages and requiring that new entrants enter the market at multiple levels rather than at a single stage.[249]

As explained by Dethmers, conglomerate mergers, are those between firms that are involved in unrelated business activities or between undertakings that provide independent or complementary products. These mergers typically occur between firms within different industries or firms located in different geographical locations.[250] The parties involved have no current competitive relationship.[251] Generally, conglomerate mergers raise few competition concerns, as they do not affect or change the structure of competition in a specific market and generally do not raise traditional horizontal or vertical

[246] Coase H "The Nature of the Firm" 1937 (14) *Economica* 386 at 393-394 and Neuhoff (ed.) (2017)180.
[247] This perception of vertical integration was first advanced by Spengler in Spengler JJ "Vertical Integration and Antitrust Policy" 1950 58 *Journal of Political Economy* 347. See Adams & Brock (1991) 63. In some quarters, vertical mergers are seen as simply replacing a market transaction with administrative direction because the latter is believed to be a more efficient method of coordination. See McGee JS *Industrial Organisation* (1988) 276.
[248] Hylton (2003) 335.This was the theory implicit in *Brown Shoe Co. v United States*. See chapter 2 par 2.4.2. A classic example of anticompetitive foreclosure through backward integration is when a producer locks up the available supply of some production input. For example, a decision to purchase from a customer only on condition that the customer refrains from selling to any of the dominant firm's competitors.
[249] Adams & Brock (1991) 78.
[250] Dethmers F, Dodoo N and Morfey A "Conglomerate Mergers Under EC Merger Control: An Overview" 2005 (*1) European Competition Journal* 265 at 266.
[251] UNCTAD (2010)(b) 21; Hylton (2003) 344-345 and Van den Bergh & Camesasca (2006) 309-310.

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merger issues.[252] Courts have tended to treat them as innocuous.[253] They may, nevertheless, give rise to competitive harm where the actual or potential competitive advantages of the conglomerate merger can be or is used to foreclose rivals from the market.[254]

The theory at the foundation of conglomerate merger cases is the 'potential competition'-doctrine.[255] Underlying the doctrine is the principle that a market exhibiting high prices and profits will attract entry by additional firms. Potential entrants put competitive pressure on current market players with positive benefits for the consumer and the market. By merging, the entities remove themselves as potential independent entrants in one another's markets and thus dampen competition. A conglomerate merger takes away "actual potential competition" from the sidelines, removing competitive pressure along with its benefits. Also lost is a potential future benefit known as '" potential competition benefit", that is, pro-competition gains that would have been reaped from the now merged entities actually entering one another's market as independent players. Conglomerate merger opinions usually offer some combination of potential and actual potential competition arguments to support the decision.[256]

The "potential competition"-doctrine has been criticised for failure to appreciate the reasonable supposition that some of the conglomerate mergers are designed with the intent to provide fiercer competition whose benefit would accrue to consumers.[257] Even more crucially, the imposition of a duty on competitors to keep up pressure on one another

[252] Lindsay & Berridge refer to them as being of ambiguous effect. See Lindsay A and Berridge A *The EU Merger Regulation: Substantive Issues* (2017) hereinafter Lindsay & Berridge (2017) 452 and Whish that a general proposition, conglomerate mergers are unlikely to give rise to adverse competitive effects - Whish (2009) 864. See also Hewitt G "Portfolio Effects in Conglomerate Mergers" January 24, 2002 Organization for Economic Co-operation and Development Best Practice Roundtables in Competition Policy No. 37. (2002).
[253] See for instance in the European Union *Tetra Laval BV v Commission* joined cases C-12/03 P-DEP and C-13/03 P-DEP where the General Court confirmed that the Commission had power to prohibit conglomerate mergers, but emphasised that such transactions are generally neutral or even beneficial for competition and accordingly, the proof of anticompetitive conglomerate effects of such a merger calls for a precise examination supported by convincing evidence of the circumstances which allegedly produce such effects. The ECJ upheld this reasoning. (T-5/02) [2002] E.C.R. II-4381, [148-155] ECH *Commission v Tetra Laval BV (*C-12/03P) [2005] E.C.R. I-1987.
[254] Whish (2009) 864-865.
[255] Hylton (2003) 345-346. On the potential competition doctrine, see Lindsay & Berridge (2017) chapter 9.
[256] Hylton (2003) 345.
[257] For example, in *Federal Trade Commission v Procter and Gamble* 386 U.S. 568 (1967) (The Clorox case), the Supreme Court finding was that the merger violated section 7 of the Clayton Act because *inter alia* it eliminated the potential competition Procter would have presented in the market for liquid bleach. The fact that Procter & Gamble sought to combine its strength in the advertising and marketing areas with Clorox's expertise in production and distribution did not count for much yet the combined strengths of the two would potentially have produced a stronger firm and enhanced competition in the liquid bleach market leading to lower prices and higher quantities of liquid bleach.

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runs counter to the essentiality of competition law whose nature is to impose negative injunctions to do no harm, not positive injunctions to do good.[258] In view of this, Hylton submits that challenge to conglomerate mergers should be permitted only where the market is concentrated and the number of potential entrants small.[259] Today in the United States, few challenges to mergers are anchored in the doctrine. Of the few that reach trial, "potential competition" has been raised as a secondary matter with the primary allegation being the loss of actual competition. Other legal systems apply different theories of harm. In the EU for instance, the conglomerate effects theory is applied. It is taken that the merged entity will be able to leverage a strong market position in one product market across to a complementary or similar product market in which the merging party is operational.[260]

The majority of mergers that occur are of the horizontal variety, vertical mergers rarely raise issues, and conglomerate mergers are uncommon. On the whole, most mergers pose little or no threat to competition. Up to ninety five per cent of all unions assessed in the United States are benign.[261] For South Africa, unconditional approvals for the ten year period between 2000 and 2009 stood at 92 per cent[262] and 86 per cent for the subsequent period between 2010 and 2018.[263] Economists are now agreed, but by no means unanimously, that mergers are by and large pro-competitive because they allow the methods of production to be reorganized and inferior management to be removed, thereby creating more efficient firms.[264] Hylton observes that the 'welfare trade-off', that is, the trade-off between the cost to society created by reduced competition and efficiency gains due to cost reductions, will fall in favor of efficiency gains in the non-horizontal merger context.[265] For this reason, the law tends to treat vertical and conglomerate

[258] Hylton (2003) 345.
[259] Hylton (2003) 346.
[260] For the US, see Kwoka J "Mergers that Eliminate Potential Competition" Elhauge ER (ed.) *Research Handbook on the Economics of Antitrust Law* edited (2012)115. Notable among such cases is *FTC v Staples Inc.* 970 F. Supp. 1066 (D.D.C. 1997).
[261] Up to 95 per cent of all mergers that are dealt with by FTC turn out to be benign. Source FTC Website at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (accessed 12/10/2017
[262] Competition Commission & Competition Tribunal (2009) 23; see chapter 4, par 4.3.2.
[263] Competition Commission & Competition Tribunal (2019) Diag 11 at 35.
[264] Bergman et al. (2011) 7 *European Competition Journal* 89 at 92-93. Roller et al. assert that there seems to be no support for a general presumption that mergers create efficiency gains. Röller LH, Stennek J & Verboven F "Efficiency gains from mergers" 2005 German National Library of Economics (ZBW) Discussion Paper No FS IV 00-09 at 9. According to Monti, many, or even most mergers in actual fact fail to realise the efficiencies and innovation predicted Monti (2002) *Speech to British Chamber of Commerce*, available at http://europa.eu/rapid/press-release_SPEECH-02-252_en.htm?locale=en (accessed 19/06/2017.
[265] Hylton (2003) 333.

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mergers to the "rule of reason"-approach. There was a time when horizontal mergers were presumed to be anti-competitive and subjected by the courts to the *per se* rule. That, however, is no longer the position.[266]

2.2.4 Merger analysis

Generally analysis of mergers involves a counterfactual comparison of the market situation before and after the proposed or completed merger in order to assess the merger's potential effect on competition.[267] The likelihood of substantive lessening of competition or acquisition of dominance is assessed in relation to the market(s) where the merging firms are active. Therefore the first step in the process typically is definition of the relevant market, a veritable cornerstone of competition regulation on which the outcome of many a case has turned.[268] The algorithm for market definition is widely shared, with agencies by and large adopting the Hypothetical Monopolist Test, also known as the Small but Significant and Non-transitory Increase in Price test (SSNIP).[269] This test defines the relevant market as the smallest set of products and smallest geographic region in which a hypothetical monopolist or cartel controlling all the products in that geographic market could profitably raise prices by around 5% to 10% for the foreseeable future, usually one year, without the firms losing sufficient sales to firms outside the market to render the price increase unprofitable.[270] The test is a flexible one so that for instance, the market will be defined more narrowly in a case where the seller is able to discriminate prices and charge a higher price to a subset of buyers who cannot easily either switch to other products or buy from other locations.[271]

[266] See chapter 2 par 2.4.3.
[267] Whish (2009) 811; UNCTAD (2010)(b) 11-26. A counterfactual assessment involves comparison of the prospects for competition with the merger against the situation without the merger; that is, the 'counterfactual'. The prevailing conditions are the counterfactual.
[268] Schlossberg (2008) 65; Maier-Rigaud FP & Schwalbe U "Market Definition" (June 15, 2012). *OECD Best Practice Roundtables in Competition Policy*, June 2012 hereinafter Maier-Rigaud & Schwalbe (2012) at 4 and Baker JB "Market Definition: An Analytical Overview" 2007 (74) *Antitrust Law Journal* 129 at 129. See also generally Smith R "Defining and Proving Markets and Market Power" in Duns J, Duke A, Sweeney B *Comparative Competition Law*. (2015).
[269] Clarke in Duns et al. (eds.) (2015) 187, Van den Bergh RJ *Comparative Competition Law and Economics* (2017 hereinafter Van den Bergh (2017) 4.4. Reference to SSNIP is included in among others the guidelines of Australia, Brazil, Canada, the EU, Finland, France, Ireland, Japan, New Zealand, UK, Tanzania, Kenya.
[270] Van den Bergh (2017) 4.4. For the background and rise of SSNIP test see 4.4.1 of this same book. For a discussion on how the test is applied at the Federal Trade Commission see Coate and Fischer (2008).
[271] Neumann M and Sanderson M "Ex Post Merger Review: An Evaluation of Three Competition Bureau Merger Assessments" (2007) Competition Bureau Canada 8. Available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02447.html#sec3 (accessed 13/06/2017.

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SSNIP is unlike traditional approaches that defined relevant markets on the basis of comparison of characteristics of goods and geographical areas.[272] It is more economic in orientation. Analysis may rely on statistical investigation or non-statistical analysis such as evidence of functional substitution and the past behaviour of customers in terms of willingness to substitute. Information for the purpose may be obtained from surveys, interviews, documents from the merging parties and the like.[273] The test faces criticism on various fronts, chief among them the fact that there is no formal economic basis for the choice of 'small but significant' to mean of a 5 to 10% increase.[274] It has also been accused of being impractical, opaque, and complicated.[275] With the market defined, a merger can be categorized as horizontal, vertical or conglomerate after which an assessment of its impact on competition in the identified market is done.

Analysis next turns to consideration of the structure of the market and of the potential impact of the transaction on this structure. This involves appraisal of the pre-merger market structure and concentration by asking what existing firms there are, what their respective market shares are and their strategic importance.[276] The Herfindahl-Hirschman index (HHI) is the commonly accepted measure of market concentration applied in Germany, the United States Department of Justice and by South African Competition Authorities, among others.[277] It is calculated by squaring the market share of each firm competing in a market, and then summing the resulting numbers, and can range from close to zero to 10,000.[278]

HHI operates on the premise that industry behaviour strongly correlates with industry structure. As observed by Roberts, the larger a firm is within its industry, the more likely

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[272] Such as the traditional approach to market definition employed in German legal practice known as "Bedarfsmarktkonzept" markets based on consumer. Products are assigned to the same relevant market if they are functionally interchangeable, exhibit similar physical characteristics and if their price levels are comparable.
[273] Maier-Rigaud & Schwalbe (2012) and Kokkoris L "The Concept of Market Competition and the SSNIP Test in the Merger Appraisal" 2005 26(4) *European Competition Law Review* 209 hereinafter Kokkoris (2005) 26(4) *European Competition Law Review*.
[274]Gore et al. (2013) 36-39; Van den Bergh (2017) 4.4.2.
[275] Farrell J and Shapiro C "Upward Pricing Pressure in Horizontal Merger Analysis: Reply to Epstein and Rubinfeld" 2010 10(1) *B.E. Journal of Theoretical Economics 4*1 at 41-42.
[276] Neuhoff (ed.) (2017) 182.
[277] Neuhoff (ed.) above. See also (2012) Bundeskartellamt Guidance on Substantive Merger Control par 4.3.3 available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6 (accessed 17/07/2017.
[278] The agencies generally consider markets in which the HHI is between 1,500 and 2,500 points to be moderately concentrated and consider markets in which the HHI is in excess of 2,500 points to be highly concentrated. Department of Justice & FTC 200 Horizontal Merger Guidelines par 5.3.

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it is to engage in anti-competitive conduct.[279] Mergers where the merging parties together control less than 35% market share are usually not challenged.[280] An in-depth look at the likely effects of the notified merger on this structure, including the likelihood that the merged entity will have the power to exercise market power unilaterally and/or give rise to greater opportunity for market players to coordinate behavior, is executed. The agency is thus able to obtain an important indication of the likelihood of exertion of unilateral market power or exercise of coordinated market power post-merger. If the post-merger market structure raises no concerns, the transaction is not usually analysed any further.[281]

National competition agencies increasingly employ a similar analytical approach in assessment of merger effects, credit for which is given to institutions like the International Competition network (ICN).[282] Most frequently, either of two tests is applied: the 'substantive lessening of competition test' or the 'dominance test'. In the substantial lessening of competition test, the question is asked whether the merger is likely to cause substantial lessening of competition in the relevant market while in the dominance test, the question is whether the merger will result in creation or strengthening of a dominant position in the relevant market.[283] There is also the "significant impediment of effective competition" test, a hybrid which combines the standards of both the substantial lessening of competition test and the dominance test.[284] Under the significant impediment of effective competition-test, a merger is anticompetitive if it significantly reduces competition in the market particularly by either creation of or strengthening of a dominant position in the market. Generally, the significant impediment of competition-test is viewed

[279] Roberts (2014) 34 *Pace L Rev* 894 at 894.
[280] Laing DJ and Gómez LA (eds.) *Global Merger Control Manual (*2011) 170.
[281] Hovenkamp (2017) 24 *George Mason Law Review* at 703.
[282] Fullerton L and Alvarez M "'Convergence in International Merger Control" 2012 26(2) *Antitrust* 20 at 20-22. Galloway discusses the influence of the ICN recommendations on merger control laws in India and China in Galloway J "Convergence in International Merger Control" 2009 5(2) *The Competition Law Review* 179 at 179. The International Competition Network per its website seeks to facilitate cooperation between competition law authorities globally. It was established in 2001 after competition law experts in the United States recommended that increased collaboration with overseas authorities could contribute to the coordination of enforcement and sharing of information on competition policy globally. ICN's 'Recommended Practices for Merger Analysis' cover such matters as notification thresholds and information requirements, efficiencies analysis in mergers and and merger remedies available at http://www.internationalcompetitionnetwork.org/ (accessed 14/09/2018).
[283] Clarke in Duns et al. (eds.) (2015) 181. The same test is normally applied regardless of whether the merger is national or transnational in scope although the practical application of the law may vary where international factors are involved.
[284] Articles 2 and 3 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation) Article 2. "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." and Article 3 "A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market."

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as being nearly identical to the substantial lessening of competition-test and hence is treated as part of it.[285]

Statistics and studies suggest that in fact there is generally little difference in the outcome of merger reviews conducted in multiple jurisdictions that apply different tests.[286] The test adopted may reflect different objectives but more commonly is a consequence of history, economic size, industrial advancement or geographic location of the country.[287]

When examining a merger for impact, possible resultant efficiencies are also taken into account. Where a merger is expected to impose harm on consumers because of an increase in market power it is possible that other benefits from the merger such as lower costs can offset this harm. Static efficiencies shift costs, inducing the firms in the market to produce more output at lower prices.[288] Dynamic efficiencies increase ability to enter new markets or develop new products.[289] It is the task of the economist analysing the merger to balance expected efficiencies against anticompetitive effects where both exist. On occasion, the efficiency considerations can be integrated directly into the competitive effects analysis to generate a prediction for the post-merger price. Other situations are more complex, requiring a balancing of a welfare loss from a direct price increase with other welfare gains.[290]

The ICN Merger Group indicates that value attached to efficiency claims in merger analysis varies considerably as do modalities of treatment of efficiencies. No one modality for the treatment of merger efficiencies is necessarily correct or appropriate for all

[285] See generally OECD (2010) Standard for Merger Review.
[286] Clarke in Duns et al. (eds.) (2015) 182; OECD Substantive Criteria used in the Assessment of Mergers *Best Practice Roundtable on Competition Policy 2002* (2003) hereinafter OECD (2003) Substantive Criteria used in the Assessment of Mergers, 173. Available at https://www.oecd.org/daf/competition/mergers/2500227.pdf (accessed 16/09/2018) and Whish R "Substantive Analysis under the EC Merger Regulation: Should the Dominance Test be Replaced by "Substantial Lessening of Competition"" in Rowley JW (ed.) *International Merger Control: Prescriptions for Con*vergence (2001) hereinafter Whish in Rowley (ed.) (2001) 102.
[287] Gal (2003) 178 and Yang QG & Pickford M "Comparing Merger Enforcement Across Jurisdictions- New Zealand Versus the European Union and the United States" 2014 48(1) *New Zealand Economic Papers* 72 at 72. Some jurisdictions such as Kenya and Brazil competition law have a combination of both the DT and the SLC and Zambia's Competition and Fair Trading Act requires a consideration whether the proposed merger would result in dominance or in the acquisition of market power to cause the substantial lessening of competition.
[288] Hovenkamp H "Appraising Merger Efficiencies" (2017) 24 *George Mason Law Review* 703 hereinafter Hovenkamp (2017) 24 *George Mason Law Review*, at 706; Williamson OE "Economies as an Antitrust Defense: Correction and Reply" 1968 58(5) *American Economic Review* 18 hereinafter Williamson (1968) 58 *American Economic Review*.
[289] Bergman et al. (2011) 7 *European Competition Journal* 89 at 97-100.
[290] Bergman et al. above at 93.

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countries.[291] Efficiencies may be a factor for consideration as part of the first tier of competition analysis, or as a defence after application of either merger test, or both.[292]

Public interest concerns may also be incorporated into, or used alongside or separately from, either of the two tests.[293] As pointed out by the OECD, Public interest clauses can take various forms. Sometimes they are a general statement of principle in the preamble of the competition law.[294] Sometimes they are included in the objectives and purposes clause of the statute, therefore applying to all enforcement actions including merger control decisions. In most cases, however, they are particularly explicit in assessment of, and decisions on, mergers.[295] In a number of European Union member states, various regulatory approvals and/or consultations are required for the acquisition of certain specified businesses and those operating in certain sectors such as finance or insurance.[296]

It is possible to draw a distinction between those considerations that, though not purely economic in nature, relate to economic matters and those that are purely social concerns. Considerations such as protection of small and medium enterprises, protection of national champions, and international competitiveness of domestic firms are different from considerations such as protection of employment, public health and protection of the environment. While many of these public interests are important, they are not strictly related to competition.[297] The effect of their inclusion is potentially to cause a decision on

[291] ICN Merger Working Group "Efficiencies Report on Merger Guidelines and Efficiencies" at 1 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc558.pdf (accessed 23/09/2017.

[292] As a defence, section 96(1) of Canada's Competition Act 1985. South Africa and Canada are the only two countries that have a statutory efficiency defence. Compare Section 12A(1)(a)(i) South Africa Competition Act 1998 with Section 46(2)(h) Kenya Competition Act 2012. See also generally, Renckens A "Welfare Standards, Substantive Tests, And Efficiency Considerations in Merger Policy: Defining The Efficiency Defense" 2007 3(2) *Journal of Competition Law and Economics 149* hereinafter Renckens (2007) 3 *Journal of Competition Law and Economics.*

[293] See chapter 2 par 2.5.6 and chapters 3 and 4 generally.

[294] OECD (2016) Public Interest Considerations in Merger Control *Working Party No. 3 on Cooperation and Enforcement* (14-15 June 2016) hereinafter OECD (2016) Public Interest Considerations in Merger Control, at 7 available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En (accessed 13/11/2020).

[295] OECD (2016) Public Interest Considerations in Merger Control 8-9; OECD (2003) Substantive Criteria used in the Assessment of Mergers 3-5 and Lewis (2006) Speech of David Lewis Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf accessed 13/10/2018).

[296] In the UK, the Industry Act 1975 confers power on the Secretary of State to prohibit changes of control over an important manufacturing undertaking where that the change of control would be contrary to the interests of the United Kingdom, or any substantial part of it. This power has never been exercised, however.

[297] OECD (2003) Substantive Criteria used in the Assessment of Mergers 3 to 5.

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a merger to be made on grounds other than the merger's pro-competitive or anticompetitive effects.

A merger into a market with ease of entry stands a higher chance of approval. Easy entry is that which is likely, timely and of sufficient competitive importance.[298] If one of the merging firms is expected to fail and its assets withdrawn from the relevant market, any potential competitive repercussions from the merger may be attributable to the firm's failure rather than the merger. To make use of the 'failing firm defence', there needs to be evidence that the firm is failing, such as that it is insolvent or in bankruptcy proceedings and that it is not likely to be restructured or its assets purchased and used by other competitors.[299]

While it is vital to ensure preservation of the integrity of the market, the costs incurred by parties and agencies in the review of lawful mergers must as far as possible be kept at a minimum.[300] It must be borne in mind that harm to market participants may be the effect of ill-conceived enforcement decisions which have anti-competitive effects of their own.[301] For that reason Hovenkamp cautions that, "[m]arket intervention must be justified and the justifications by and large are not moral ones. Punishing unfair behavior is not antitrust's role. The purpose is to make markets perform more competitively, and intervention is justifiable only when it moves us toward that goal".[302]

Since Frank Easterbrook's seminal essay "The Limits of Antitrust",[303] viewing merger regulation through "the error cost framework" is the standard, though not universally accepted protocol.[304] Judge Easterbrook's contribution was to illuminate the full range of potential effects of enforcement. On one hand, sits the risk of non-intervention, what he

[298] Chapter 4 par 4.3.3.3.
[299] See generally OECD (2009) Competition Policy and the Informal Economy *Global Forum on Competition Roundtable on Competition Policy and the Informal Economy* 2009 hereinafter OECD (2009) Competition Policy and the Informal Economy available at https://www.oecd.org/daf/competition/44547855.pdf (accessed 12/11/2019).
[300] Clarke in Duns et al. (eds.) (2015) 173.
[301] Jennejohn M "Innovation and the Institutional Design of Merger Control" 2005 (41) *Journal of Corporation Law* Issue 101 hereinafter Jennejohn (2015) 41 *Journal of Corporation Law,* at 103.
[302] Hovenkamp H *The Antitrust Enterprise: Principle and Execution* (2005) hereinafter Hovenkamp (2005) 7.
[303] Easterbrook FH "Limits of Antitrust" 1984 (63) *Texas Law Review* 1 hereinafter Easterbrook (1984) 63 *Texas Law Review* 1 at 1. For a brief summary of the intellectual history of the thesis see Baker JB "Taking the Error Out of 'Error Cost' Analysis: What's Wrong with Antitrust's Right" 2015 (80) *Antitrust Law Journal* 1.
[304] Easterbrook (1984) 63 *Texas Law Review* 1 at 7-8 and Rosch (2009) available at https://www.ftc.gov/sites/default/files/documents/public_statements/thoughts-withdrawal-doj-section-2-report/090625roschibareport.pdf (accessed on 12/04/2017.

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calls a Type I or false positive error. An agency's decision not to intervene in a market may allow anti-competitive conduct to continue unabated. The converse, a Type II or false negative error, is what occurs in situations where an agency mistakenly picks on conduct that is on balance pro-competitive and intervenes to stop it. Easterbrook posits that the cost of false negatives or interfering with beneficial behavior often outweigh the cost of false positives since market forces have at the least, a muted ability to counteract the latter.[305] Decision-making therefore should be more open to erring on the side of false positives and avoid the possibility of false negative errors at all cost.[306]

Subsequent scholars have built upon and refined Easterbrook's theory on enforcement policy and current agency practice typically disregards entirely outcomes with low probability of harm.[307] All said and done, an agency must find a place of balance so that the criteria used is not so demanding as to cause beneficial mergers to be abandoned or so relaxed that some harmful mergers are cleared.[308] Of course, calculating benefits, costs, and their probabilities *ex ante* is not always easy due to incomplete information.[309] Good processes are indispensable in achieving this end.

In merger control, Kwoka points out that the options available after analysis are prohibition of the merger in its entirety, dissolution in the case of a consummated merger and ordering divestiture to undo the anti-competitive effects of a merger while allowing it to continue. The agency may also make orders to regulate or modify the conduct of the merged firm to prevent anticipated anti-competitive effects, for instance, undertaking to grant licences to competitors upon completion of the merger. The earlier batch of remedies are structural and the latter behavioural.[310] Taking into account that merger control is concerned with safeguarding competitive market structure, structural remedies

[305] Easterbrook (1984) 63 *Texas Law Review* 1 at 15-16.
[306] Easterbrook above.
[307] Manne GA and Wright JD "Innovation and the Limits of Antitrust" (2010) 6(1) *Journal of Competition Law and Economics* 153 who argue for simpler filters which they say would better help to produce accurate results. See specifically 222-226. Also see Padilla AJ and Evans DS "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-*Chicago* Approach" 2005 72(1) *University of Chicago Law Review 78* for an approach combining the error-cost framework and the Decision Theory.
[308] Seldeslachts J, Cloughtery JA and Barros PP "Settle for Now but Block for Tomorrow: The Deterrence Effects of Merger Policy Tools" 2009 52(3) *Journal of Law and Economics* 607 hereinafter Seldeslachts et al. (2009) 52 *Journal of Law and Economics*, at 631 and UNCTAD 2010.
[309] Jennejohn (2015) 41 *Journal of Corporation Law* at 103.
[310] Kwoka J "Merger Policy and Remedies" in Kwoka J (ed.) *Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy* (2015) 107-109.

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are usually the first choice to remedy competitive concerns. They are easier to adopt in mandatory *ex ante* regimes as the merging parties can be required to put the structural changes in place before the merger has been completed. Behavioural remedies are less effective owing to difficulties in monitoring and tracking implementation.[311] A number of merger control regimes allow the notifying party to propose remedies and restructure the proposed transaction in a way that resolves the competition issues.[312] Examples include New Zealand and Slovenia.[313]

2.3 GOALS OF COMPETITION LAW

2.3.1 Introduction

The longstanding debate on the proper role of competition law in an economy has been typified by Adams and Brock as a "shrill cacophony of divergent opinion" whose script "the aficionados of the theatre of the absurd would find intimately familiar".[314] Hyperbolic as that may sound, it is pretty close to the truth. The question of the normative baseline of competition law theory lies at the root of much controversy, fomenting a debate that is as much laden with ideological connotations as it is polarised.[315] In this "dialogue of the dead"', discussants join the conversation bearing a "philosophical pre-commitment or prior beliefs on certain values and personal taste, occasionally taking support in the legislative history or the interpretation of the competition law provisions by the courts and competition authorities".[316] Much has been written about this "battle for the soul of antitrust" that pits two opposing economic theories against one another, each battling for dominance and the prize of the licence to drive competition policy for the season.[317]

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[311] UNCTAD (2010)(b) 13-14.

[312] See the FTC approach in Sullivan & Gris (2016) "What does it take to settle a merger case?" available at https://www.ftc.gov/news-events/blogs/competition-matters/2016/07/what-does-it-take-settle-merger-case (accessed 22/01/2017). On merger remedies generally see Lévêque F and Shelanski H (eds.) *Merger Remedies in American and European Union Competition Law* (2003).

[313] UNCTAD "Challenges in the Design of a Merger Control Regime for Young and Small Competition Authorities" *Sixteenth Session of Intergovernmental Group of Experts on Competition Law and Policy* (5–7 July 2017) 11 available at https://unctad.org/system/files/official-document/ciclpd45_en.pdf (accessed 23/09/2017).

[314] Adams & Brock (1991) xi-xii.

[315] Waked DI "Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices" 2015 38(3) *Seattle University Law Review* 945 hereinafter Waked (2015) 38 (3) *Seattle University Law Review,* at 949 and Elzinga KG "The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?"1977 (125) *University of Pennsylvania Law Review* 1182 hereinafter Elzinga (1975) *125 University of Pennsylvania Law Review 1182,* at 1191.

[316] Adams & Brock (1991) xii and Lianos I and Genakos C "Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis" in Lianos I & Geradin D *Handbook on European Competition Law: Substantive Aspects* (2013) 3.

[317] For a concise summary of the battle see Piraino TA "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century" 2007 82 *Indiana Law Journal* 345 hereinafter Piraino (2007) 82 *Indian Law Journal,* at 348-363 and Fox EM "The

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The core purpose of antitrust appears to depend on which part of the competition law gamut is being analysed, by whom, for what purpose and more recently, for which jurisdiction.[318] Though native to the United States, this conversation has moved abroad and acquired a global quality. In the European Union for instance, the advent of a more economic approach to competition law has enflamed what Rigaud refers to as "the most substantial debate on the normative foundations of competition law in recent history".[319] Developing countries too have been drawn in. On our shores, the dominant concern is whether competition law goals already exist as a platonic ideal or whether we may design for ourselves the adaptation that we consider best fit for our settings.[320] Encased within this inquiry and of singular significance is the question whether non-economic, public interest considerations have a place at all in competition law, and more especially in merger analysis.[321]

One may wonder about whether there is any value in engaging with the notion of goals of merger regulation. This aside from the emphatic argument in some quarters that competition law is in fact a counterproductive archaism that should be abolished altogether.[322] Rigaud contends that we attach too much importance to a matter that in the end matters little.[323] For a fact, the notion of normative goals is of little practical importance in the standard enforcement practice of a competition authority.[324] The daily business of

Battle for the Soul of Antitrust" 1987 (75) *California Law Review* at 917. For current reading on the matter see Ezrachi A and Stucke M "'The Fight over Antitrust's Soul" 2017 (8) 9 *Journal of European Competition Law* and *Practice 1* hereinafter Ezrachi and Stucke (2017) 8 (9) *Journal of European Competition Law and Practice* 1, at 1; Ezrachi 2016 (5) 1 *Journal of Antitrust Enforcement* 49 and Hovenkamp H "Whatever *Did* Happen to the Antitrust Movement?" 2018 (93) *Notre Dame Law Review* 583. Other recent pickings since the turn of the 2010 decade arranged chronologically include Orbach (2011) 7(1) *Journal of Competition Law and Economics at 133*; Blair R & Sokol D "The Rule of Reason and the Goals of *Antitrust*: An Economic Approach" 2012 78 (2) *Antitrust Law Journal* 471 hereinafter Blair & Sokol (2012) 78(2) *Antitrust L J* 471; Stucke (2012) 53 *Boston College Law Review 551*; Wright JD "Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust" 2012 78(1*) Antitrust Law Journal* 241 hereinafter Wright (2012) 78(1) *Antitrust Law Journal* ; Witt AC "Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order" 2012 8(3) *European Competition Journal* 443; Fox (2013) 81 *Fordham Law Review* 2157; Orbach (2011) 7(1) *Journal of Competition Law and Economics 2253* hereinafter Orbach (2013) 81 *Fordham Law Review*; Wright JD and Ginsburg DH "The Goals of Antitrust: Welfare Trumps Choice" 2013 81 *Fordham Law Review* 101 hereinafter Wright & Ginsburg (2013) 81 *Fordham Law Review* and Waked (2015) 38 (3) *Seattle University Law Review* at 945; Steuer R "The Horizons of Antitrust" (2016) Proceedings of the 2016 Lewis Bernstein Memorial Lecture. Available at https://ssrn.com/abstract=2908172 (accessed 24/03/2017); Kirkwood JB and Lande R "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency" 2008 (84) *Notre Dame Law Review* 191 hereinafter Kirkwood JB & Lande R (2008) 84 *Notre Dame Law Review*; Pitofsky (2008) and Zimmer (ed.) 2012.

[318] Shenefield JH and Stelzer IM *The Antitrust Laws: A Primer* (2001) hereinafter Stelzer & Shenefield (2001) 10.

[319] Maier-Rigaud F "Efficiency, Political Freedon and the Freedom to Compete" in Zimmer D (ed.) *The Goals of Competition Law* (2012) hereinafter Maier-Rigaud in Zimmer (ed.) (2012) 132.

[320] Ezrachi and Stucke 2017 (8) 9 *Journal of European Competition Law and Practice* at 2.

[321] See chapter 2 pars 2.4.2; 2.4.3 and 2.5.6.

[322] Stucke (2013) 1 *Journal of Antitrust Enforcement* 162 at 165.

[323] Maier-Rigaud in Zimmer (ed.) (2012) 135.

[324] Stelzer & Shenefield (2001) 11.

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a national competition agency consists essentially in conducting investigations in order to detect, remedy and ultimately deter competition law infringements.[325] It is highly unlikely that an enforcer engaged in analysing a merger will occupy himself with hazy inarticulate normative goals that do not yield to easy answers. Not when relevant precedents, clear guidelines and fundamental preconceptions are readily available.[326] Judges too seem to have little time for articulation of antitrust goals.[327] In *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[328] for example, the Supreme Court stated thus: "Inter-brand competition . . . is the 'primary concern of antitrust law.'"[329] "Inter-brand competition" was however not defined and neither did the court enunciate how to establish if it has been enhanced or restricted. The only opinion in recent times that has gone that far is *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*[330] where the "traditional concern" of the antitrust laws was identified as "consumer welfare and price competition."[331] If the agencies and the courts are not keen, why should we be? Why not focus on the more practical but somewhat bland matters of merger control?

Bork's much cited declaration is an apposite response: "[A]ntitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law - what are its goals? Everything else follows from the answer we give."[332] The whole purpose of engaging with the question of what goals drive the law is to give the policy balance and rationality. With specific regard to mergers, if antitrust policy is to be applied correctly, if substantive analysis is to be accurate, goals must be defined.[333] Objectives inform enforcement and the extent to which they are measurable and transparent can increase accountability of enforcers. In a jurisdiction with multiple enforcers, definition of objectives ensures that officials of the various agencies are not countering each other's

[325] Maier-Rigaud in Zimmer (ed.) (2012) 133.
[326] Kalbfleisch P "Aiming for Alliance: Competition Law and Consumer Welfare" 2011 2(2) *Journal of European Competition Law & Practice* 108 at 109 and on the normative foundation of competition law efficiency, political freedom and the freedom to compete see Maier-Rigaud in Zimmer (ed.) (2012) 132.
[327] Gal and Fox in Gal et al. (eds.) (2015) 217.
[328] 546 U.S. 164 (2006).
[329] *Volvo Trucks North America, Inc. v Reeder-Simco GMC, Inc.* 546 U.S. 164 (2006) at 180 quoting *Continental T. V., Inc. v GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).
[330] 509 U.S. 209 (1993).
[331] 509 U.S. 209, 221 (1993).
[332] Bork RH *The Antitrust Paradox: A Policy at War with Itself* (1978) hereinafter Bork (1978) 50.
[333] Lindsay & Berridge (2017) 1.

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efforts.[334]It is submitted that framing of goals is all the more important for developing countries which typically have newly enacted law without the benefit of accumulated jurisprudence on which to base enforcement. Articulating goals will enable them to assess needs and tailor analysis in ways that pertinently address the key issues.

That said, the task of denoting competition law goals is one in which there are no right answers. Whatever conclusions reached are temporary, often in place until “fresh thinking” arrives in town.

2.2.3 The goals divide

Pinning down the goals of competition law is anything but scientific. Contrary to common perception, the ideal traits of stability, purity and predictability are as a matter of fact not inherent in competition law.[335] Like all other legal disciplines competition law is a social construct, stemming from the domestic foundations and values of each jurisdiction and rationalised from time to time to more aptly exemplify the subtleties and political dynamics of the jurisdiction.[336] Moreover, as pointed out by Ezrachi, competition law is “remarkably vulnerable to capture by the collective interests of the groups having the most salient stakes in enforcement outcomes”.[337] These groups include government, traders, unions and consumer associations.

It may be said, and that with a degree of veracity, that the agreed and consistent goal of competition policy in both large and small economies is that of creating and maintaining the conditions for workable competition.[338] An equally veracious position but yet the “spanner in the works” is that what “competition” denotes is the sum of vastly different jurisdictional experiences, expectations and perceptions and therefore, different systems

[334] Stucke (2011) 53 *B C L Rev* 511 at 551,558 and Orbach (2011) 7(1) *Journal of Competition Law and Economics* at 133.

[335] The International Competition Network (ICN) with its motto "All competition, all the time" prides itself as the only international agency whose principal concern is purely competition law enforcement. Presumably, this as contrasted to peers with a ‘mishmash’ of concerns like the Organisation for Economic Co-operation and Development (OECD) whose mission is the promotion of policies that will improve the economic and social well-being of people around the world. See at http://www.internationalcompetitionnetwork.org/about.aspx and http://www.oecd.org/about/ (accessed 26/06/2018). See further Hollman & Kovacic (2001) 20 *Minn J Intl L* 274 at 303-305 for a query on the sustainability of ICN’s approach.

[336] ‘...[C]ompetition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.’ (1992) 11 *Commission(EC), XXIInd Report on Competition Policy* at 13. Hart (1994) 116 quoted in Ezrachi (2016) (5) *Journal of Antitrust Enforcement* at 51. Also see Schauer F “The Social Construction of the Concept of Law: A Reply to Julie Dickson” 2005 25(3) *Oxford Journal of Legal Studies* 493 for the argument that concepts of law change over time and vary across cultures and this must be factored into interpretation of the law.

[337] Ezrachi (2016) (5) *Journal of Antitrust Enforcement* at 50. On intellectual and regulatory capture of competition law see at 71-72.

[338] Gal (2003) 5.

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of competition law may reflect different concerns.[339] As Fox aptly observes, since economies and economic development may be very different between countries, it is impossible for each country's competition law to have identical concerns.[340] It is this reality that is used to anchor the now relatively settled supposition that developing countries, different in fundamental ways from jurisdictions in the developed world, are best served by specially tailored competition policy goals that correspond to those different concerns.[341]

In the arena of the goals debate, players include empiricists against theorists; apostles of the "new learning" against defenders of the traditional structure-conduct-performance paradigm; "laissez-faire" advocates against "interventionists"; each claiming to have twigged not just the letter but also the spirit of the law.[342] Even more, all claim to have the weight of cogent economic thought on their side.

The dichotomy could be framed in the form of a question: should competition laws seek to enhance competition by maintaining an atomistic structure in which numerous businesses compete, or should the aim be to maximize welfare with the focus on efficiency? Put otherwise, is the central purpose of law to encourage decentralization of economic power so that as many as possible can participate in the market or is it to promote total or consumer welfare as an outcome?[343] Another question that is asked is; which is superior? Is it a monist reading of the purpose of competition or are multiple goals a better alternative?[344] These are the questions that we must answer with regard to merger analysis in the developing country.

At its simplest, the span of the divide can be reduced into a "means-end" dichotomy where the point in issue is whether what is to be safeguarded is the process of competition or

[339] Whish & Bailey (2018) 17-19.
[340] Fox EM "The Kaleidoscope of Antitrust and Its Significance in the World Economy: Respecting Differences" in Hawk B (ed.) *International Antitrust Law & Policy* (2001) 597.
[341] Gal (2003) 10.
[342] Adams & Brock (1991) xi.
[343] Adams & Brock (1991) ix.
[344] Elzinga, (1977) 125 *University of Pennsylvania Law Review* 1182 at 1191 as compared to Brodley JF "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress" 1987 (1053) (62) *New York University Law Review* 1020 hereinafter Brodley (1987) 62 *New York University Law Review* at 1053. Brodly proposes a hierarchical or balancing approach when selecting amongst several goals of antitrust.

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its outcome.[345] Process-focused conceptions fixate on the functioning of the market mechanism. Here, it is the place of the law to facilitate markets to function at their optimum. Outcome-focused conceptions on the other hand give emphasis to the socially desirable distribution that competitive markets are presumed to yield. If the outcome of market conduct is an increase in welfare the law will sanction the conduct without undue attention to the process used to arrive at the outcome.

There is thought that in fact the process- and outcome-themed conceptions are not mutually exclusive, parting ways only at the scope of law in securing specified parameters.[346] Both schools emphasise reliance on economic theory in the formulation of antitrust rules.[347] There are those who maintain that there is an undeniable difference in terms of results between competition policies that promote efficiency and the more interventionist alternative that promotes competitive markets. Pursuit of one could produce a different outcome on the market from pursuit of the other.[348] For the purposes of the developing country, the distinction does matter.[349]

The process-focused, also known as the structure-conduct-performance approach, is attributed to the Harvard School of thought that took hold of United States antitrust philosophy from the mid-1930s, peaking in the 1960s and declining in the 1970s. Courts and agencies adopted the economic theories of a group of Harvard scholars who moved from the premise that firms with market power would presumably act in an anti-competitive manner.[350] The cure they proposed was to focus on securing an environment favourable for vigorous rivalry, the assumption being that such an environment - one with many active players - is most conducive for efficiency in the market.[351] Their view was

[345] Dunne (2015) 27-31.
[346] Dunne (2015) 27.
[347] Kovacic (2007) *Columbus Business Law Review* at 35. Kovacic at 67 also quotes Professor Jacobs speaking of the Chicago and Post Chicago Schools thus; "Despite their differences, post-Chicago and Chicago scholars share a common metric. They agree that wealth maximization should be the exclusive goal of antirust policy, and antitrust enforcement should strive to achieve the highest practicable level of consumer welfare." Jacobs MS "*An Essay on the Normative Foundations of Antitrust Economics* "1995 (74) *North Carolina Law Review* 219 at 242.
[348] For a specific example see Elzinga (1977) 125 *University of Pennsylvania Law Review* 1182 at 1191. Kolasky blames pursuit of antitrust policies that prioritised among other things protection of small competitors for the stagflation of the 70s in the US. (2012) "The Role of Competition in Promoting Dynamic Markets and Economic Growth Kolasky" Address at U Tokyo America Center Tokyo, Japan November 12, 2002
[349] See chapter 2 par 2.5.4
[350] Piraino (2007) 82 *Indian Law Journal* at 348-349 and Hovenkamp (2003) 116 *Harv L Rev* 917 at 920. See chapter 2 par 2.4.2.
[351] Fox (1981) 66 *Cornell Law Review* at 1169.

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that competition law should therefore primarily concern itself with protecting the process of competition.[352]

Outcome-focused thinking is fundamentally attributable to the legacy of the Chicago School antitrust scholars, which succeeded Harvard thought in the late 1970s. It continues to hold sway albeit amidst increasingly louder rumblings of discontent.[353] Here the emphasis is on the pivotal place of economic theory and in particular the efficiency criterion, in constructing the parameters of antitrust.[354] The outcome of business conduct may justify its approval, regardless of the size and number of players in the relevant market. Chicago thought puts more trust in the market mechanism to correct itself.[355] The rumblings of discontent are those of Post-Chicago thought which goes by various monikers such as Post-Chicago, Neo-Chicago and Chastened Harvard. The shared bond in this fold is loyalty to the core commitment of Chicago - centrality of economic theory in assessing competitiveness or otherwise of market conduct.[356] The biggest grouse is with core aspects of Chicago's approach to merger regulation but the group is yet to find a steady branch on which to perch.

Yet another facet of the debate, one beyond the question of process and outcome, atomism and efficiency, is the matter of whether competition law goals are bounded and limited to the purely economic or whether the law is pliable enough to pursue non-economic goals. Public interest considerations range from the somewhat audacious wealth distribution from rich to poor, to the probably more unpretentious protection and nurture of small enterprises.[357] This discussion which was always in the flanks, has acquired fresh prominence with the arrival of new entrants into the universe of competition law, and especially those from developing economies. For many grappling with high

[352] Fox (1985) 61 *New York University Law Review* 554 at 578 and Fox (1981) 66 *Cornell Law Review* 1191.
[353] See chapter 2 par 2.4.3
[354] Bougette P, Deschamps M & Marty FM "When Economics met Antitrust: The Second Chicago School and the Economization of Antitrust Law" (2014) at 16-19 *GREDEG Working Paper* No 23.
[355] See chapter 2 par 2.4.3.
[356] Hylton (2003) iii.
[357] Hovenkamp (2017). *Faculty Scholarship at Penn Law* 1769 at 2 and Pitofsky R "Political Content of Antitrust" 1979 127 *University of Pennsylvania Law Review* 1051 hereinafter Pitofsky (1979) 26 *University of Pennsylvania Law Review,* at 1058. Discussed by Bork (1978) at 49, Posner RA *Antitrust Law* (2001) hereinafter Posner (2001) at 25, Kovacic (2007) *Columbus Business Law Review* 51 to 64; Kovacic WE "Competition Policy, Consumer Protection and Economic Disadvantage" 2007 (25) *Washington University Journal of Law* 101. *Contra* Kirkwood JB and Lande RH "The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) 233-6.

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levels of poverty and unemployment, the question becomes one of how a regime whose concerns are only the economic can be of genuine service to the jurisdiction.

On this matter, purists insist that the questions to be answered in the realm of antitrust are purely economic.[358] They point to the difficulty in establishing how best to inject non-economic values into antitrust analysis.[359] For them, competition law is concerned primarily with protecting competition either as a process or an outcome, nothing more. As Judge Posner would have it, "[a]lmost everyone professionally involved in antitrust today, whether as litigator, prosecutor, judge, academic, or informed observer, agrees that the only goal of antitrust laws should be to promote economic welfare."[360] The pragmatists on the other hand are emphatic that as important as competitive markets are, it is simplistic to overlook that they function within social and political contexts.[361] According to Rodger and MacCulloch depending on the setting, competition law will rightly accommodate a number of "extra-competition policies" or "non-competition law proper" policies.[362] In fact, where necessary, some argue that competition law could and should be used to achieve socio-political purposes in order to produce results that give proper effect to the "complex matrixes of needs, aspiration and ideals operating within a society at a given time."[363] The two standpoints do have shared ground. Both find their inspiration from some form of utilitarian or welfarist argument.[364]

There is yet a group that prefers to tread the middle ground because it is "bad history, bad policy and bad law to exclude certain political values in interpreting the antitrust laws".[365] For that reason, the law should make room for non-economic ends. However, in

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[358] Bork RH *The Antitrust Paradox: A Policy at War with Itself* (1978) 50 and 72-89 and Fox EM "Consumer Beware Chicago" 1986 84(8) *Michigan Law Review* 1714 at 1718.
[359] Remarks by Albert Foer, President of the American Antitrust Institute, Washington D.C., to the 16th International Conference on Competition March 21, 2013 Berlin "The political content of antitrust" available at http://www.ikk2013.de/pdf/Foer.pdf (accessed 4/02/2017) at 3.
[360] Posner (2001) viii. Note however comments by Stucke who argues that the "U.S. antitrust community never agreed that antitrust's goals were only economic or that antitrust only had one goal – to promote economic welfare..." Stucke (2012) 53 *Boston College Law Review* at 564.
[361] Rodger & MacCulloch (2014) 13.
[362] Rodge & MacCulloch above.
[363] Brassey (ed.) (2002) 8. In fact, it may even be possible to promote producer welfare per Joelson (2017) 11.
[364] Dunne (2015) 4.
[365] Foremost among these is former Chairman of FTC, Robert Pitofsky. Pitofsky (1979) 26 *University of Pennsylvania Law Review* at 1075 - "Such considerations as the fear that excessive concentration of economic power will foster antidemocratic political pressures, the desire to reduce the range of private discretion by a few in order to enhance individual freedom, and the fear that increased governmental intrusion will become necessary if the economy is dominated by the few, can and should be feasibly incorporated into the antitrust equation. *Although economic concerns would remain paramount*, to ignore these non-economic factors would be to ignore the bases of antitrust legislation and the political consensus by which antitrust has been supported. (emphasis added). But see

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the event of a conflict between social and economic considerations the latter must have primacy in adherence to Adam Smith's notion that the "invisible hand" of competition should guide operation of the economy.[366]

The Organisation for Economic Development (hereafter OECD) has contributed to the debate, zeroing in on the goals of merger control. It divides merger regulation goals into "core", "grey zone" and "broad public interest" objectives.[367] "Grey zone" objectives are those that fall between public interest concerns and economic ones - for instance ensuring fair competition or an equitable opportunity for small and medium-sized enterprises.[368] Public interest objectives manifest in over-rides in the law. They are those that in theory would permit an anti-competitive merger to proceed on the basis of broader public interest concerns or a pro-competitive merger to be blocked or remedied on the basis of such considerations.[369] Generally, they carry more weight in emerging economies. Even when empowered to consider public interest considerations, authorities in developed economies tend to interpret them narrowly.[370] The ICN recently identified the protection of competition as the sole goal towards which merger laws ought to be directed.[371] Many jurisdictions, developing ones included, agree and their written law reflects as much.[372]

Absence of a universal definition of competition or consensus about what constitutes its promotion, and what the phenomenon should yield means that merger regimes end up

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response by Schwartz LB "Justice and Other Non-Economic Goals of Antitrust" 1979 127 (4) *University of Pennsylvania Law Review* 1076 hereinafter Schwartz (1979) 127 (4) *University of Pennsylvania Law Review* 1979, at 1076.

[366] Stelzer & Shenefield (2001) 12.

[367] OECD (2003) The Objectives of Competition Law and Policy 4.

[368] OECD (2003) The Objectives of Competition Law and Policy 3-5.

[369] OECD (2003) The Objectives of Competition Law and Policy 5.

[370] Examples of OECD jurisdictions that have moved away from public interest oriented tests or political overrides include Canada, the Czech Republic, Ireland, Sweden and the U.K. OECD (2003) Substantive Criteria used in the Assessment of Mergers 4.

[371] ICN Recommended Practices for Merger Analysis - Recommendation 1A and associated comments, of Merger Working Group 2008, 2010) "The purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly" Available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (accessed 10/03/2017.

[372] Most jurisdictions express the object of their law as being the prevention of conduct that would cause significant harm to competition See generally Thurman (2008) *Wisconsin Law Review* 261 at 265 and Stuer RM "The Simplicity of Antitrust Law" 2012 14(2) *University Pennsylvania Journal of Business Law* 543. As a sample see Section 3(1) Kenya Competition Act 2012 - 'The object of this Act is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya; Section 2 Namibia Competition Act 2003 – 'The purpose of this Act is to enhance the promotion and safeguarding of competition in Namibia . . .' and Preamble of India Competition Act 2002 'An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets . . .' Nigeria's Federal Competition and Consumer Protection Act 2018 at section 3 sets out the objectives of the Act as being promotion of competitive markets, promotion of economic efficiency and consumer welfare.

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promoting a diverse range of policy goals.[373] Garza et al observe that largely similar law can produce diverse multiple economic and social goals from one jurisdiction to the next is neither unusual nor paradoxical in the context of merger regulation.[374] For many in the developed West, the brief of merger review is purely economic and the legal framework for merger regulation should not be used to pursue other goals.[375] We are of a different opinion here, believing like Lewis that "despite strong . . . misgivings in the international competition community, it is wholly possible to carry out a . . . mandate which requires sensitivity to a number of industrial and social policy considerations without compromising the core objectives and approaches of orthodox competition law and policy."[376] It is important for law to be able to address the unique jurisdictional challenges effectively and so a country's merger regime must take into account the economic circumstances of the country it is applied in. I

The rapid expansion of merger control laws in recent times has been credited with the revitalisation of the goals debate.[377] Today, the regulation of mergers is the subject of vibrant discourse, not only in the more arcane world of academia but in public discourse as well. In the United States for instance, merger policy has become a classic campaign issue responsible for dissent through and beyond election cycles.[378] It is in merger cases that the goals divide plays out most conspicuously.[379] No wonder then it is merger control

[373] "[No] satisfactory comprehensive definition of competition exists" Stucke in Zimmer (ed.) (2012) 28; Fuchs A "Characteristic Aspects of Competition and their Consequences for the Objectives of Competition Law: Comment on Stucke" in Zimmer D (ed.) *The Goals of Competition Law* (2012) 53; Budzinski . . . "[T]he absence of a unifying theory of competition . . . implies that different regimes will legitimately base their theories of competitive harm on diverging economic approaches." Budzinski O "An Evolutionary Theory of Competition/Impact Evaluation of Merger Decisions, see what fits best there" (2012) 17(2) *Ilmenau Economics Discussion Papers* at 7; UNCTAD (2010)(b) pars 8-9.

[374] Garza et al. (2007) *Antitrust Modernisation Commission, Report and Recommendation* 26 and Sokol DD and Blumenthal W "Merger Control: Key International Norms and Differences" in Ezrachi A (ed.) *Research Handbook on International Competition Law* (2012) 327-330.

[375] Comment 1 ICN Recommended Practices For Merger Analysis available at http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf (accessed 22/10/2017; Clarke in Duns et al. (eds.) (2015) 174 and Shahein in Whish & Townley (eds.) (2012) 59.

[376] Lewis (2006) Speech of David Lewis, Chairperson of the Competition Tribunal of South Africa on Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf (accessed 03/12/2018).

[377] Clarke in Duns et al. (eds.) (2015) 173.

[378] Kaplow L "On the Choice of Welfare Standards in Competition Law" in Zimmer D (ed.) *The Goals of Competition Law* (2012) 26. See comments by Senator Elizabeth Warren, calling for a return to 19th-century approach to monopolies and mergers https://www.usnews.com/news/articles/2016-06-29/elizabeth-warren-calls-for-strong-executive-leadership-on-antitrust (accessed 19/02/2017).

[379] Cseres (2007) 3(2) *Competition Law Review* 121 at 137; Cseres (2015) 3 and Hovenkamp (2017) 24 *George Mason Law Review* at 715-717. Best illustrated by Williamson's trade-off model between efficiency and market power originally set out in Williamson (1968) 58 *American Economic Review* 18; For a summary of the trade-off model, see Lindsay & Berridge (2017) 23-24.

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that has played a pivotal role in goal trends from the early days of Sherman Act to today's emergence of Post-Chicago schools.[380]

2.3.3 Origins of the divide

To what can we attribute the unsettled character of competition law goals? In our search for the whys and wherefores, we have found a set of stimuli we believe to be responsible for the divergences. The most important determinants of policy on maintaining fair market competition have been political, not economic or bureaucratic.[381] Picking a competition law goal is "not merely a product of economic theorising, but of political economy"[382] that is, "the demand-side drivers of antitrust activity such as market failures and interest groups as well as supply-side drivers including ideology, partisan politics and institutions of antitrust."[383] Antitrust is a political choice.[384] This will shortly become evident from United States antitrust trends.[385] As Foer points out, law morphs over time to accord with changing political and economic realities, advancing knowledge, and general fashions in political and economic thought.[386]

We have found a triad of elements that have driven antitrust thought from the early days of the Sherman Act and continue to do so to this day. These three are: the course of the politics of the day and hence government policy; the dominant economic scholarship and philosophy of the season; and the judiciary's perception and interpretation of the law in the given season. The most critical of the three elements has been the first one with the other two playing the role of supporting cast, at times appearing on the set concurrently and in sync and at other times either of the two taking a retreat but still very much part of the script.

An elemental feature of antitrust has facilitated the working of the triad. Competition legislation tends to be broad in scope, providing a legal framework for protection of

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[380] See chapter 2 par 2.4.4.
[381] Wood BD and Anderson JE "The Politics of US Antitrust Regulation" (1993) 37 *American Journal of Political Science* 1 at 34.
[382] Foer AA "The Goals of *Antitrust*: Thoughts on Consumer Welfare in the US" August 2005 *American Antitrust Institute Working Paper No. 05-09* 2 hereinafter Foer (2005).
[383] Waked (2015) 38 (3) *Seattle University Law Review* at 948 and Ghosal V, Harrington JE and Stennek J "Issues in Antitrust Enforcement" in Ghosal V and Stennek, J (eds.) *The Political Economy of Antitrust (Contributions to Economic Analysis, Vol. 282)* (2007) hereinafter Ghosal & Stennek (eds.) (2007) 1.
[384] Foer (2005)23.
[385] See chapter 2 par 2.4.
[386] Foer (2005) 2.

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competition while failing to offer clear guidance as to what that should be taken to mean.[387] The open-grained nature of competition law has over the years presented courts, agencies, economists, scholars and importantly, bureaucrats, with a clean canvas on which to paint. The law lending itself to fairly easy manoeuvring has made it possible to cast different goals on the very same canvas. There is definitely something to be said for want of specificity in statutes. Examples exist of specific statutes that have been rendered valueless by their very specificity.[388] The phenomenon of competition is itself devoid of clear lines. As observed by Cosway, if all market conduct was good, or all was bad, legislating would be simpler.[389] The principal antitrust laws are therefore fairly abstract, broadly worded, vague and malleable; a blank cheque to be filled by scholars, practitioners or courts.[390] This has enabled the formulation of a "common law" of antitrust with which courts are able to rework the realm of antitrust law.[391]

The Sherman Act was a political tool from the get go, an instrument with which to dismantle powerful corporations and prevent the amalgamation of economic power that could threaten the political arm.[392] Overwhelming public sentiment in its favour made voting against it a risky choice for politicians with aspirations for re-election.[393] Not only was the origin of the Sherman Act political, its implementation was too. Thorelli explains the seemingly slow take-off of the Act with a quip: "If the Sherman Act was weak in its infancy the fault did not lie with the courts. The Presidents, acting through their cabinets and particularly their Attorneys General, deserve any blame that is to be placed."[394]

[387] Dunne (2015) 26.
[388] Thorelli HB *The Federal Antitrust Policy: Origination of an American Tradition* (1955) 429 and Cosway R "The Federal Antitrust Policy: Origination of an American Tradition, by Hans B. Thorelli," 1956 31(3) *Indiana Law Journal* 429 hereinafter Cosway (1956) 31(3) *Indiana Law Journal* 429 at 429.
[389] Cosway (1956) 31(3) *Indiana Law Journal* 429 at 431.
[390] Hovenkamp (2005) 49; Sagers (2014) 7; Easterbrook FH "Workable Antitrust Policy" 1986 (84) *Michigan Law Review* 1702 hereinafter Easterbrook (1986) *84 Michigan Law Review* 1696 at 1702 and Shapiro C and Kovacic WE "Antitrust Policy: A Century of Economic and Legal Thinking" 2000 14 *Journal of Economic Perspectives* 43 hereinafter Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives,* at 43.
[391] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 58; First H and Waller SW "Antitrust's Democracy Deficit" 2012 81(5) *Fordham Law Review* 2543 at 2546-2548; Judge Hand in *United States v Associated Press* 52 F Supp. 362 (S.D.N.Y. 1943) asserts that in enacting the Sherman Act, the Congress had delegated to the courts the duty of fixing the standard in each case broad substantive provisions and relies so heavily on a common law method of judicial interpretation to implement them. Also worth of note is section 5 of the Federal Trade Commission Act, which uses a wide intervention formula - 'unfair methods of competition' - that enables discretion as to the scope of intervention. That provision has been criticized as going too far afield from antitrust concerns. See Cooper JC "The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act" 2015 (87) *Journal of Antitrust Enforcement* 87;
[392] Ezrachi (2016) 5 *Journal of Antitrust Enforcement*) 60.
[393] Orbach (2013) 81 *Fordham Law Review* at 2258-2259. Senator Rufus Blodgett (D-New Jersey), who voted against the bill, was not a candidate for re-election.
[394] Cosway (1956) 31(3) *Indiana Law Journal* 429 at 430.

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Orbach puts it differently: "Members of Congress who passed the Act made plain the object that they had in mind. It was when the statute became a football of party politics and [p]oliticians . . . seized upon phrases that would attract the public eye . . . that ambiguity sprouted".[395] President Nixon gave the game away in 1971 when he stated with regard to the application of antitrust: "Our game here is solely political."[396]

Successive political regimes have deployed competition law to achieve pre-determined goals. Allocation of resources, appointment of antitrust officials and Supreme Court Justices are some of the interfaces through which ideology has affected antitrust intervention.[397] As an illustration, although Bork had published his seminal article far back in 1966, the Chicago School only gained significant control of the antitrust world after the election of President Reagan on a platform of reduced government in 1980.[398] The School would pick up momentum and become fully dominant in Reagan's and subsequent Republican administrations.[399] The Clinton Years saw the brief return of a more activist antitrust with agencies becoming sharply more active than during the two prior Republican Administrations.[400] To be sure, antitrust law has often received support because of its value in advancing objectives more accurately labeled political than economic.[401]

Beyond the US, other competition regimes exhibit a similar susceptibility to domestic political realities that affect and shape competition policy enforcement.[402] South Africa's post-apartheid competition regime, as will become evident in due course, has been

[395] Taft WH *1857-1930 Anti-Trust Act and the Supreme Court* (1914) 6 quoted in Orbach (2013) 81 *Fordham Law Review* 2257. Of note, it was during Taft's Administration that the court concluded two of the government's most epic antitrust battles with the break-up of Standard Oil and the American Tobacco Companies. *Standard Oil Co. of N.J. v United States,* 221 U.S. 1 (1911) and *United States v American Tobacco Co.,* 221 U.S. 106 (1911).
[396] Levy RA *Shakedown: How Corporations, Government, and Trial Lawyers Abuse the Judicial Process* (2004) 208. See also Pincus & Lardner 'Nixon Hoped Antitrust Threat Would Sway Network Coverage' [1997] Washington Post Staff Writers (1 December 1997) available at http://www.washingtonpost.com/wp-srv/ national/longterm/nixon/120197tapes.htm (accessed on 17/6/2017) and Stucke (2009) 42(5) *UC Davis L Rev* 1375 at 1449.
[397] Ezrachi (2016) (5) *Journal of Antitrust Enforcement* 56.
[398] Kovacic WE "The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modem Antitrust Policy" 1990 (36) *Wayne Law Review* 1413 hereinafter Kovacic (1990) 36 *Wayne Law Review,* at 1445 asserts that "Reagan antitrust officials repeatedly embraced a single minded efficiency orientation." See also Robert E. Taylor, "A Talk with Antitrust Chief William Baxter" Wall St J Mar. 4, 1982, at 28 (quoting President Reagan's first Assistant Attorney General (AAG) for Antitrust, William Baxter as follows, "The sole goal of antitrust is economic efficiency."
[399] Kirkwood JB & Lande R (2008) 84 *Notre Dame Law Review* at 193-194; Rule (2005) Statement for the Hearing of the Antitrust Modernization Commission (Nov. 17, 2005) available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Rule.pdf (accessed 19/12/2017) and Stucke (2012) 53 *B C L Rev* 551 at 552-553.
[400] Shapiro C and Litan RE "Antitrust Policy during the Clinton Administration" 2001 University of California Berkeley Competition Policy Center Working Paper No. CPC01 at 1.
[401] Crane DA "Rationales for Antitrust: Economics and other Bases" in Blair RD and Sokol DD (eds.) *The Oxford Handbook of International Antitrust Economics: Volume 1* (2015) hereinafter Crane in Blair & Sokol (eds.) (2015) 13.
[402] Ezrachi *Journal of Antitrust Enforcement* (2016) (5) 49 at 56.

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motivated in substantial part by the need to break down the vestiges of the apartheid era power structures and establish a more just social order.[403]

The political inclinations of the law are rationalised, tempered and given broad acceptability by economic theory - the second limb of the triad. Naturally, diverging theories affect perception of the competitive process, the relevant competition forces, assumptions regarding market participants and the role of institutions in antitrust enforcement.[404] Economic learning and theory have been used to anchor political ideology with prominent economists resident on both sides of many a disputed antitrust policy issue. Though economists rarely disagree regarding fundamental principles, such as gains from trade or the importance of incentives, highly qualified economists appear on opposite sides of litigation in virtually every case. [405]

Economics is not a value-free science, inoculated from normative judgments. A given underlying economic analysis may evolve when it is embedded in a different political context and market reality. As an example, the scope and meaning of some of the terms used in economic analysis are context dependent. "Consumer welfare", a widely accepted benchmark, does not embody universally agreed qualities or means of achieving it. Gregory thus remarks that "[E]very favoured policy is said to promote consumer welfare but . . . the superficial consensus on this point masks a deep disagreement about what [that] means and what policies best to promote it."[406] Another core competition law concept; "efficiency", engenders similar ambiguity.[407] The porosity of U.S. antitrust

[403] See chapter 4 pars 4.2.6, 4.2.7 and 4.3 and Crane in Blair & Sokol (eds.) (2015) 14. For Reading on apartheid era policies, see Allen J *Apartheid South Africa: An Insider's View of the Origin and Effects of Separate Development and Apartheid in South Africa* (2005).

[404] Sidak JG and Teece D "Dynamic Competition in Antitrust Law" 2009 *(5) Journal of Competition Law and Economics* 581 at 585; Sandeen SK "The Value of Irrationality in the IP Equation" Flanagan A and Montagnani ML (eds.) *Intellectual Property Law: Economic and Social Justice Perspectives* (2010) 48 and Stucke ME "Behavioral Economists at the Gate: Antitrust in the Twenty-First Century" 2007 38 *Loyola University of Chicago Law Journal* 513.

[405] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 48; Cremieux P and Yeater AC "Use and Abuse: The Myth of Divided Antitrust Economics" Ginsburg DH and Wright JD (eds.) in *Global Antitrust Economics: Current Issues in Antitrust and Law & Economics* (2016) 16 and 17. See also 16 for the swing in belief on usefulness of mergers whether beneficial or abusive to competition and the economy. On the quandary judges are put under by apparent deadlocks among qualified economists in an antitrust trial see Haw (2012) 106 *Nw U L Rev* 1261 at 1283-1293.

[406] Gregory J "Essays on Consumer Welfare and Competition Policy" (2 March 2009) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352032 (accessed 17 June 2017); Cseres in Cseres (2007) 3(2) *Competition Law Review* 121 approaches this concept from a new angle by making use of its interpretation in consumer law as does Orbach (2011) 7(1) *Journal of Competition Law and Economics* at 133. Also note the possible consideration of wider values within consumer welfare. See Baker & Salop (2015) *American University Washington College of Law Working Paper*.

[407] Damien G "Efficiency Claims in EC Competition Law and Sector-Specific Regulation" in Ullrich H (ed.) *The Evolution of European Competition Law* (2006) 317 and Brodley (1987) 62 *New York University Law Review* 1020 at 1099.

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statutes has given economists considerable power to influence the direction and ends of competition law and policy.[408] Economic theories of many varieties have always been part of antitrust discourse and have contributed significantly to guiding the formation of antitrust policy.[409] The influence of economic thought increased especially in the second half of the last century and today, the links between economics and law have been institutionalized as can be seen in the extensive judicial reliance on economic theory, and the substantial presence of economists in the government antitrust agencies.[410] Indeed, the influence of economics may have a longer history with connection spanning from the beginning of the last century.[411] Be that as it may, Hovenkamp aptly points out that "antitrust has seldom suffered from a shortage of economic theories suggesting why certain behavior should be unlawful."[412]

The final limb of the triad is the enforcement agency, usually a combination of the national competition agency and the judiciary. Competition policies are built on the normative judgments of legal and enforcement institutions.[413] In the American scheme of things, the role of the judiciary goes beyond ensuring procedural regularity, reasoned decision making, and faithfulness to the regulatory agency's governing statute.[414] As observed by Shapiro, the decisions of the courts have been based on the court's vision of what the economy ought to be.[415] The courts have greater leverage and as Shapiro points out, they are not even tied to the application of legal standards developed by the national legislature and neither are they required to defer to the agencies' policy judgments.[416] Consequently, Arthur remarks that substantive federal antitrust law is the common law of antitrust and is entirely judge made.[417]

[408] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 59.
[409] Kovacic WE and Shapiro C "Antitrust Policy: A Century of Economic and Legal Thinking" 1999 University of California, Berkeley, Center for Competition Policy Working Paper No CPC99-09 hereinafter Kovacic & Shapiro (1999) University of California Berkeley Working Paper CPC99-09, at 19. The other significant contribution by economists to the U.S. antitrust regime has been making the case for competition as the superior mechanism for governing the economy, as opposed to government regulation and intervention.
[410] Kovacic and Shapiro above.
[411] Crane in Blair & Sokol (eds.) (2015) 13.
[412] Hovenkamp (2001) *Columbus Business Law Review* 257 at 259.
[413] Stucke (2012) 53 *Boston College Law Review* at 609.
[414] Arthur TC "Lessons from the U.S. Experience" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereafter Arthur in Sokol et al.(eds.) (2013) 71 and Aman C & Mayton WC *Administrative Law* (2014) 348.
[415] Shapiro M *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (1964) 327.
[416] Shapiro above.
[417] Arthur in Sokol et al. (eds.) (2013) 70-74.

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The judiciary has been at the forefront of resolving the two great policy debates that have long divided antitrust lawyers: the basic goals that antitrust law should further and the proper economic analysis to be applied.[418] The goals question as presented to the United States courts, has by and large been one of whether in matters presented before them, they should only attempt to further economic efficiency or should instead balance the maximization of efficiency against non-economic social and political goals, such as the preservation of small, locally owned businesses. Absent legislative direction, this policy question has turned on the judges' own preferences to err on the side of regulation, or to be more aggressive.[419] Fox aptly brings out this reality in summarising the swings of the courts as a war of philosophies, tracing through judicial approaches from the late 19th Century to a few years back:

> "The first Justice, John Marshall Harlan (1877–1911) took up the cudgels against powerful giants of business. Justice Edward White, (1894–1921) and soon also Justice Oliver Wendell Holmes Jr., (1902–32) took up the cudgels freedom of business from government regulation. Much later, Justice William O. Douglas (1939–75) would stand in the shoes of Justice Harlan I, and later again, Justice Holmes's (1902–32) scepticism about business power and disdain for intervention to contain it would resonate in opinions of Justice Antonin Scalia (1986–2016)."[420]

At times, the judiciary has even prompted legislative action. For example, judicial conservatism evidenced in weak law on tying and exclusive dealing prompted the Clayton Act of 1914.[421]

Within the European Union, competition policy has, too, been pursued with reference to the legal, economic, political and social context.'[422] It is correct to say that political and economic goals have affected the levels and nature of competition enforcement there.[423] European market integration has been one , if not the key driver, of the Union's competition law since its inception. Ezrachi points out that this has in practice led to a

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[418] In contrast, federal antitrust agencies are not authorized to develop competition law and policy. Their core function is to bring civil and criminal enforcement actions in federal court. Arthur in Sokol et al. (eds.) (2013) 70.
[419] See chapter 2 pars 2.4.2, 2.4.3 and 2.4.3.
[420] Fox EM "Against Goals" 2013 (81) *Fordham Law Review* 2157 hereinafter Fox (2013) 81 *Fordham Law Review*, at 2157. For an interesting narrative on the Supreme Court justices and their jurisprudential leanings and influences on American politics and society see Schwartz B *A History of the Supreme Court* (1993).
[421] See chapter 2 par 2.4.2.
[422] European Commission, XXIInd Report on Competition Policy 1992 at 13.
[423] The European Commission has alluded to the economic nature of market integration and its potential to promote competition. Commission (EU) [2010] *OJ C* 130/1 par 7 and Commission (EC) [2009] OJ C45/7 par 1.

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focus on territorial restrictions that may undermine the creation of the Single Market dictated a restrictive view of vertical agreements and exclusivity arrangements.[424] An example is the determination in *Consten and Grundig v Commission*[425] where the European Court of Justice ruled that an agreement between a producer and distributor which might tend to restore the national divisions in trade between Member States would frustrate the most fundamental objectives of the Community and as such would not be allowed.[426]

As pointed out by Fox, the trends in goals of enforcement of competition law generally are a consequence of external impetus.[427] A temporal analysis of competition law and merger trends in the United States and in the European Union, focusing not only on what the purpose of the law has been but also the "push" factors responsible for the trends will give credence to this proposition. Supporting our later argument that the goals of merger control are not a magic potion to be doled out for quick adoption and guaranteed reward. Rather, what a jurisdiction pursues with its merger analysis must be fit for its current circumstances appropriate for the stage the jurisdiction is at.

2.4 TRENDS IN AMERICAN ANTITRUST ENFORCEMENT

2.4.1 A prelude

The dominant view of antitrust enforcement policy in the United States today is that it exists to promote some version of economic welfare - either total or consumer welfare.[428] It is a view generally dedicated to the proposition that markets usually work by themselves

[424] Ezrachi (2016) 5 *Journal of Antitrust Enforcement* 53.
[425] Case 58/64 *Consten and Grundig v Commission* [1966] ECR 299.
[426] Case 58/64 above at par 8.
[427] Fox (2013) 81 *Fordham Law Review* at 2157- 2159 for the factors that have driven shifts.
[428] Hovenkamp HJ "Antitrust Policy and Inequality of Wealth" (2017) *Faculty Scholarship at Penn Law*. 176 at 1 explains that total welfare refers to the aggregate value that an economy produces, without regard for way that gains or losses are distributed. For example, if a product costs $5 to make and is sold for $8, the $3 surplus goes to the seller. On the other side, if a customer would have been willing to pay $10 for a product but is able to purchase it for $8, then this $2 surplus is value added to the consumer. Formally, 'consumer welfare' looks only at the surplus that goes to consumers, ignoring that which goes to sellers. For a succinct distinction between the two welfares see Albaek S "Consumer Welfare in EU Competition Policy" in Heide-Jørgensen C, Bergqvist C, Neergaard U and Poulsen ST (eds.) *Aims and Values in Competition Law* (2013) 70-74 and Salop SC "Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard" 2010 22(3) *Loyola Consumer Law Review* 336. The debate over the choice of welfare is controversy laden but most writers consider it trivial. Classic Chicago texts typically ignore this distinction and few if any decisions have turned on the difference. Hovenkamp (2013) above at 6 and 9. Schmalansee argues for the total welfare, most enforcement agencies choose consumer welfare. He adds though that the choice can be very important in some situations, but it is rarely critical in practice. Schamalansee R "Thoughts on the Chicago Legacy in U.S. Antitrust" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008)13.

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to attain efficient results. Intrusion by the law must therefore be episodic, applied only when good reason exists to believe it is necessary to remedy a market anomaly. Today's antitrust is the product of ideology evolving to meet dynamic economic conditions and changing enforcement philosophy.[429]

As pointed out by Stucke, the history of the interpretation and enforcement of antitrust laws has been marked by two levels of development, one progressive and the other cyclical, in roughly twenty to thirty year rotations.[430] Policy regimes have arisen, been revised and rearticulated, only to decline and be replaced.[431] The United States Supreme Court has transformed from one for whom antitrust laws were the "magna carta of free enterprise"[432] to one that complains about antitrust suits,[433] captive to "economic theories that view political, social, and moral considerations as diluting antitrust principles".[434] The consequence of this shift is a marked decline in enforcement, quite paradoxically against ever increasing numbers of agency staff.[435] Indeed, looking back over the landscape since 1890, one is justified to reach the conclusion, as observed by Crane, that "[a]ntitrust enforcement has historically been a political luxury good, consumed only during periods of relative peace and prosperity".[436]

The United States antitrust jurisprudence developed at the close of the 19th century was fit for the then rapid industrialisation and increasing disparities of wealth and power. In these early years of the 21st century, several critical turns later, that law has morphed from an ally of the powerless and small business, a tool for economic democracy, to a body of rules for consumers and efficiency. Proving that the nature of antitrust is after all

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[429] Ezrachi (2016) 5 *Journal of Antitrust Enforcement* 54; Dictum of the court in *Leegin Creative Leather Products, Inc v PSKS, Inc* (06–480) 127 SCt 2705US (2007) at par c reads as follows, "Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions." For detail on the evolution of thinking about competition since 1890 as reflected by major antitrust decisions see Kovacic, & Shapiro(1999) U *of California, Berkeley, Center for Competition Policy Working Paper* No. CPC99-09.
[430] Stucke (2010) 81 *Mississippi Law Journal* 107 at 108.
[431] Ramsey D *Antitrust and the Supreme Court* (2012) hereinafter Ramsey (2012) 107.
[432] *United States v Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).
[433] In *Leegin Creative Leather Prods., Inc. v PSKS, Inc.*, 551 U.S. 877, 895 (2007) the court lamenting that use of a *per se* standard might increase litigation costs by promoting "frivolous" suits; in *Credit Suisse Sec. (USA) LLC v Billing*, 551 U.S. 264, 28182 (2007) the court fearing "unusually" high risk of inconsistent results by antitrust courts; in *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 558-60 (2007) court commenting on antitrust's "inevitably costly and protracted discovery phase," quoting A*sahi Glass Co. v Pentech Pharm., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003)) and in *Verizon Communications Inc. v Law Offices of Curtis V Trinko, LLP,* 540 U.S. 398, 414 (2004) decrying antitrust's "interminable litigation".
[434] Stucke (2012) 53 *Boston College Law Review* at 559.
[435] Stucke (2012) 53 *Boston College Law Review* 551-553.
[436] Crane DA "Did We Avoid Historical Failures of Antitrust Enforcement During the 2008-09 Financial Crisis?" 2010 (3) University of Michigan Public Law Working Paper No 185 *at 2* hereinafter Crane (2010) *University of Michigan Public Law Working Paper* No. 185.

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that of a sponge into which one may force the influences of the prevalent social, economic and political preferences.[437]

On the merger front, there has been a remarkable transformation of goals pursued yet with little modification of the underlying statute. The weight given to market concentration in merger analysis by federal courts and antitrust agencies has declined from the 1960's presumption against size and ubiquitous use of the doctrine of incipiency, to a more flexible antitrust that accommodates much higher levels of concentration.[438] And even at these higher levels, the merging parties may still rebut the presumption of harm with evidence of ease of entry or of expected resultant efficiencies from the merger.[439] Recent thought is that Chicago has overshot the mark.[440] With the unhappy consequence that even mega-mergers that result in highly concentrated markets now receive the green-light based on limited evidence of ease of entry and efficiency benefits.[441]

A fascinating interdependence exists between antitrust goals and merger trends in the United States, as everywhere else.[442] Viscusi *et al* point out that the United States has experienced five major merger waves - each being in response to a shift in competition law goals, or itself being the stimulus for such a shift.[443] The first wave, described as 'merger for monopoly', occurred roughly during the 1890 to1904 period, encouraged by the weak take off of the Sherman Act.[444] In spite of popular sentiment in favour of the legislation, economists were sceptical about its advisability. The then dominant view in the field was that antitrust posed a possible impediment to attainment of superior efficiency from industrial organisation. During the 1880s, over 200 steel makers merged into twenty larger firms. Come 1901, twelve of these twenty merged into a corporation

[437] Ezrachi (2016) 5 *Journal of Antitrust Enforcement* 50 and Maggiolino M "The Regulatory Breakthrough of Competition Law: Definitions and Worries" in Drexl J and Di Porto F (eds.) *Comparative Law as Regulation* (2015) 3 and 10-11 for the various influences on the law and how they impact competition law.
[438] Baker J and Shapiro C Reinvigorating Horizontal Merger Enforcement in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) hereiafter Baker & Shapiro in Pitofsky (ed.) (2008) 236.
[439] Baker & Shapiro above at 235.
[440] In a conversation was going on from the late 1990s. See generally Hovenkamp H "The Reckoning of Post-Chicago Antitrust" in Cucinotta A, Pardolesi R and Van den Bergh RJ (eds.) *Post-Chicago Developments in Antitrust Law* (2002). Today, the lead piece of scholarship on this subject is considered to be Pitofsky (ed.) (2008).
[441] Baker & Shapiro in Pitofsky (ed.) (2008) 235.
[442] Viscusi WK, Harrington JE and Vernon JM *Economics of Regulation and Antitrust* (2018) hereinafter Viscusi et al. (2018) 204.
[443] Viscusi et al. above at 204-206.
[444] Viscusi et al. above at 204.

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with about 65% control of the market.[445] All with the Sherman Act already in force. The court's response finally came in 1904, breaking up this behemoth in *Northern Securities Co. v. United States.*[446] By then, the law had begun to find some support among the powers that be and was increasingly seen as a key tool in maintaining the desirable market structure - one in which numerous small businesses could compete. This and a few other subsequent decisions, notably *United States v. United States Steel Corp*[447] and *United States v. American Tobacco Company,*[448] chilled the first merger wave. With evidence now that antitrust law was not going to countenance monopolies, firms turned to forming oligopolies and a second wave of "mergers to oligopoly" picked up from about 1916 running through to 1929.[449]

The preference though continued to be an atomistic market with the law focusing on the process, not so much the outcome of competition. The advent of the Great War, however, turned the tide in favour of Big Business, implying light-touch antitrust enforcement with regard to merging. Courts and agencies eased off to accommodate big firms to contribute to the war effort. The 'conglomerate merger' wave began after World War II, peaking around 1968.[450] This wave was attributable to the emergence of the structure-conduct-performance-paradigm under which horizontal and vertical mergers were proscribed even where they resulted in very low market shares. By now preference had shifted to markets with low concentration. Congress responded to the conglomerate merger wave by passing the Celler-Kefauver Act in 1950,[451] adding them to the list of possible antitrust violations where it could be demonstrated that the proposed union would impede competition.

The 1980s were good years for mergers, with the coming of age of Chicago outcome-oriented antitrust. Structure and size ceased to be the focus and the incipiency doctrine that would nip perceived anticompetitive mergers in the bud fell by the way side. Under

[445] For a history of the consolidation of the United States' steel industry in the last century see generally Parsons DO and Ray EJ "The United States Steel Consolidation: The Creation of Market Control" 1975 18(1) T*he Journal of Law and Economics* 181.
[446] 193 U.S. 197 (1904).
[447] 251 U.S. 417 (1920).
[448] 221 U.S. 106 (1911)
[449] Viscusi et al. (2018) 205.
[450] Viscusi et al. above.
[451] 64 Stat. 1125, 12 USC 18.

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the doctrine, a merger could be blocked on grounds of potential to concentrate the relevant market even where the share of the market of the merged entity was relatively small.[452] The decade witnessed a fourth merger wave with the total value of acquisitions in the United States topping over $200 billion by 1988.[453] The fifth merger wave, from the 1990s to-date is thought to be even bigger than that of the 1980s.[454] With Chicago in full throttle, the past two decades have witnessed some of the most spectacular mergers of our times including that between Time Warner and America Online which, at its approval in January 2000, was valued in excess of $165 billion.[455] June 2017 saw final approval of a merger between Dow Chemical and Dupont valued at $130 billion when it was initially announced in 2015.[456] What is sure, and what is also a valuable lesson for the developing country, is that the business of mergers will continue to occupy a position of special bearing over the direction of competition policy generally.

2.4.2 Early Antitrust days

For economic thinkers at the dawn of antitrust, the Sherman Act was not to be taken seriously. At best, Kovacic and Shapiro remark that the legislation was a harmless measure incapable of halting an irresistible trend toward firms of larger scale and scope, and, at worst, a possible impediment to attainment of the promise of superior efficiency in the new forms of industrial organization.[457] The Act started off as a paper tiger, presenting a feeble check upon creation and exercise of market dominance. [458] The first case under the legislation, *U.S v E.C. Knight Co,*[459] ended with a crushing defeat in 1895 when the Supreme Court declined to apply section 1 of the Act barring 'prohibitions in restraint of trade' to sugar production, ostensibly because 'production' did not qualify as "trade".[460] E.C. Knight Company had gained control of the American Sugar Refining Company in 1892. At the time, the latter enjoyed a virtual monopoly of sugar refining in the United States and the merger led to the merged entity controlling 98 percent of the

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[452] See par 2.4.3.
[453] Viscusi et al. (2018) 206.
[454] Singh and Dhumale consider the 1990s wave the biggest. Singh & Dhumale (1999) 4.
[455] Figure 7.1 Viscusi et al. (2018) 205.
[456] Bartz D Reuters June 15 2017 Available at https://www.reuters.com/article/us-du-pont-m-a-dow/dow-dupont-merger-wins-u-s-antitrust-approval-with-conditions-idUSKBN1962SN (accessed 13/05/2017.
[457] Kovacic & Shapiro (1999) University of California Berkeley Working Paper CPC99-09 at 2.
[458] Kovacic & Shapiro above at 2-4.
[459] Kovacic & Shapiro above.
[460] *U.S v E.C. Knight Co* 156 U.S. 1 (1895).

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industry. The court ruled against the government by a majority, declaring that manufacturing was a local activity not subject to congressional regulation of interstate commerce.[461]

The decision, permitting combinations of manufacturers, put most monopolies beyond the reach of the Sherman Antitrust Act. The Act's earliest triumph came two years later in *United States v. Trans-Missouri Freight Association.*[462] Justice Peckham dissociated the Sherman Act from common law precedents which prohibited only "unreasonable" monopolies. The Act prohibited every restraint of trade and would be interpreted literally as such.[463] Hylton remarks that the court did concede though that proscribing all agreements which restrict commercial freedom could imperil beneficial forms of cooperation. There was therefore need to formulate principles for distinguishing between collaboration that suppressed rivalry and that which promoted growth. Of note, reference was made to the desirability of maintaining a market in which numerous small businesses compete.[464]

Soon after in 1899, Judge Taft tackled the "beneficial cooperation versus detrimental collusion"-predicament by fashioning a distinction between 'naked' trade restraints, illegal arrangements where direct rivals simply agree to restrict trade and reasonable 'ancillary' restraints which encumbered the participants only as much as was needed to expand output or introduce a product that no single participant could offer.[465] This was in *United States v. Addyston Pipe & Steel Co.*[466] The government had argued that some antitrust

[461] *U.S v E.C. Knight Co* above par 34.
[462] 166 U.S. 290 (1897).
[463] Judge Peckham at 166 U.S. 327 "We are asked to regard the title of this Act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a federal statute in order to be dealt with in a federal court. It is said that, when terms which are known to the common law are used in a federal statute, those terms are to be given the same meaning that they received at common law, and that, when the language of the title is "to protect trade and commerce against unlawful restraints and monopolies," it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the federal statute. We are of opinion that the language used in the title refers to and includes, and was intended to include, those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of, and does not alter the plain language contained in, its text."
[464] Hylton (2003) 317. The court at 166 in U.S. 290 (1897) states thus, "In this light, it is not material that the price of an article may be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country, by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein."
[465] Kovacic & Shapiro (1999) University of California Berkeley Working Paper CPC99-09 at 45. At 293 in the judgment - The court found it not essential that an entire monopoly be created but that it si sufficient to violate the Act if the agreement deprives the public of the "advantages which flow from free competition."
[466] 85 Fed. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899).

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violations like the bid rigging in this case were such egregious anticompetitive acts that they were always illegal - the so called *per se* rule. The defendant's comeback was that it could not be possible that the Act barred all restraints, even reasonable ones, a view the court agreed with. Taft's reasoning was affirmed on appeal to the Supreme Court.[467] It is *Addyston* that launched the "rule of reason" which would come to maturity in 1911 in *Standard Oil*.[468] But in contrast to the drift of T*rans-Missouri,*[469] Judge Taft interpreted the Act within the framework of the common law, pointing to an incoherence that early antitrust jurisprudence has been accused of.[470]

It was not until 1904 in *Northern Securities Company v. United States*[471] that the Act appeared to acquire some teeth. It is instructive that this shift related to merger regulation. In this case, the Supreme Court firmly demonstrated that the Sherman Act could forestall anticompetitive mergers, declaring all mergers between directly competing firms to constitute a combination in restraint of trade and therefore a violation of section 1. In the opinion of the Court, the acquisition of the power to suppress competition was what was forbidden by the Sherman Act. Therefore, neither goodness of motive nor proof that there had been no actual restrain could condone the offense. The contention of the defendants that the Sherman Act was intended to prohibit only restraints which are unreasonable at common law was dismissed by the Court as was the argument that the Sherman Act prohibited only those acts of direct and immediate restraint and not those merely incidental to the proprietors of the property. To the Court the scope of antitrust extended not only to combinations which result or threaten to result in complete prohibition of trade or creation of a total monopoly, but also to those which, tend to restrict or monopolize.[472]

Moreover, the decision affirmed the *per se* rule and overruled *E.C. Knight's*[473] distinction between 'production' and "trade". *Northern Securities* was a reflection of the emergent section 1 doctrine, reflected soon after in *Dr. Miles Medical Co. v. John D. Park & Sons.*

[467] Case was appealed to the Supreme Court as *Addyston Pipe and Steel Company v United States*, 175 U.S. 211 (1899).
[468] *Standard Oil Co. of N.J. v United States,* 221 U.S. 1 (1911).
[469] *United States v Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).
[470] Hylton (2003) 317-318.
[471] 193 U.S. 197 (1904).
[472] For analaysis of the court ruling see Garner (1904) 24 *The Annals of the American Academy of Political and Social Science* 125.
[473] *U.S v E.C. Knight Co* 156 U.S. 1 (1895)

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Co.[474] where minimum resale price maintenance agreements (RPM) were declared illegal *per se*.[475] *Dr. Miles* continued to apply to such arrangements until the 2007 ruling in *Leegin Creative Leather Products, Inc v PSKS, Inc*.[476]

The back and forth from firm enforcement to light enforcement from 1890 to this point reveals a system trying to find its footing in terms of purpose for its existence. This is the place many a developing country are at and going by the precedent it is a normal, probably even necessary, part of the tangent.

1911 was a momentous year for antitrust. The Supreme Court overturned the *per se* rule of *Northern Securities*[477] on a day that saw the delivery of two significant antitrust judgements: *Standard Oil Co. of New Jersey v. United States*[478] and *United States v. American Tobacco Company.*[479] The court whittled down the scope of the doctrine on restraint of trade in *Standard Oil.*[480] Mergers and other market combinations would only be unconscionable where the enhanced market power resulted in higher prices, reduced output or reduced quality, the three proscribed consequences of monopoly.[481] Monopoly *per se* or the acquisition of market power *simpliciter* was no longer a violation of the law. *Standard Oil* was an endorsement of Taft's rule of reason in *Addyston Pipe*.[482] In *American Tobacco,*[483] section 2 of the Sherman Act, banning monopolization, was held not to be a ban on the mere possession of monopoly power but only on the unreasonable acquisition or maintenance of it.[484] Justice Lurton continued the 'rule of reason'-thread in

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[474] 220 U.S. 373 (1911).
[475] See chapter 2 par 2.2.2.
[476] (06–480) 127 SCt 2705US (2007. See further chapter 2 par 2.4.3.
[477] 193 U.S. 197 (1904).
[478] 221 U.S. 1 (1911).
[479] 221 U.S. 106 (1911).
[480] *Standard Oil Co. of N.J. v United States,* 221 U.S. 1 (1911)
[481] Taken literally, the term "restraint of trade" could refer to any number of normal or usual contracts that do not harm the public. *Standard Oil Co. of N.J. v United States,* 221 U.S. 1 (1911)at 3.
[482] Justice Harlan though concurring with the outcome dissented against adopting a rule of reason on grounds that it marked a departure from existing precedent that the Sherman Act banned any contract that restrained trade directly such as was held in *United States v Joint Traffic Association,* 171 U.S. 505 (1898) and then more usurped the constitutional functions of the legislative branch of the government. Nonetheless, on the facts, Standard Oil was found guilty of monopolising the petroleum industry through a series of abusive and anticompetitive actions and the court ordered its split into several independent and eventually competing firms
[483] 221 U.S. 106 (1911).
[484] Nonetheless, the combination under consideration was found to be one in restraint of trade contrary to section 1 of the Sherman Act and the resultant firm split into 4 competitors, dissolving it into an oligopoly. Incidentally, three decades later in 1938 the Department of Justice Antitrust Division began hosting hearings in the Temporary National Economic Committee to determine whether the four companies were still engaged together in monopolistic practices. The committee found that 3 of the 4 companies were guilty of the charges and the matter was presented to the court in *U.S. v American Tobacco Company,* et al.*,* Temporary National Economic Committee Monograph, XXI (United States District Court for the Eastern District of Kentucky July 24, 1940).

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United States v. Terminal Railroad Association of St. Louis[485] stating that: "It is not contended that the unification of . . . terminal facilities . . . is, *under all circumstances and conditions*, a combination in restraint of trade or commerce. Whether it is . . . will depend upon the intent to be inferred from the extent of the control thereby secured . . . and the manner in which that control has been exerted."[486] Size alone was not the problem. In any event, one could have a monopoly just by having a superior product, that of itself being no violation of the law. The number of players in the market was not the key concern. Monopolies and oligopolies that did not engage in misuse of market power could lawfully use competitive means to lock others out of the market.

Duignan points out that, soon enough, Congress began to fear that the Supreme Court's apparent softening of the law foreshadowed continuing efforts by conservative judges to unduly narrow the antitrust statute. There was alarm that Big Business had become too big and the control of money and credit in the country was such that a few men had the power to plunge the nation into a financial crisis.[487] When President Woodrow Wilson required a drastic revision of existing antitrust legislation to respond to this perceived problem, Congress responded with the Clayton Act and the Federal Trade Commission Act in 1914.[488] Whereas the Sherman Act only declared monopoly illegal, the Clayton Act declared as illegal certain business practices conducive to the formation of monopolies or which result in their formation.[489] Specific forms of holding companies and interlocking directorates were forbidden, as were discriminatory freight agreements.[490] On top of that, the Act reduced judicial discretion by specifically prohibiting certain tying arrangements, exclusive dealing agreements, and mergers achieved by purchasing stock.[491]

[485] 224 U.S. 383 (1912).
[486] 224 U.S. 394 at 400. [emphasis added]. Nonetheless, the court went on to find several unreasonable provisions in an agreement between railroad proprietors that pointed at a clear intention to unjustifiably restrain trade. The defendants were forced to give outsiders access to terminal facilities at the main crossing of the Mississippi River on reasonable terms.
[487] Duignan B (ed.) *The Legislative Branch of the Federal Government: Purpose, Process, and People* (2010) 307.
[488] Winerman M "The Origins of the FTC: Concentration, Cooperation, Control, and Competition" 2003(71) *Antitrust Law Journal* 1 at 3 and 4. The Clayton Bill was brought to the House by the House Committee on the Judiciary, chaired by Henry Clayton of Alabama to give effect to Wilson's objective of having legislation to define more clearly what conduct violated the antitrust laws. The House Committee on Commerce took the lead on the other of Wilson's objectives, creating a trade commission to provide guidance to business on compliance with the antitrust laws. See also Kolasky W "George Rublee and the Origins of the Federal Trade Commission" 2011 (26) 1 *Antitrust* 106 at 107.
[489] Sections 1 and 2 Clayton Act.
[490] Section 18 Clayton Act.
[491] Sections1, 2, 3, 5 and 8 Clayton Act.

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It is difficult to miss the political nuances of the time. Big business had to be kept under the thumb for socio-political purposes and the way to do this was by stringent enforcement. The vague language of the Sherman Act provided large corporations with numerous loopholes, enabling them to engage in certain restrictive business arrangements that, though not illegal *per se*, resulted in concentrations that had an adverse effect on competition.

In the three-way election of 1912 antitrust was one of the defining issues.[492] It was won by Woodrow Wilson, who stood on the ticket of firm antitrust. Wilson's position was that policy should be applied to prevent monopolies from forming, rather than regulating them after they formed.[493] It is instructive that merger regulation played a central role in the politics of the election. Two years earlier, the Republican Party had lost control of the House in the 1910 mid-term election and in 1911 President Roosevelt was summoned to appear before a congressional Investigating Committee to defend his approval of U.S. Steel's purchase of Tennessee Coal & Iron in 1907.[494] The Committee delivered a mixed verdict in August 1911, with the Democratic majority sharply critical of Roosevelt's action.[495] Shorlty after, the Attorney General filed a suit accusing U.S. Steel of monopolizing the U.S. steel industry, citing the acquisition as a part of U.S. Steel's pattern of monopolistic conduct.[496] Roosevelt was directly indicted in the circumstances leading to the alleged monopolisation.

This saw a brief period of reinvigorated antitrust enforcement and the emergence of Brandeisian thought.[497] The Brandeisian tradition is described as a social or political theory supporting atomistic competition because of its beneficial effects on personal liberty and autonomy.[498] Given the mood of the time, one would expect years of a short leash for businesses to follow. This was not to be. A war was looming and war efforts cost

[492] Crane (2010) *University of Michigan Public Law Working Paper No. 185* at 3.
[493] Theodore Roosevelt, A Confession of Faith, Speech to Progressive Party Convention, Chicago (Aug. 6, 1912), available at http://www.teachingamericanhistory.org/library/index.asp?document=613 (accessed 17/09/2022).
[494] For further reading see McLaughlin, "The acquisition of the Tennessee Coal, Iron and Railroad Company by the United States Steel Corporation: A legend re-examined" available https://digitalcommons.unomaha.edu/studentwork/1458 (accessed 17/01/21).
[495] Kolasky Antitrust 2011(25) 97 at 103.
[496] *United States v. U.S. Steel Corp*., 251 U.S. 417 (1920).
[497] For an interesting reading of the elections and behind the scenes and antitrust see Crane (2015) 100 *Iowa Law Review* 2025. See also Crane DA "Progressivism and the 1912 Election" in Crane DA and Hovenkamp H (eds.) *The Making of Competition Policy: Legal and Economic Sources* (2013
[498] Crane in Blair & Sokol (2015) 13.

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money. With the First World War at hand, erstwhile intentions of keeping Big Business in check were placed on the back burner to deal with the reality of the moment. Big Business had a big role to play, and antitrust law would be an impediment to this role. U.S. entry into World War I brought the short-lived experiment with firm antitrust enforcement to a dramatic end. Most major antitrust cases were suspended until the end of the war.[499]

As observed by Viscusi *et al*, a study of the Wilson years is a study of the link between politics and economics, and antitrust.[500] As support for competition waned, antitrust policy receded. The executive branch discouraged aggressive prosecution by the Justice Department and the FTC.[501] The agency laboured under "dismal appointments and bumptious leadership".[502] It did not help that one court decision after another narrowed down the agency's mandate. Especially damaging was *Federal Trade Commission v. Eastman Kodak Co.*[503] with its finding that the FTC lacked power to order a divestiture to undo anticompetitive asset acquisitions. Courts heavily relied on the rule of reason, often treating suspect conduct permissively. A good example is *United States v. United States Steel Corp.*,[504] where a consolidation of most of the steel industry into one firm possessing 80 to 90 per cent of the market in some lines was found to not constitute a violation of the law. Mere size, capital and power of production or power to restrain competition was held to be not automatically objectionable.[505]

Decisions on collusion and cooperation alike reflected tolerance. *Board of Trade of the City of Chicago v. United States*[506] upheld agreements to limit prices for after-hours trading, holding that evaluation of such restraints required a comprehensive inquiry into their history, purpose and effect; *United States v. Colgate & Co.*[507] permitted producers to announce a favored distribution policy and refuse to deal with downstream firms that did not comply; and *Maple Flooring Manufacturers' Association v. United States*[508] took

[499] Crane (2010) *University of Michigan Public Law Working Paper No. 185* at 3.
[500] Viscusi et al. (2018) 207-208.
[501] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 47.
[502] Kovacic & Shapiro above at 49.
[503] 274 U.S. 619 (1927).
[504] 251 U.S. 417 (1920).
[505] 251 U. S. 447, 251 U. S. 450.
[506] 246 U.S. 231 (1918).
[507] 250 U.S. 300 (1919).
[508] 268 U.S. 563 (1925). The Court initially took a more doubtful view of information exchanges involving price and output data in *American Column & Lumber v United States*, 257 U.S. 377 (1921).

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a benign view of arrangements for sharing price and output data among rivals.[509] Courts generally applied broad market definitions that made a finding of dominance less likely, as in *Standard Oil Co. v. United States.*[510] Later court decisions would further limit the scope of the Clayton Act.[511] Kovacic and Shapiro remark that it is difficult though during this period to detect significant direct effects of economic thinking on judicial antitrust decisions.[512]

The United States would in due course go through two wars and an economic depression. Each time, antitrust morphed not as much in content as in outcome, the exigencies of each era directly influencing analysis and enforcement of antitrust. Successive Republican administrations in the 1920s continued the "the era of [antitrust] neglect".[513] Through the First World War up until the end of the 1930s, Pitofsky remarks that antitrust became a "faded passion."[514] Antitrust activity became rare since the administration generally preferred industry-government cooperation.[515] This strong central leadership paid off with success in the war. The pro-Big Business lobby received a boost, but antitrust enforcement lost out.[516]

Government and business leaders of the post-war generation retained the more tolerant approach toward consolidation, cooperation and associationalism.[517] The favoured rule of reason required costly time-consuming efforts to gather and evaluate information, conditions that tended to favor defendants and even further dampened enforcement. And so came to pass a season where the demonstrated goal of antitrust was centralisation of economic power in order to support the contemporary need of the country at the time. Antitrust had been a tool of political expediency from the get go and so it continued to be.

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[509] *Maple Flooring* featured the Supreme Court's first citation of an economist's work in an antitrust decision, here specifically to underscore how access to information could enable producers to make efficient decisions. Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 47.
[510] 283 U.S. 163 (1931).
[511] In *Thatcher Manufacturing Co. v FTC*, 272 U.S. 554 (1926), the Supreme Court held that the FTC could not restrict the transfer of assets following a stock acquisition when the transfer occurred before the filing of the FTC's complaint. In *International Shoe Co. v FTC*, 380 U.S. 291 (1930), the Court ruled that section 7 did not apply to stock acquisitions in which the acquired company was on the verge of insolvency. See too *Arrow-Hart & Hegeman Electric Co.vFTC*, 291 U.S.587 (1933).
[512] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 50.
[513] Crane (2010) *U of Michigan Public Law Working Paper* No. 185 at 3.
[514] Pitofsky (ed.) (2008) 4.
[515] Stucke & Ezrachi (2017) *Harvard Business Review* available https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement (accessed 14/11/2017.
[516] Ramsey (2012) 79. For further reading on antitrust in the Wilson Years see Crane (2015) 100 *Iowa Law Review* 2025 and Crane & Orbach (2013) 81 *Fordham Law Review* at 2269.
[517] Ramsey (2012) 79 and Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 47.

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Herein the lesson for the developing country that competition law must be viewed through the lens of the economic situation at hand.

The next phase up was precipitated by the Great Depression which lasted from 1929 until the late 1930s. Over the next several years, consumer spending and investment dropped, causing steep declines in industrial output and employment as failing companies laid off workers.[518] The economic collapse was seen as a repudiation of the competitive model of economic organisation and a validation of associationalist preferences.[519] Herbert Hoover, at the time Secretary of Commerce, urged businesses to cooperate through trade associations and curb the wasteful features of competition. The relaxation of antitrust standards in the late 1920s paved the way for the 1933 National Industrial Recovery Act (NIRA),[520] President Roosevelt's stimulus plan. In particular, NIRA fostered collective wage setting, installed controls on prices and output levels and banned forms of normal competition.[521] As a matter of fact, the federal government pushed industry to cartelise as part of national policy. The goal was to protect struggling incumbent firms from more efficient rivals. Although price-fixing had already come to be treated as *per se* illegal after *United States v. Trans-Missouri Freight Association,*[522] the court in 1933 endorsed a cartel formed to avoid distress sales during the Depression.[523]

By mid-decade, Congress had imposed comprehensive controls on entry and pricing in sectors such as transportation and passed the Robinson-Patman Act (1936).[524] The legislation which was in line with the New Deal sought to prevent national retailing chains from expanding at the expense of smaller stores by limiting their discretion in pricing their goods to competing retailers.[525] The fortunes of many small family owned businesses had been destroyed by the Depression and those still afloat were having a difficult time dealing

[518] For reading on Antitrust during the great depression see Crane (2010) above at 263 to 287 and Cox CC "Monopoly Explanations of the Great Depression and Public Policies toward Business" in Brunner K (ed.) *The Great Depression Revisited* (1981) chs. 8-10.
[519] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 47.
[520] 15 U.S.C. § 703.
[521] Meese AJ "Competition Policy and The Great Depression: Lessons Learned and a New Way Forward" 2013 (23) 2 *Cornell Journal of Law and Public Policy* at 256 hereinafter Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy, at 254.*
[522] 166 U.S. 290 (1897).
[523] *Appalachian Coals, Inc. v United States*, 288 U.S. 344 (1933).
[524] 15 U.S.C. § 13.
[525] "The Robinson–Patman Act (RPA) remains one of the core pieces of antitrust legislation in the United States. Essentially designed to prevent suppliers from benefiting one retail purchaser over another by price-discriminating, . . . " Yonezawa K, Gomez MI and Richards TJ "The Robinson-Patman Act and Vertical Relationship" 2020 (102) 1 *American Journal of Agricultural Economics* 329 at 330; For reading on the New Deal see Hiltzik M *The New Deal: A Modern History* (2011) and Rauchway E *The Great Depression and the New Deal: A Very Short Introduction* (2008) chaps 4-6.

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with large chain stores from a weakened position.[526] As stated by Meese, the law was seen as a lifeline.[527] This calls to mind the Small and Medium-sized Enterprises (hereafter SMEs) and small domestic businesses that are a common denominator of developing country markets. With opening up of economies comes big multinational players, often through mergers and acquisitions. It becomes incumbent on the competition agencies to make pragmatic decisions that balance the need of these firms to maintain a competitive profitable presence in the market while still allowing the economy the benefits that come with entrance of bigger foreign firms.

The Robinson-Patman Act is seen in some quarters as problematic. Hovenkamp for instance, advocates its repeal or at least having a competitive injury requirement read into its rules. The Act, he says, was born out of Depression era hostility to vertical integration and organised distribution, views that are "hopelessly archaic".[528] We see things differently. The situation then at hand called for the interventions that were effected, including the now besmirched Act. The times called for rescue and protection of small retailers and antitrust did exactly that. The choice was between letting more of these small businesses die out while the big retailers by virtue of their size and position, survived; maybe even thrived. In our opinion, the interests of more players than the big ones mattered at the time and the freedom of the small player to remain competitive was considered important. Contrary to common supposition, antitrust did not die during the Great Depression, it just changed in character.[529]

There is, as a matter of fact, no consensus today as to the consequence of docking antitrust during the Great Depression or in equivalent times. Some have it that departure from free competition tends to thwart economic recovery.[530] Contrary arguments have it that protection for economic liberty and free competition would only have exacerbated the Depression, a position embraced by some scholars and modern Supreme Court Justices

[526] Crane DA "The New Deal and the Institutionalists" Crane DA and Hovenkamp H (eds.) *The Making of Competition Policy: Legal and Economic Sources* (2013) 168.
[527] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy at 254.*
[528] Hovenkamp (2005) 10.
[529] Hawkins argues that change in antitrust policy towards more lenient measures does not necessarily imply laxity or non-existence. Hawkins JR "Antitrust Enforcement During the Great Depression" (29 June 2012) 2-3 available at https://ssrn.com/abstract=2175995 (accessed 18/05 2017.
[530] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy at* 263-265 and 320-325 and Crane (2010) *U of Michigan Public Law Working Paper* No. 185 at 3.

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who consider that indeed, cartelisation helped reverse the Depression.[531] Meese points out that these are the same voices that called for interference with free-market outcomes to speed up recovery from the recent 2008 Global Financial Crisis.[532] And they were heard. Congress reaffirmed the policy of encouraging cartelization between health insurance companies and refused to remove other barriers to competition in health care markets, thereby pushing up economic concentration.[533]

In 1935, the Supreme Court unanimously invalidated key portions of the National Industrial Recovery Act in *Schechter Poultry v. United States,*[534] after which the Administration turned toward renewed antitrust enforcement in yet another short-lived revival.[535] The antitrust divisions reinvigorated antitrust activity between the late 1930s and 1940 as a defence of the "ideals of industrial democracy".[536] Then came the Second World War which predictably turned things on their head again. What followed was the "wholesale repeal or practical nullification of antitrust in the face of the war planning and production leading up to the U.S. entry into World War II."[537] Meese indicates that the Roosevelt administration issued guidelines for industry collaborations, permitted pooling of small firms, and gave the secretaries of war and the navy the power to toll antitrust cases until the termination of the war. By the mid-1940s commitment to free-market competition was a thing of the past. While the antitrust laws still banned private restraints interfering with free competition, states and the federal government were entirely free to displace free-market outcomes.[538]

Years of conservative antitrust favoured the business class. To a point that Big Business grew so powerful that President Roosevelt felt it was a challenge to legitimate government.[539] A "trustbusting" revival drew intellectual strength from the work of

[531] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy* at 262.
[532] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy* at 256. The Great Recession of 2008-2009: Causes, Consequences and Policy Responses Sher Verick and Iyanatul Islam IZA Discussion Paper No. 4934 May 2010; Layna Mosley & David Andrew Singer (2009) The Global Financial Crisis: Lessons and Opportunities for International Political Economy, Empirical and Theoretical Research in International Relations
Volume 35, 2009 - Issue 4 420.
[533] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy* at 263.
[534] 295 U.S. 495 (1935) and Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy* at 256 and 360.
[535] *Crane (2010) University of Michigan Public Law Working Paper No. 185* at 4.
[536] Thurman (2000) 12.
[537] Waller (2005) 106, quoted in Crane (2010) *U of Michigan Public Law Working Paper* No. 185 at 4.
[538] Meese (2013) 23 (2) *Cornell Journal of Law and Public Policy at* 256.
[539] *http://www.ushistory.org/us/43b.asp* (accessed 18/05/2017.

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University of Chicago economists Henry Simons, Jacob Viner, and Frank Knight.[540] Simons in particular assailed the assumptions of the New Deal experiment and advocated robust antitrust enforcement, including steps to deconcentrate American industry.[541] From 1936 through 1940, Roosevelt's top appointees to the Justice Department, mounted elaborate attacks on horizontal collusion and single-firm dominance. For them, the key to economic restoration was competition. And so came in the next phase of antitrust; a season of emphasis on market structure and return to *per se* rules.[542]

2.4.3 Harvard Antitrust

As the country began to move out of the Second World War, Brandeis' views on the dangers of bigness and the importance of protecting small firms experienced resurgence.[543] Economists based in Harvard University, focused their work on campaigning for the revival of the antitrust laws. The core scholarship derived mainly from the works of J.M Clark, E.S. Mason and one of Clark's students, J.S. Bain. Clark's theory of 'workable competition' envisioned economists and regulators working hand in hand to police markets and organise industry along pro-competitive lines.[544] He conducted detailed empirical studies of particular industries, formulating three specific hypotheses on the relations of market structure to market performance. The first supposition was that economies of scale were not substantial in most markets. As a result, many markets contained larger firms and were more concentrated than necessary to achieve optimal productive efficiency. Secondly, barriers to entry by new firms were very large and could easily be manipulated by dominant firms. And thirdly, the non-competitive performance associated with monopoly began to occur at relatively low concentration levels.[545] These three conclusions worked against arguments in favour of Big Business. These three general economic premises directed the development of the next phase of antitrust enforcement.

[540] Kovacic WE "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration" 1989 *Iowa Law Review* 1105 hereinafter Kovacic (1989) 74 *Iowa Law Review*, at 1134.
[541] Henry SC *Economic Policy for a Free Society* (1948) 87-88 quoted in Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 51.
[542] Henry (1948) above.
[543] Louis Brandeis had been an economist and a valued advisor of President Woodrow Wilson. In 1916 Wilson nominated Brandeis to the Supreme Court, sparking massive opposition, particularly from leaders of industry and financers. See Crane in Blair & Sokol (2015) 13.
[544] Ramsey (2012) 91.
[545] Ramsey above.

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Bain built upon Clark's theory of workable competition to put forward the so-called structure-conduct-performance--paradigm. The theory advanced that an industry's structure, this being the number of firms in the market and their relative sizes, determine how effectively firms will perform in that market. Structure determines conduct and conduct in turn determines market performance. Bigger profitability, technical progress and general growth are all a product of market structure.[546] With the economic and the political converged around suspicion of Big Business, all that remained was validation by antitrust enforcers and the courts.

Under the "Harvard School" approach, the courts and agencies presumed the illegality of any mergers, joint ventures, or agreements that allowed firms to obtain, enhance, or exercise market power, regardless of whether the conduct had the potential to benefit consumers by lowering prices or increasing output.Soon enough, an unusually interventionist and indulgent court ushered in what is now thought to be "the most aggressive enforcement program in the nation's history".[547] Supreme Court decisions animated the shift in policy, abandoning the philosophy of *Appalachian Coals, Inc. v. United States*[548] in which the court had refused to condemn an output restriction scheme in a joint marketing agreement. The language of *per se* rules began to appear in decisions in the 1940s and would carry through to the twilight years of Harvard in the late 1960s and early 1970s. *United States v. Socony-Vacuum Oil Co.*[549] set the pace with the court establishing that henceforth, horizontal price fixing agreements would be condemned summarily and treated as crimes, regardless of their actual effects. They could not be salvaged even by the showing of "competitive abuses or evils which the agreements were designed to eliminate or alleviate."[550] *Socony's* ban of all arrangements that affect price appears drastic, but not when seen within the bigger picture, where the goal was to revitalise the Sherman Act and reaffirm strongly the primacy of competition, now taken to be rivalry.[551] In *Interstate Circuit, Inc. v. United States,*[552] as in *Socony,* the court relied

[546] Jones et al. (2019) 22. For detail on the Harvard Economists see Piraino (2007) 82 *Indian Law Journal* at 348 -349.
[547] Pitofsky (ed.) (2008) 4.
[548] (1933) 288 U.S. 344 (1933).
[549] 310 U.S. 150 (1940).
[550] *United States v Socony-Vacuum Oil Co.* 310 U.S. 150 (1940) US 220-1, S Ct 843.
[551] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 51-52.
[552] 306 U.S. 208 (1939).

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on circumstantial evidence to find an illegal horizontal conspiracy. The *per se* rule was also applied to tie-in arrangements by which a purchase would be required as to purchase other kinds of goods in addition to those the subject matter of the agreement. In *Northern Pacific R. Co. v. United States,* [553] the court declared certain agreements to be of such pernicious effect on competition as to lack any redeeming virtue. Such agreements would be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they had caused or the business excuse for their use.[554] The same rule was applied to vertical price fixing. In *Albrecht v. Herald,*[555] the Supreme Court declared the fixing by a publisher of maximum resale price of newspapers *per se* unlawful.

Utah Pie Co. v. Continental Baking Co.[556] which followed the next year stands out. A regional producer and market leader of frozen fruit pies cut prices at which it sold the product. National rivals responded and at times charged lower prices in Utah than in other regional markets. During the relevant period, the market expanded and there was no reason to claim that competition had been stifled by their reductions. They were nonetheless found to have injured competition under the Robinson-Patman Act. The Supreme Court used *per se* rules to ban non-price vertical restraints by which a manufacturer limited its retailers to specific geographic areas,[557] group boycotts by which a full-service retailer threatened not to deal with manufacturers who sold to discounters,[558] tying arrangements that conditioned the sale of one product upon the buyer's agreement to purchase a second product[559] and horizontal agreements to allocate markets or customers.[560] Adoption of exclusive sales territories by participants in a marketing joint venture were also found to be *per se* unlawful.[561]

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[553] 356 U.S. 1 (1958).
[554] *Northern Pacific R. Co. v. United States* 356 U. S. at 5.
[555] 390 U.S. 145 (1968) Albrecht drew heavy criticism by economists for many whom maximum price fixing actually increases consumer welfare. See Easterbrook FH "Maximum Price Fixing" 1981 48 (4) *University of Chicago Law Review* 886–910 and Blair R and Fesmire J "Maximum Price Fixing and the Goals of Antitrust" 1986 37 (1) *Syracuse Law Review* 43–77. The case was finally overruled in *State Oil Co. v Khan,* 522 U.S. 3 (1997). Maximum price-setting is today evaluated under the rule of reason rather than a *per se* rule.
[556] 386 U.S. 685 (1967).
[557] *United States v Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).
[558] *Klor' s, Inc. v Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).
[559] *Northern Pacific Ry. Co. v United States,* 356 U.S. 1 (1958); *International Salt Co. v United States*, 332 U.S. 392 (1947).
[560] *Timken Roller Bearing Co. v United States*, 341 U.S. 593 (1951).
[561] See *United States v Topco Associates, Inc.*, 405 U.S. 596 (1972)

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As the courts tightened rules for cooperation between firms, they also grew more willing to find that dominant firms had acted improperly. In *United States v. Aluminum Co. of America* (ALCOA)[562] the court treated the fulfillment of new demand through the pre-emptive addition of capacity wrongful. ALCOA's mere possession of the power to control prices and curb competition was held to be illegal monopoly *per se* under both sections 1 and 2 of the Sherman Act. It did not matter how the firm had become a monopoly, the offence was simply becoming one.[563] ALCOA was a nod to Brandeisian thought favouring a more interventionist antitrust policy and a stronger role for the court in policing the national economy. Learned Judge Hand put it eruditely; "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to *perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.* [emphasis added]"[564] In ALCOA one sees a court deferring to the political branches.[565]

ALCOA is the case with the dubious reputation of the longest trial in American history, itself maybe a presage of the long years of dissension antitrust was yet to see.[566] It is also one of the most criticised decisions of its era. Many agree with Greenspan's analysis that "ALCOA [was] being condemned for being too successful, too efficient, and too good a competitor. . . [T]he hidden intent, and the actual practice of the antitrust laws in the United States have led to the condemnation of the productive and efficient members of our society because they are productive and efficient."[567] The goal of antitrust was to manage Big Business in a way that opened up the market for smaller players.

Piraino indicates that Harvard scholarship convinced many judges to presume illegality of any conduct by firms with market power, regardless of its effect on consumers.[568] There

[562] 148 F.2d 416 (2d Cir. 1945).
[563] In Justice Hand's words in *United States v Aluminum Co. of America* 148 F.2d 416 (2d Cir. 1945) at 419, "Nothing compelled ALCOA to keep doubling and redoubling its capacity before others entered the field. . . . [W]e can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."
[564] 148 F.2d 416, 429 [emphasis added]. For more on the argument that antitrust is for competition see E M Fox (1981) 66 *Cornell Law Reviwe* 1140. Writer at 1149 says that freedom of economic opportunity is a central theme of antitrust.
[565] Ramsey (2012) 79.
[566] For an interesting analysis of the case see May J "The Story of Standard Oil Co. v. United States" in Fox EM & Crane DA (eds.) *Antitrust Stories* (2007).
[567] Federal Reserve chairman Alan Greenspan quoted Skrabec QR *Aluminum in America: A History* (2017) 132.
[568] Piraino (2007) 82 *Indian Law Journal* at 349.

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was considerable consistency between judicial decisions and economic thinking during the 1940s, 1950s, and 1960s.[569] Courts and economists of this era tended to downplay efficiencies associated with large-scale enterprises.[570] The thinking then was that Congress enacted the Sherman and Clayton Acts out of concern over the growing economic and political power of trusts and out of a desire to protect individual competitors from the power wielded by large firms. In *United States v. United Shoe Machinery*,[571] the court, while accepting that the defendant's customers approved of its policy of only leasing as opposed to selling its machines, still went ahead to condemn the practice. In *Utah Pie* the Supreme Court condemned a national bakery's use of localised price cuts to challenge the leading local producer.[572] Courts routinely slighted efficiency rationales, revealing an implicit suspicion that superior performance never could explain dominance.[573] Needless to say, few decisions of this era command praise today.[574]

2.4.3.1 The Harvard School of Thought and Mergers

Harvard School scholars believed the goal of merger regulation was to keep markets fragmented through pre-emptively precluding mergers that could lead to monopolisaiton of markets. Competition was believed to equal rivalry, justifying interventionism to keep markets at low levels of concentration. Mergers and joint ventures which substantially increased concentration levels in the relevant market made it easier for the remaining firms to engage in anticompetitive conduct. The Harvard School antitrust treatise supported prima facie illegality for mergers in which the parties had an aggregate share of thirteen to fourteen percent of the relevant market.[575] Either the merged entity acting alone, so called unilateral effects, or the merged entity collaborating with the remaining firms in the market, that is, coordinated effects, could limit competition by charging higher prices, lowering output, reducing product quality, or slowing innovation. In *United States v. Mercy Health Services*,[576] the court's key consideration was whether the merger would

[569] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 54.
[570] Kovacic & Shapiro above.
[571] 110 F. Supp. 295 (D. Mass. 1953), affirmed per curiam, 330 U.S. 806 (1954).
[572] 386 U.S. 685 (1967).
[573] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 52.
[574] One exception is *Lorain Journal Co. v United States* 342 U.S. 143 (1951) which condemned a newspaper's efforts to destroy a small radio station by refusing to sell advertising to businesses which advertised on the radio station.
[575] See 4 PHiLLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 915, at 83 (1980).
[576] 902 F. Supp.968, 975 (N.D. Iowa 1995)

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cause the merged entity to have enough market power such that it could profitably increase prices[577] while in *Hospital Corp.of America v. FTC*[578] the worry was whether the merger could "enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price."[579]

Under the Harvard School approach, courts and enforcement agencies defined a relevant market, assigned market shares to each of the competitors in the market, and presumed the illegality of transactions that increased market concentration levels beyond particular thresholds. As the Supreme Court noted, "market definition generally determine[d] the result of the case."[580] *United States v. Philadelphia National Bank*[581] established the principle that the illegality of a merger can be presumed from a substantial market share concentration level and *Brown Shoe Co. v. United States*[582] that the "proper definition of the market is a 'necessary predicate' to an examination of the competition that may be affected by the... merger."[583]

Under the Harvard School approach, the courts and agencies applied the market share presumption of illegality regardless of whether the transaction at issue had the potential to lower costs or prices or otherwise benefit consumers. For example, in *Brown Shoe Co. v. United States*[584] the Supreme Court considered the legality of a merger between two shoe manufacturers. The Court conceded that the merger would allow the integrated companies to "market their own brands at prices below those of competing independent retailers."[585] Despite this advantage to consumers, the Court invalidated the merger, pointing out that it was more important to promote Congress's objective of protecting small business against potential abuses of power by larger firms: "[W]e cannot fail to recognize Congress'[s] desire to promote competition through the protection of viable, small, locally

[577] 107 F.3d 632 (8th Cir. 1997).
[578] 807 F.2d 1381 (7th Cir. 1986).
[579] 807 F.2d 1381 (7th Cir. 1986) at 1386
[580] Referenced to in *Eastman Kodak Co. v. Image Technical Services* 504 U.S. 451, 469 n.15 (1992).
[581] 374 U.S. 321 (1963) at 363.
[582] 370 U.S. 294 (1962).
[583] 370 U.S. 294 (1962) at 335.
[584] 370 U.S. 294 (1962).
[585] Id. at 344.

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owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.[586]

Throught out the Harvard School era, section 7 of the Clayton Act prohibiting mergers and acquisitions that could substantially lessen competition or tend to create a monopoly continued to be interpreted restrictively. It culminated in Government loss in *United States v. Columbia Steel Co.*[587] where the court held that a merger between two producers of steel fabrications that created a firm with a 24 per cent market share did not substantially lessen competition because the relevant fabrication market was expanding. This loss and the restrictions on section 7 imposed by the courts had Congress uncomfortable. Adding weight to this apprehension was a 1948 FTC report which predicted that giant corporations would soon take over the country and there was urgent need to "counter the rising tide of economic concentration in the American economy."[588] Contemporary media chimed in with the opinion that the unchecked corporate expansions through mergers spelt danger to the existence of small businesses and the American economy. Though the report came under heavy criticism from some economic quarters its recommendations found favour with Congress which passed the Celler-Kefauver Act in 1950[589] to strengthen section 7 of the Clayton Act. The new legislation added vertical and conglomerate mergers to the growing list of possible antitrust violations whenever the effect would substantially lessen competition and tend to create a monopoly.[590] Asset or stock consolidations which fell short of creating dominance were proscribed. The Celler-Kefauver Act is sometimes quite tellingly referred to as the Anti-Merger Act.[591]

Brown Shoe Co. v. United States[592] is perhaps the most famous case under the amended section 7.[593] The Supreme Court invalidated a merger that would have yielded a horizontal market share of 5 per cent and a vertical foreclosure of under 2 per cent. The

[586] 370 U.S. 294 (1962) at 344.
[587] 334 U.S. 495 (1948).
[588] United States Federal Trade Commission *The Merger Movement: A Summary Report* (1948) 68.
[589] 64 Stat. 1125, 12 USC 18.
[590] Under the original section 7, firms were prohibited from acquiring stock in competing firms if such acquisition would substantially diminish competition between the two firms or tend to create a monopoly in any line of commerce.
[591] Lande RH "Resurrecting Incipiency: From Von's Grocery to Consumer Choice" 2001 (68) *Antitrust Law Journal* 875 hereinafter Lande (2001) 68 *Antitrust Law Journal,* at 879.
[592] 370 U.S. 294 (1962).
[593] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 53.

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issue before the Supreme Court was whether the merger tended to substantially lessen competition in the market contrary to the new section 7. Although *Tampa Electric Co. v. Nashville Coal Co*.[594] decided only a year earlier would suggest that such market share was insignificant to warrant action, the court went ahead to find evidence of potential substantial lessening of competition given an existing trend toward concentration in the overall shoe industry. In finding a violation, the Court announced something close to a rule of reason approach which it then disregarded for the remainder of the opinion.[595] Justice Warren's now worn for quotation *dictum* in *Brown Shoe* is an ode to the antitrust goal of that era:

> "[W]e cannot fail to recognize Congress' desire to promote competition through *the protection of viable, small, locally owned business.* Congress appreciated that *occasional higher costs and prices might result* from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give favor to that decision." [italics added][596]

*Brown Shoe wa*s the court's first statement of the "incipiency" doctrine under which, a merger could be precluded on grounds of an apparent inclination toward concentration even though the share of the market absorbed was relatively small. By using the word *'may'* in section 7, Congress was taken to have created an "incipiency" standard.[597] On theoretical grounds, the doctrine is supported by the notion that mergers are difficult to undo thus making it wiser to block them before monopolisation occurs.[598] The intention was to outlaw not just acquisitions that would immediately create a monopoly or give the parties market power, but also those that had the potential to do so.[599]

[594] 365 U.S. 320 (1961).
[595] Hylton (2003) 319.
[596] 370 U.S. 294 (1962) 344.
[597] 370 U.S. 294 (1962) at 276 to 277 of the judgment "To arrest this 'rising tide' toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by 'plugging its loophole' and broadened its scope so as not only to prohibit mergers between competitors the effect of which "may be substantially to lessen competition, or to tend to create a monopoly," but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger, but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency . . . Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers". And at 278 of judgment "Section 7 requires not only an appraisal of the immediate impact of the merger on competition, but a prediction of the merger's effect on competitive conditions in the future, to prevent the destruction of competition. . ."
[598] Hylton (2003) 320. For reading on a contemporary view of the incipiency doctrine see Lande (2001) 68 *Antitrust Law Journal* at 875.
[599] Hylton (2003) 320 and *Brown Shoe Co. v United States* 370 U.S. 294 (1962) at 276 to 277.

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The Warren Court blazed a new path, finding grounds for pre-emptive action in industries it deemed vulnerable to incipient monopoly. Courts followed government policy, itself driven by economic thought. Mergers, were precluded if it was believed they showed signs of incipient monopoly or potential to diminish competition.[600] The Clayton Act, more than being a mere amendment to the Sherman Act, had become an autonomous second tier of government's antitrust policy.[601] Throughout that period, merger enforcement was used to maintain market equilibrium in the form of viable, small, locally-owned businesses, even if this meant "occasional higher costs and prices."[602]

Associated Press v United States[603] was decided in the same year as *Brown*.[604] By-laws of a cooperative association prohibited service to non-members and empowered members to block membership applications of competitors. The District Court rendered summary judgment holding that the by-laws, *prima facie* constituted restraint of trade and violated the Sherman Act. That the defendant had not achieved a complete monopoly was irrelevant.[605] The decision was upheld on appeal.[606] *United States v. Philadelphia National Bank,*[607] decided a year after *Brown*, set up a "structural presumption"-threshold beyond which mergers were presumptively illegal and no further evaluation of economic impact would be required for their preclusion.[608] Testimony by officers of rival banks that vigorous competition existed in spite of the high levels of concentration in the market was dismissed. The incipiency test was approved as fully consistent with economic theory that "competition is likely greatest where there are many sellers none of which has any significant market share."[609] In any event, application of a structural presumption carried

[600] This new approach paradoxically enough was contrary to the Sherman Act which required evidence of restraint or monopolization Hylton (2003) 87-88.
[601] Hylton (2003) 87.
[602] *Brown Shoe Co. v United States* 370 U.S. 294 (1962) at 344.
[603] 326 US 1 (1945).
[604] *Brown Shoe Co. V United States* 370 U.S. 294 (1962).
[605] 326 US 1 (1945).
[606] 52 F. Supp. 362.
[607] 374 U.S. 321 (1963).
[608] *United States v Philadelphia National Bank* 374 U. S. 321 (1963) at 363 Thus said the court, "A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."
[609] *United States v Philadelphia National Bank above.*

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the added advantage of "lighten[ing] the burden of proving illegality . . . with respect to mergers whose size makes them inherently suspect."[610]

Rebuttal efforts usually failed. In fact, efficiency claims were regarded as irrelevant and possibly even a factor weighing against approval of a merger.[611] The incipiency net would soon be cast wide enough to accommodate non-concentration considerations in barring mergers. In *United States v. Aluminum Co. of America (Rome Cable)*[612] the court used evidence of lack of a competitive culture in a market to anchor a decision to preclude a merger where the expected market share was 30 per cent.[613] Never mind that in *Philadelphia Bank*,[614] the same court had declined evidence of existence of a competitive culture as a mitigating factor. In *United States v. Continental Can Co.*,[615] the court based its decision to preclude the merger partly on the observation that the two separate industries where the merging parties operated were relatively concentrated. This trend is similar to a wide sweeping approach urged in some quarters for developing country merger analysis.[616]

The high point of the incipiency doctrine and the "poster child for structural era excess" in merger enforcement was *United States v. Von's Grocery Co*.[617] in 1966. An acquisition in the Los Angeles grocery store market produced a firm with 7.5 per cent control of the market. At that time no other firm served more than 8 per cent of the market and even after a wave of grocery store consolidations, more than 3500 single grocery stores remained in the area. The Court held that this merger violated section 7 of the Clayton Act, the reason proffered being that the market showed a trend toward concentration. It was in *Von's Grocery* that Justice Potter Stewart wryly remarked that the sole consistency he could perceive in merger decisions of the season was that "the Government always

[610] *United States v Philadelphia National Bank above.*
[611] See *Federal Trade Commission v Procter & Gamble Co.*, 386 U.S. 568 (1967).
[612] 377 U.S. 271 (1964).
[613] The court reiterated that the purpose of section 7 is to proscribe mergers with a probable anticompetitive effect. See 377 U. S. 271 (1964) at 280.
[614] 374 U.S. 321 (1963).
[615] 378 U.S. 441 (1964).
[616] See chapter 2 par 2.5.6
[617] Baker in Pitofsky (2008) 237 and 384 U.S. 270 (1966).

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wins."[618] *United States v. Pabst Brewing Co.*[619] precluded a horizontal merger creating a market share of 4.5 per cent.

Vertical mergers were treated to the same standard of incipiency. Before the 1950 amendment, section 7 had referred to a lessening of competition between the acquiring and acquired companies, implying that the two needed to be competitors.[620] In *Brown Shoe,* the court applied the incipiency test to preclude the vertical component of the proposed merger.[621] The Supreme Court went on in 1967 to block a conglomerate merger in part because the record showed that post-acquisition, one of the merging parties would become more efficient in production, sales, distribution and, especially, advertising.[622] The potential competition concept provided an anchor in such instances.[623]

The 1968 Department of Justice Merger Guidelines reflected the lack of concern for productive efficiency.[624] Meanwhile, *per se* rules continued to proliferate often with little empirical data to support their adoption by the Court.[625] In addition to partiality for small business, Wright and Ginsburg remark that courts interpreted the antitrust statutes to accommodate a "hodgepodge of social and political goals many with an explicitly anticompetitive bent".[626] This refrain is one repeated today with reference to many developing country merger regimes.[627]

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[618] 384 U.S at 301.
[619] 384 U.S. 546 (1966).
[620] No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce.
[621] Hylton (2003) 340. The court examined the degree of foreclosure and economic and historical factors that shed light on the nature and purpose of the arrangement. In sum, the decision established that a violation would have occurred where a vertical merger lessened competition substantially in an area of effective competition. At 370 U. S. 328 and 329. See also *United States v E.I. du Pont de Nemours & Co* 366 U.S. 316 (1961).
[622] *Federal Trade Commission v Procter and Gamble* (Clorox) 386 U.S. 568 (1967).
[623] *U. S. v Penn-Olin Chemical Co., 378 U. S. 158 (1964) at pp 175-176.*
[624] United States 'Department of Justice and Federal Trade Commission (2020) Horizontal Merger Guidelines 10 on horizontal mergers; 16 for vertical mergers, 18(c) &19(c) on conglomerate mergers. Available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (accessed 16/12/2018).
[625] Ramsey (2012) 155 and Kimmel S "How and Why the Per Se Rule Against Price-Fixing Went Wrong" (2006) Economic Analysis Group Discussion Paper, EAG 6-7.
[626] Wright & Ginsburg (2013) 81 *Fordham Law Review* at 101-102. For some examples see *Utah Pie Co. v Cont'l Baking Co*., 386 U.S. 685, 703 (1967) condemning rivals' attempts to compete with Utah Pie by lowering prices because "each of the respondents also bore responsibility for the downward pressure on the price structure" and the "[Clayton] Act reaches . . . price discrimination that is intended to have immediate destructive impact"; *Brown Shoe Co. v United States*, 370 U.S. 294, 344 (1962) where court stated thus, ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.") and in *United States v Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897) where it was held that antitrust law exists to protect "small dealers and worthy men".
[627] See chapter 2 par 2.5.2.

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By the time the 1960s were coming to a close, there was increasing concern, especially among the business class that the pendulum may have swung too far out, a feeling neatly captured in Justice Stewart's caustic observation in *Von' s Grocery*.[628] The arbitrariness of policy was put down to operating without a coherent answer to the question, "[W]hat are the goals of antitrust?"[629] The Harvard approach was summarised as compelling the foregoing of a certain gain today in order to avoid a "very uncertain, quite speculative harm in the future".[630] Preference for atomistic markets was implausible and simplistic, building mostly on "out-of-context quotes of lawmakers' concerns for competitors of the trusts".[631] Many commentators today share Stewart's assessment and consider the antipathy of 1960s merger jurisprudence as indefensible.[632]

What exactly 'competition' denotes is as contentious now as it was then. Today, as then, the nature of the ideal market is a matter of concern for policy makers. In contemporary Western practice, competition is construed not as rivalry but as a process whose outcome is economic welfare, otherwise referred to as the "the economist's concept of efficiency."[633] Yet barely 50 years ago, were economists of note agreed that competition equaled rivalry, justifying interventionism to keep markets at low levels of concentration. As we speak, Brandeisian theories in favour of atomistic markets are enjoying a renaissance driven by widely shared opinion that goals of antitrust today are out of sync with economic realities of the populace.[634] Obviously, there has never been, and chances are that there never will be, consensus over what ideal markets look like. At the risk of sounding flippant, we dare say that the ideal market is what you make it to be. "Competition" is what the markets and contemporary needs of a jurisdiction and its people dictate it to be. If the demand of the moment is rivalry, so be it. If it is economic welfare, so be it.

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[628] 384 U.S. 270 at 301.
[629] Wright & Ginsburg (2013) 81 *Fordham Law Review* at 101.
[630] Hylton (2003) 321.
[631] Orbach (2013) 81 *Fordham Law Review* at 2267. Harvard has also been accused of being a "simplistic hypothesis that reduces a complex political and economic history into a one-dimensional explanation and whose starting point was that "antitrust laws . . . often hinder rather than improve economic efficiency." DiLorenzo TJ "The Origins of Antitrust: An Interest-Group. Perspective" 1985 (5) *International Review of Law and Economics* 73 at 73.
[632] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 53-54.
[633] Posner (2001) at ix.
[634] Khan L "The New Brandeis Movement: America's Antimonopoly Debate" 2018 9(3) *Journal of European Competition Law and Practice* 131 hereinafter Khan (2018) 9(3) *Journal of European Competition Law and Practice,* at 131.

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2.4.4 The Chicago School

Starting in the 1940s, a band of economists, economically trained lawyers and academics, mostly at Chicago University, began to challenge the premise that 'big' was always 'bad'. Their approach to examination of business behavior came from an economic and empirical point of view, excluding from consideration any political or social values.[635] Sound economics did not support the application of the antitrust laws in many of the situations in which the laws were being applied. Put to question were many of the applications of *per se* rules. In fact some conduct, such as vertical restraints, were said to be so often benign or pro-competitive that they merited to be endorsed with rules of *per se* legality, not condemned.[636] A free market could do the job of achieving efficiency, encouraging innovation and keeping itself competitive much better than the prevailing intrusive policies.[637]

This new thought came to be referred to as Chicago antitrust. Under its dispensation, court's would play a much-diminished role akin to that envisioned by Judge Taft in his *Addyston Pipe* opinion,[638] for Chicago adherents "one of the greatest, if not the greatest, antitrust opinions in the history of the law".[639] Market forces assumed many of the roles otherwise ascribed to antitrust.[640] This was not the first time that the University of Chicago had influenced competition policy but unlike their predecessors, this new Chicago School of Thought abhorred comprehensive market regulation, attributing efficiency explanations for many phenomena that antitrust law has so far disfavored.

The Chicago School of antitrust is most unique for its move from the classroom, to law and economic reviews, and finally to the court's jurisprudence.[641] The movement lifted off from the lectures of professors Aaron Director and Edward Levi; the former a professor of economics and the latter a professor of law at University of Chicago.[642] These two

[635] Pitofsky (ed.) (2005) 5.
[636] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 55.
[637] Kovacic (2007) *Columbus Business Law Review* at 4.
[638] See chapter 2 par 2.4.2.
[639] Bork (1978) 26 quoted at Armentano DT *Antitrust Policy: The Case for Repeal* (1991) 65.
[640] Lianos et al. in Lianos (eds.) et al. (2013) 42-43.
[641] Ramsey (2012) 111.
[642] Director joined the Chicago Law faculty in 1946 and founded the Journal of Law and Economics in 1958. His students included legal scholars and judges who greatly influenced antitrust. Bork notes: "[Director's] teachings ... made him the seminal figure in launching the law and economics movement, which transformed wide areas of legal scholarship." U*niversity of Chicago News Office* 13 Sept 2004 available at http://www-news.uchicago.edu/releases/04/040913.director.shtml (accessed 13/05/2017.

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would together originate and bring to the mainstream the discipline of law and economics that applied economic analysis to antitrust problems.[643] A strong proponent of the free market, Director used the basic principles of price theory, focusing on actual business practices in the market.[644] So fresh was this new scholarship and thought that it was often spoken of in religious language.[645]

In 1958, Director founded the *Journal of Law and Economics*. The periodical gave successful entrepreneurs and business leaders a chance to explain their business actions in terms of profit maximization and increased efficiency.[646] He also called attention to data about actual business practices available in antitrust trial records. This data hitherto largely ignored, given Harvard's pre-occupation with structural presumptions, told the story from the market side. Through the journal and the accompanying scholarship, Director was able to directly influence developments in three areas of antitrust law: predatory pricing, retail price maintenance, and tie-ins. As his ideas about antitrust reform began to spread they benefited from elaboration and expansion by his students whose writings came to be known as "second wave statements of Chicago School orthodoxy".[647] It is through these writings that Director's thoughts reached a wider audience and the Chicago School of antitrust analysis first rose to prominence.[648]

The most influential of Director's disciples by far remains Robert Bork. His 1978 book *The Antitrust Paradox: A Policy at War with Itself*[649] is considered "the most momentous if not

[643] Kitch EW "The Fire of Truth: The Remembrance of Law and Economics at Chicago, 1932-1970" 1986 23(1) *Journal of Law and Economics* 163 presents a compelling account of the influence Director had on the course of Chicago School reform.
[644] Simply put, the theory of price, also known as price theory, is a microeconomic principle that uses the concept of supply and demand to determine the appropriate price point for a good or service. Price theory is concerned with the economic behaviour or individual consumers, producers, and resource owners and explains the production, allocation, consumption and pricing of goods and services.
[645] Ramsey (2012) 114.
[646] Ramsey above at 117.
[647] Ramsey above at 119-120.
[648] These included the following: Ward BJ "Tying arrangements and the leverage problem" 1957 67(1) *The Yale Law Journal* 19 where the argument was that tie-ins would only give monopoly power where there was already existing leverage. A *per se* rule was thus hardly justifiable in all cases and in some would even prevent manufacturers from realizing efficiency; McGee JS "Predatory Price Cutting: The Standard Oil (N. J.) Case" 1958 (1) *Journal of Law and Economics* 137 in which the argument was that there was so much to lose the predation that no rational profit-maximizing business would wily nily engage in it. Assuming equal access to credit at similar rates, the predator would be forced to forego just as much profit as his prey and Telser LG "Why Should Manufacturers Want Fair Trade?" 1960 3(1) The Journal of Law and Economics 86. Tesler's was a review of the per se rule against RPM with a focus on *United States v General Electric Co.* 272 U.S. 476 (1926) His proposition was that manufacturers pursue RPM agreements not out of anticompetitive motives, but rather as a way of encouraging non-price competition between retailers.
[649] Bork (1978).

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controversial work in modern antitrust."[650] In the 1960s, Bork had published a series of provocative articles in which he attacked the state of antitrust policy in the United States. Taken together, these articles constitute the bulk of *The Antitrust Paradox*.[651] His views were fiercely debated by antitrust scholars and practitioners throughout the 1960s, 1970s, and early 1980s.[652]

The paradox, said Bork, was that while touted as quintessentially pro-competition, Harvard antitrust was in reality restraining competition by favouring small players and the underdog against big market players. The sum effect was to lock the latter out of competition defeating the very purpose of the law in the first place. The Supreme Court, of no compulsion by law, and without adequate explanation, had inhibited or destroyed a broad spectrum of useful business structures and practices.[653] Consequently, antitrust was on its way to becoming an internal tariff against domestic competition and free trade. Populist views that the antitrust laws were passed to further a variety of social and political goals were historically baseless. What had actually concerned Congress was that trusts and certain other business forms would acquire monopoly or market power and with it the ability to artificially raise prices and restrict output, thus harming the consumer.[654] To that extent, antitrust laws embodied only a concern for consumer welfare which Bork equated with the "maximization of wealth or consumer want satisfaction".[655] According to Bork Congress had adopted the Sherman Act as a "consumer welfare prescription" and "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[656]

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[650] Orbach (2014) 79 *Antitrust Law Journal* 881 at 881-882. Orbach at 882accuses Bork of purposeful use of confusing terminology to disguise his agenda as a pro-consumer policy. For criticism of Bork see generally Orbach (2013) 81 *Fordham Law Review* 2253. For a general discussion of the influence of Bork's analysis, see Kovacic (1990) 36 *Wayne Law Review* at 1437–39 and 1445–51.
[651] Bork & Ward *Fortune* Dec. 1963; Bork RH "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division I" 1965 (74) *Yale Law Journal* 775; Bork (1966) 75 *Yale Law Journal* 373; Bork RH "Legislative Intent and the Policy of the Sherman Act" 1966 (9) *Journal of Law and Economics* 7 hereinafter Bork (1966) 9 *Journal of Law and Economics* 7; Bork, (1967)57 *Am Econ Rev* 242; Bork *Fortune* Aug 1967, at 92; Bork RH "Resale Price Maintenance and Consumer Welfare" 1968 (77) *Yale Law Journal* 950; Bork *Fortune* Sept. 1969 at 103.
[652] See Blake HM and Jones WK "Goals of Antitrust: A Dialogue on Policy" 1965 (65) *Columbia Law Review* 377 at 422; Elzinga (1977) 125 *University of Pennsylvania Law Review* 1191; Lande (1982)34 *Hastings L J* 65; Pitofsky (1979) 127 *University of Pennsylvania Law Review* 1051 and Sullivan LA "Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust" 1977 125 *University of Pennsylvania Law Review* 1214.
[653] Ramsey (2012) 134.
[654] Bork (1966) 9 *Journal of Law and Economics* 7at 12 to 21.
[655] Bork (1978) 91.
[656] Bork (1978) 73. This position is the same one initially asserted in Bork (1966)9 *Journal of Law and Economics* 7 at 10.

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Bork argued for diminished scrutiny and an altogether lenient approach to mergers and acquisitions, especially vertical integrations. He argued that Harvard's operation of structural presumptions "cut far too deeply into the efficiencies of integration."[657] He was especially ardent about antitrust easing off conglomerate mergers.[658]

As trade barriers fell, foreign competition surged and international trade opportunities emerged in the early to mid-1970s. The country grew increasingly restless under the thumb of invasive prohibitory antitrust law. Concern was increasing that United States' firms operating under a regime that was averse to big size, were losing ground in international markets.[659] The economy was struggling under a prolonged period of 'stagflation' - rising unemployment and inflation. The time was ripe for change. When Ronald Reagan ran for the Presidency of the United States in 1980, he won on a mandate to shrink regulation - to get government off the backs of business. This was just the formula Chicago antitrust needed to surge, and it did; leading some commentators to quip that the Chicago school had been "smuggl[ed]" into antitrust.[660] But had it? Not at all. Antitrust was merely responding to circumstance and priorities of the season as it had done in eras past. Strong businesses were now needed to propel the United States to its next phase as envisioned in Ronald Reagan's Republican economic agenda to stimulate the economy, famously referred to as 'Reaganomics'. Reaganomics can be reduced to four primary objectives which included tax reduction especially for corporations and deregulation in the hope that this would reduce costs for consumers and business.[661] Deregulation of domestic markets offered the best way to stimulate economic growth.[662] His often quoted statement made in the inaugural speech of January 1981, "government is not the solution to our problem, government is the problem"[663] encapsulates the approach for antitrust. Therefore, the less the intervention in business affairs, the better.

[657] Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) 237.
[658] Bork (1978) 3 and 7.
[659] Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 55.
[660] Schwartz LB "The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?" 1983 71(2) *California Law Review* 575 at 576–77.
[661] The other two were reduced government spending and support for the Federal Reserve's plan to tighten the availability of money to combat inflation. Books Caps Study Guides Staff (2011) Chap 3.
[662] https://www.reaganfoundation.org/ronald-reagan/the-presidency/economic-policy/ (accessed 13/08/2019).
[663] https://www.reaganfoundation.org/ronald-reagan/reagan-quotes-speeches/inaugural-address-2/ (accessed 13/08/19.

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The Reagan years were only a catalyst to the Chicago flight. Years before in the mid-1970s when the phrase "consumer welfare" was gaining popularity, Robert Bork would serve as the Solicitor General.[664] Toward the end of his term in 1977, the Ninth Circuit in determining *Boddicker v. Arizona State Dental Association*[665] gave a nod to his interpretation of legislative intent declaring that serving the public was the goal of the Sherman Act and equating consumer welfare with public welfare.[666] 1977 would turn out to be a rewarding year for Chicago. Litigation over vertical restraints availed the occasion for Chicago School efficiency perspectives to enter antitrust's doctrinal mainstream. *Continental T.V. Inc. v. GTE Sylvania Inc.*[667] declared that all non-price vertical restrictions warranted a rule of reason analysis in a judgment that prominently cited Chicago School commentary.[668] The court curtailed the tying doctrine in *U.S. Steel Corp. v. Fortner Enters, Inc.*,[669] adopted the requirement that a private plaintiff prove antitrust injury in *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*,[670] and imposed the "direct-purchase requirement" on private plaintiffs in *Illinois Brick Co. v. Illinois.*[671] The pinnacle of the good run would come two years later in *Reiter v. Sonotone*[672] when the Supreme Court, reiterating *Boddicker* on public welfare and directly quoting Bork. pronounced: "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[673] Of note, Easterbrook for whom Bork's Paradox was "a legal blueprint"[674] was at the time of *Boddicker*[675] serving as a Deputy Solicitor General. It was he who signed the government's *amicus* brief in the matter.[676]

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[664] Orbach (2013) 81 *Fordham Law Review* at 2273.
[665] 549 F.2d 626, 632 (9th Cir. 1977).
[666] *Boddicker v Arizona State Dental Association* 549 F.2d 626, 632 (9th Cir. 1977) at 632 (citing Bork). "In an exhaustive study of the legislative intent underlying the Sherman Act, Professor Robert H. Bork, the current Solicitor General of the United States, concluded [that the] 'legislative history [of the Sherman Act] contains no colorable support for application by courts of any value, premise or policy other than the maximization of consumer welfare.'"
[667] 433 U.S. 36 (1977).
[668] Minimum retail price maintenance agreements remained illegal per se, but later decisions toughened evidentiary tests for proving the existence of such arrangements See *Monsanto Co. v Spray-Rite Service Corp.*, 465 U.S. 752 (1984); *Business Electronics Corp. v Sharp Electronics Corp.*, 485 U.S. 717 (1988).
[669] 429 U.S. 610 (1977).
[670] 429 U.S. 477 (1977).
[671] 431 U.S. 720 (1977).
[672] 442 U.S. 300 (1979).
[673] *Reiter v Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert Bork (1978) 66).
[674] Priest GL The Limits of Antitrust and the Chicago School Tradition (2009) 6 *J. Competition L & Econ.* 1, 9.
[675] 549 F.2d 626, 632 (9th Cir. 1977).
[676] For Easterbrook, "[H]owever you slice the legislative history, the dominant theme is the protection of consumers from overcharges," Easterbrook (1986) *84 Michigan Law Review* 1696 at 1703 and "[G]oals based on something other than efficiency really call on judges to redistribute income." *Boddicker v Arizona State Dental Association* 549 F.2d 626, 632 (9th Cir. 1977) at 1703–04.

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With *Sonotone*[677] the judiciary legitimised the dominant economic and political thought of the time on the objective of antitrust. The Supreme Court changed into a more pro-business tribunal supportive of freedom from legal constraints. Courts gave dominant firms considerable freedom to choose pricing, product development, and promotional strategies.[678] With rare exceptions such as *United States v. AT&T Co.*,[679] cases challenging dominant firm conduct usually failed.[680] Decisions concerning rules for collusion and cooperation by firms, however, reflect a tension between the absolutist approach of *Socony* applied in *Arizona v. Maricopa County Medical Society*[681] and *Federal Trade Commission v. Superior Court Trial Lawyers Association;*[682] and those endorsing a full rule of reason analysis, such as in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[683] and *NCAA v. Board of Regents*.[684] Most decisions though perceived the need for an analytical middle ground between *per se* condemnation and elaborate rule of reason analysis.[685]

2.4.4.1 Mergers under Chicago School of Thought

With regard to mergers, Chicago thought maintained that the central goal of policy was not to simply prevent undue concentration, but to prevent mergers that may create or enhance market power or facilitate its exercise. Consumer welfare, referring to increasing of the aggregate wealth of the nation or, in economic terms, maximizing allocative efficiency was the goal of merger regulation. Thus, if a merger promised to result in a more efficient use of resources, it should be allowed even if it also produced market power. Consumer welfare was the bottom line concern of antitrust and Harvard thought's focus on almost any increase in market share was not always beneficial for consumers.

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[677] 442 U.S. 300 (1979).
[678] See *Matsushita Electric Industrial Co. v Zenith Radio Corp*., 475 U.S. 574 (1986) and *Berkey Photo, Inc. v Eastman Kodak Co*., 603 F.2d 263 (2d Cir. 1979). Judicial decisions involving monopolization in this period generally favored defendants. A major exception to this trend is *United States v Otter Tail Power Co*., 410 U.S. 366 (1973) and *Aspen Skiing Co. v Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985), where the Supreme Court ruled that dominant firms may have a broad duty to deal with rivals, particularly where they own assets with natural monopoly characteristics.
[679] 552 F. Supp. 131 (D.D.C. 1982) and *Maryland v United States*, 460 U.S. 1001 (1983).
[680] Kovacic (1989) 74 *Iowa Law Review* at 1106-09.
[681] 457 U.S. 332 (1982).
[682] 493 U.S. 411 (1990).
[683] 441 U.S. 1 (1979).
[684] 468 U.S. 84 (1984).
[685] See Federal *Trade Commission v Indiana Federation of Dentists*, 476 U.S. 447 (1986).

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The federal courts' presumption of illegality for mergers and joint ventures based on market shares was criticized as capable of precluding efficiency-enhancing transactions. For example, Posner argued that there was no basis for automatic judicial intervention against a merger where the combined market share of the four largest firms in the market was less than sixty percent.[686] Responding to these concerns the Supreme Court, in the mid-1970s, began to open up merger and joint venture analysis to a consideration of factors other than market share concentration statistics. In 1974, in *United States v. General Dynamics Corp.*,[687] a marked departure from its earlier antitrust jurisprudence, the Supreme Court held that a merger could not be deemed illegal simply because the defendants held high market shares and expressed a willingness to consider conditions that might affect the future market shares of the merging parties. General Dynamics involved a merger between two coal companies. The Court pointed out that most of the coal companies' production was committed under long-term supply contracts. The defendants' past market shares did "not... necessarily give a proper picture of [their] future ability to compete" because other companies with large supplies of coal not already under contract would likely be able to obtain a greater market share in future negotiations.[688]

The determination in General Dynamics paved the way to a more sophisticated approach to merger and joint venture analysis. The courts and agencies became willing to consider defendants' arguments that their current market shares inaccurately predicted a transaction's probable effect on future competition. Before determining whether to challenge a merger, they would also assess the other market factors that pertain to competitive effects, as well as entry, efficiencies and failure.[689] The District of Columbia Circuit Court's statement in *United States v. Baker Hughes, Inc.*[690] to the effect that "evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness'[691] captures this reality.

[686] Posner RA Antitrust Law: An Economic Perspective (1976) at 112.
[687] 415 U.S. 486 (1974).
[688] Above at 501-502
[689] See Merger Guidelines 1984.
[690] 908 F.2d 981 (D.C. Cir. 1990)
[691] 908 F.2d 981 (D.C. Cir. 1990) at 984.

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Under Chicago thought merger regulation, Harvard's structure-conduct-performance paradigm was replaced by a more benevolent approach accompanied by a departure from the the incipiency doctrine. Departure from the incipiency doctrine was signaled by *United States v. General Dynamics Corp*.[692] which handed the government its first Supreme Court defeat under the Celler-Kefauver Act. Market share statistics revealed a market with undue concentration and a trend toward concentration. The issue at hand was whether the lower court had erred in approving the merger on grounds that other factors singular to the coal industry disclosed that the union would not lead to a substantial lessening of competition.[693] The Supreme Court picked up the rule of reason set forth and abandoned in *Brown Shoe* to find that, as a matter of law, the lower court had not erred but simply applied existing precedent. *General Dynamics*[694] opened the doors for the courts to start to reform merger law. Merging firms would be allowed to rebut the structural presumption by showing that concentration had been miscalculated by failure to take into account idiosyncrasies of the relevant market. They could also raise the defence of ease of entry, which though acknowledged in *Philadelphia National Bank,* had at the time received scant consideration.[695] For instance, during the 1980s on two occasions, courts determined that the structural presumption could be trumped by proof of ease of entry.[696]

By 1990, the Supreme Court had adopted a "totality-of-the-circumstances approach", that is, weighing a variety of factors to determine the effects of particular transactions on competition. The most significant case in this regard remains the 1990 Court of Appeal's judgment in U*nited States v. Baker Hughes, Inc.*[697] These decisions parallel similar developments in the federal merger guidelines, which disavowed the extreme enforcement created by Supreme Court merger decisions of the 1960s.[698] Market concentration, though influential, would no longer be outcome-determinative in evaluating horizontal mergers. The Justice Department would allow the inference of harm to

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[692] 415 U.S. 486 (1974).
[693] The coal market was different from others because much of the production was committed through long-term supply contracts with electric utilities.
[694] 415 U.S. 486 (1974).
[695] Several influential lower court cases used ease of entry to permit mergers that yielded high market shares. See *United States v Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984) and *United States v Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990).
[696] Pitofsky (2008) 238.
[697] 908 F.2d 981 (D.C. Cir. 1990).
[698] 2020 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines pars 13 and 104. The 1982 Merger Guidelines validated and reiterated Chicago antitrust.

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competition from a merger to be rebutted by a number of factors, including proof of ease of entry or individual characteristics of the market that would make it difficult for firms to collude tacitly even after the merger. The 1992 Horizontal Merger Guidelines,[699] promulgated in the wake of *Baker Hughes,*[700] set forth two classes of competitive effects theories; coordinated and unilateral; and outlined the factors that the federal enforcement agencies would consider in establishing if a merger raised a risk of either. Efficiency justifications would be considered, even if at first at a conceptual level.[701]

By the turn of the new millennium, as regards the objective of antitrust, the Chicago Schools' approach to antitrust analysis had decisively carried the day.[702] Posner remarks that in modern times, the structural presumption has been eroded to the point where evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness. The competition referred to in antitrust statutes is not rivalry but rather a process, the outcome of which is economic welfare construed as "the economist's concept of efficiency."[703] Antitrust laws have a single end, that of maximizing economic efficiency.[704] Other goals have "no implications for the content of antitrust policy."[705] Courts still cite the writings of Bork, Posner and Easterbrook giving the Chicago School continued validation. For instance, in *State Oil v. Khan* Judge O'Connor, while overturning *Albrecht's per se* rule on vertical price restraints,[706] would, like Justice Powell in *Sylvania* exactly 30 years earlier, liberally cite scholarly commentary on the question of the efficacy of vertical price restraints.

Chicago's successful move of policy from "form-based" to "effects-based" has not exactly been received with unanimous approbation. Accusations against the project include but are not limited to reliance on an incomplete, distorted conception of competition, open acceptance of increased risks of concentration for the prospect of future efficiencies and

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[699] US Department of Justice and Federal Trade Commission Horizontal Merger Guidelines Issued 2nd April 1992.
[700] 908 F.2d 981 (D.C. Cir. 1990).
[701] See *Federal Trade Commission v University Health Inc*., 938 F.2d 1206 (11th Cir. 1991) rejecting efficiency arguments of merging parties but treating efficiency claims as relevant to merger analysis.
[702] Ginsburg DH "An. Introduction to Bork "1966 (2) *Competition Policy International* 225 at 227–28.
[703] Posner (2001) ix.
[704] "Almost everyone professionally involved in antitrust today—whether as litigator, prosecutor, judge, academic, or informed observer . . . agrees that the only goal of the antitrust laws should be to promote economic welfare . . . ." Posner above.
[705] Posner (2001) at 24.
[706] 522 U.S 3 (1997).

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innovation, and the worst, engineering years of stagnation in enforcement.[707] With anger over taxpayer bailouts for firms deemed too-big-and integral-to-fail simmering and agitation for a possible return to early Sherman days increasing, the United States may well be ready for a third major direction shift in antitrust enforcement.[708]

2.4.5 Post Chicago Movement

Huffman remarks that "if Chicagoans are Catholics, Post Chicagoans are Lutherans."[709] Their ideology is a reaction to excesses of under-enforcement that they attribute to the former's preference for economic models over facts, assumption that free market mechanisms will cure all market imperfections and belief that only efficiency matters. The most significant accusation though, is that of willingness to approve questionable transactions "if there is even a whiff of a defense."[710]

As the name suggests, Post Chicago theorists have been reluctant to remove themselves completely from the project of the Chicago School theorists.[711] They also agree that antitrust enforcement today is better as a result of conservative economic analysis and Chicago policies have generally been a constructive influence.[712] In common with their predecessor, they tend to advocate a single-goal economics-centric policy. Their problem is not with conservative economic analysis but with those portions of that analysis that have "overshot the mark" producing an enforcement approach that is exceptionally generous to the private sector and where the pro-antitrust position always loses.[713] If the scores of practices that traditionally were regarded as anticompetitive continue to be

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[707] Adams W and Brock JW "Antitrust, Ideology, and the Arabesques of Economic Theory" 1995 (*66) University of Colorado Law Review 257* at 268-69 (1995). Stucke in Stucke (2012)53 *B C Law Review* 551 at 560 puts it as, "economic power's capacity to obtain government bailouts - regardless of how incompetent, inefficient, and unprogressive those who wield it may be - as the ultimate perversion of private enterprise".

[708] Risen *US News and World Report* June 29 2016 "Elizabeth Warren Calls for 'Strong Executive Leadership' on Antitrust" where Warren is quoted as saying that, "2016 was the biggest year for mergers in U.S. history, both in the terms of the number of mergers and the size of mergers," and warning that "antitrust laws written to curtail 19th-century monopolies are needed once again". https://www.usnews.com/news/articles/2016-06-29/elizabeth-warren-calls-for-strong-executive-leadership-on-antitrust (accessed 10/07/2017). Also Adams & Brock (1991) 123.

[709] Huffman M "Marrying Neo-Chicago with Behavioral Antitrust" 2012 78(1) *Antitrust Law Journal* 105 at 111. See also Crane DA "Analysis of the Schools: Chicago, Post-Chicago, and Neo-Chicago" 2008 (76) *University of Chicago Law Review* 1915 for analysis of the schools.

[710] Pitofsky R "Setting the Stage" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) hereinafter Pitofsky in Pitofsky (ed.) (2008) 5.

[711] Pitofsky in Pitofsky (ed.) (2008) 5 and Kauper TE "Influence of Conservative Economic Analysis on the Development of the Law of Antitrust" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) hereinafter Kauper in Pitofsky (ed.) (2008) 90.

[712] Schmalensee in Pitofsky (ed.) (2008) 9.

[713] Pitofsky in Pitofsky (ed.) (2008) 5.

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allowed to pass, the end term results will be higher prices, lower quality of products and a diminishing of innovation, to the detriment of the consumer.

Post Chicago movements lack the simple elegance of the two earlier schools. Ramsey observes that they do not share a comprehensive unifying theory, being an assemblage of those dissatisfied with Chicago School orthodoxy. Their adherents front an assortment of alternative frameworks such as the behavioural game theory.[714] While the game theory in standard experimental economics presumes a self-interested, rational maximizer, behavioral game theory extends the standard theory to take into account how players feel about the payoffs other players receive, limits in strategic thinking and the influence of context. The influence of factors such as cooperation and fairness are considerered.[715] Of the assemblage, the most prominent is the Post-Chicago School.[716] Post-Chicago charges that various simplifying assumptions and unrealistic economic models used by Chicago ignore actual market effects and produce a false understanding of market realities.[717] The result is unconscionable under-enforcement. Markets are more varied and complex than the orthodox Chicago School appreciates and there must be a keen delving into case-specific facts and refining of Chicago theories to accommodate those facts as necessary.[718]

Business arrangements viewed by the Chicago School as generally or always efficient may actually be anticompetitive. A monopolist in one market can have an incentive to monopolize an adjacent product market under some conditions. In some scenarios, the risks of under-deterrence of anticompetitive acts cause greater losses that the risks of over-deterrence. For instance, if a venture capitalist believes that an entrenched incumbent will be allowed to snuff out incipient competition for instance through vertical restraints tie-ins, bundling or full-line forcing, conduct Chicago is gentle with, he may adopt one of two options. Either retreat from the venture or raise the cost of capital to

[714] Ramsey (2012) 159.
[715] For reading on behavioural economics see Thaler R (2015) “Misbehaving: The Making of Behavioural Economics” 2015 (3) *Journal of Economic Behavior and Organization* 367-388.
[716] Wright (2012) 78(1) *Antitrust Law Journal* 241 at 249.
[717] Hovenkamp (2005) 38.
[718] Kauper in Pitofsky (ed.) (2008) at 159; Abramson B “The IP Grab: The Struggle Between Intellectual Property Rights and Antitrust” (2007) *38 (2) Rutgers Law Journal 399* at 465.

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reflect the enhanced risk.[719] Chicago policies will have had the effect of chilling competition.

2.4.5.1 Post Chicago Thought and Mergers

As regards mergers and their regulation, Post Chicagoans support a more nuanced, fact-intensive economic inquiry into competitive effects of mergers. The thinking is that the Chicago pendulum tends to swing too far in the direction of non-intervention. Mergers are allowed to proceed based upon "dubious economic arguments" about concentration, entry, expansion, and efficiencies.[720] The 1990 appellate decision in *United States v. Syufy Enterprises*,[721] is presented as one such instance. The court in the matter is accused of choosing to "indulge its non-interventionist prejudices rather than engage in serious economic inquiry and careful antitrust analysis" and for openly displaying a "deep skepticism about the value of enforcing the antitrust statutes."[722] The failure to enjoin Oracle's acquisition of PeopleSoft has also been criticised. The decision of the court is said to betray "a deep hostility to unilateral effects that interfere with careful antitrust analysis.[723] To counter this perceived laxity, some Post Chicago scholars have, as a matter of fact, argued for even partial restoration of the structural presumptions of Harvard.[724]

While not very different from Chicago School in terms of the goals of merger regulation, they argue that there is need to narrow down the breadth of efficiencies considered sufficient to reverse the merger's potential to harm consumers in keeping with the Merger Guidelines.[725] The only efficiencies to be considered should be those likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of the proposed merger.[726] Efficiencies such as those relating to procurement,

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[719] Stelzer IM "Some Practical Thoughts about Entry" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* at 25.
[720] Baker and Shapiro in Pitofsky (ed.) (2008) 236.
[721] 903 F.2d 659 (9th Cir. 1990) For further reading see Speech by Baker in *Antitrust Law Journal* (1997) 65 at 353. Available at https://www.ftc.gov/public-statements/1996/04/problem-baker-hughes-and-syufy-role-entry-merger-analysis (accessed 12/02/2017.
[722] Baker and Shapiro in Pitofsky (ed.) (2008) 240&241.
[723] *Oracle Corp. v PeopleSoft Inc.,* No. 20377 (Del. Ch. Sept. 8, 2004) and Baker and Shapiro in Pitofsky (ed.) (2008) 242. See also Millstone & Subramanian (2005) *Harvard Negotiation Law Review*, Forthcoming.
[724] Baker and Shapiro in Pitofsky (ed.) (2008) 239.
[725] See Department of Justice and Federal Trade Commissions Horizontal Merger Guidelines 1992 (revised 1997)
[726] Above Guidelies section 4.

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management, or capital cost are less likely should not be cognizable for merger analysis.[727]

The primary source of the Post Chicago wind is not quite agreed, but it is difficult to not see the political economy at play. Antitrust policy as a political issue diminished over the past antitrust cycle but the policy debate has been re-ignited in the political arena.[728] The public is angry over the record taxpayer bailouts extended during the 2008 Global Financial Crisis and increasing wealth inequality.[729] An accusing finger is pointed at Chicago merger policies for allowing firms to become "too-big-to-fail" at the cost of the public.[730] Calls have been increasing for stronger antitrust enforcement as a means of revitalizing the economy. Definitely, the apparent evolution in economic thought has made its contribution. As economic theory develops and new empirical tools are created, antitrust interpretation evolves. Hofstadter puts it down to scholarly rivalry.[731] The courts too have been credited with "keeping the law before economics".[732]

Whither next for antitrust, only time will tell. Piraino commented in 2007 that antitrust analysis in the United States is "poised at a critical tipping point between the Harvard and Chicago Schools."[733] The calls by and large are for a return to stricter antitrust. The direction of the imminent change cannot be told with exactitude. But for a fact, jurisdictional circumstances will point out the path as they have done before.[734] Stucke posits that the new policy cycle, like those before it, will be defined by three fundamental questions: what is competition, what are the goals of competition law and what should be the legal standards to promote these goals?[735] The new movement he says, is likely to go in the opposite direction of the contemporary one. He posits that over the next thirty

[727] Above Guidelies section 4.
[728] Stucke (2010) *University of Tennessee Legal Studies Research Paper* No. 135 at 6.
[729] Stucke above. The Emergency Economic Stabilization Act of 2008, was passed by the United States Congress in the midst of the financial crisis of 2007–2008. The law created the Troubled Asset Relief Program to purchase distressed assets from financial institutions. Protests against the proposal took place in cities across America. See for instance https://money.cnn.com/2008/09/25/news/economy/bailout_protests/ (accessed 12/18/2019). See generally Block CD "Measuring the True Cost of Government Bailout" 2010 (88) *Washington University Law Review* 149.
[730] Moosa I "The Myth of Too Big to Fail" (2010) 11 *Journal of Bank Regulation* 319–333; Ioannou S, Wójcik D and Dymski G "Too-Big-To-Fail: Why Megabanks have not become smaller since the Global Financial Crisis" (2019) (31) 3 *Review of Political Economy* 356-381 and Stern GH and Feldman RJ "Too Big to Fail: The Hazards of Bank Bailouts" (2004).
[731] Hofstadter R *The Paranoid Style In American Politics* (1965) 188 and Kauper in Pitofsky (ed.) (2008) 159.
[732] Kauper in Pitofsky (ed.) (2008) 159.
[733] Piraino (2007) 82 *Indian Law Journal* at 345.
[734] Stucke (2010) *University of Tennessee Legal Studies Research Paper* No. 135 at 2.
[735] Stucke above.

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years, the goals of competition law will broaden to include political, social, and ethical concerns.[736] If this be true, we will have come full circle.

2.5 CONCLUSION

The trends in interpretation and enforcement of American antitrust support the argument that there is no archetype for the object(s) of competition law. The law has transformed in preferred outcomes to cater for the exigencies of each socio-economic era. The connotation of ideal competition has not been a constant one. Contemporary Western practice construes the enforcement of competition law as a process whose outcome is economic welfare. This is a change from half a century or so ago when economists equalled competition to rivalry.

As indicated, Ezrachi makes the point that there is no purity to competition law goals. He further adds and that the nature of competition law is that of a sponge into which the influences of the dominant social, economic and political preferences may be instilled. This quality of the law makes it pervious to objectives that are jurisdiction relevant.

Competition law is viewed either as a positive intervention or a negative intrusion, depending on which side the subject of its intervention is speaking from. The varied reactions to the European Commission's 2017 decision, penalising Google for abuse of market dominance is an illustration of that reality. On the one hand, the decision is viewed as a penalisation of hard work and innovation while on the other, a laudable protection of the right of direct competitors to a fair opportunity to compete.

Modern competition law originated with the enactment of the American Sherman Act in 1890, in the backdrop of the industrial revolution. Antitrust law was so named because the Sherman Act was essentially intended to rein in trusts, powerful corporate monopolies that dominated manufacturing and mining. The Law was seen as a charter of economic liberty to safeguard economic and political liberalism. The Clayton Act was additionally passed in 1914 to regulate mergers and acquisitions whose effect may substantially

[736] Stucke (2010) *University of Tennessee Legal Studies Research Paper* No. 135 at 6. Stucke argues that going forward, antitrust scholarship will increasingly emphasize the normative foundations of competition law.

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lessen competition or tend to create a monopoly. These two Acts and the Federal Trade Commission Act 1914 constitute the core of American antitrust.

Competition law spread from the United States as typically as a body of rules set up to safeguard and support markets where vigorous fair competition results in the most effective allocation of economic resources. The concept of market failure is used to confine operation of the law to activities that are actually or potentially injurious to competition, and away from otherwise legitimate business behaviour. Conventional competition law proscribes anticompetitive agreements, abuses of market power and anticompetitive mergers.

Competitors may need to collaborate in order to achieve the benefits of leveraging on economies of scale and scope. Differently, collusive agreements may be intentionally designed for unscrupulous purposes such as elimination of competition. A distinction is therefore made, between agreements that reduce competition and those that, on a balance, enhance it. Arrangements such as price fixing, bid rigging, market allocations, group boycotts and tying arrangements are considered so egregious that they are prohibited *per se* without further analysis into their effect. Others such as restraints in the supply chain and exclusive dealing are treated to a rule of reason inquiry that requires a deeper analysis to weigh up the harms and benefits of the conduct in question before making a determination.

A monopoly or dominant status is?? not illegal by definition. What is prohibited is the abuse of the power such a status confers. A dominant firm can act independently of competitors and customers and use its power to lock out effective competition. Jurisdictions provide for thresholds or market share to determine if a player is a monopoly or has dominance.

Regulation of mergers is aimed at forestalling creation of entities that have incentive and ability to exercise market power either unilaterally or through coordination, thereby safeguarding the competitiveness of the relevant market. The fundamental concern is whether the merger under scrutiny will enhance or diminish economic performance of the market. Pre-merger notification requirements make it possible to analyse proposed

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mergers before they can be effected and thus prevent the need for potentially ineffective "unscrambling of the eggs."

Mergers are divided into horizontal, vertical and conglomerate mergers. Horizontal mergers present the greatest competition concerns by virtue of their capacity to directly concentrate economic power. Vertical mergers may be beneficial if savings from synergies and efficiencies are passed on to consumers. Conglomerate mergers raise the least competition concerns and tend to be treated as innocuous.

Analysis of mergers involves a counterfactual comparison to assess the status of competitiveness in the relevant market(s) prior to and after the merger. Agencies largely apply the Small but Significant and Non-transitory Increase in Price test (SSNIP), also known as the Hypothetical Monopolist Test. The structure of the market and potential impact of the transaction on it is assessed by appraisal of the pre-merger market structure and concentration. The Herfindahl-Hirschman index (HHI) is the commonly accepted tool for measuring market concentration. It operates on the premise that industry behaviour strongly correlates with industry structure. Subsequently, the larger a firm is within a market, the more likely it is to engage in anticompetitive conduct. If the post-merger market structure raises no concern, the transaction is usually not analysed any further.

Two analytical approaches are commonly applied to establish whether a merger will enhance or diminish the performance of a market. In the substantive lessening of competition test, the question is whether the merger is likely to cause substantial lessening of competition in the market. For the dominance test, the question is whether the merger will create or strengthen a dominant position in the market. The choice of test is often a consequence of history, economic size, industrial advancement or geographic location of the country concerned. There is in fact little difference in the outcome of merger reviews conducted using either test but jurisdictions have increasingly moved towards the substantial lessening of competition test. On the whole, mergers pose little or no threat to competition and up to ninety-five per cent of all mergers assessed in the United States are found to be benign.

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Possible resultant efficiencies are taken into account and measured against anticompetitive effects of a merger where both exist. Efficiencies may be assessed as part of the first tier of analysis or as a defence to a finding of anti-competitiveness. Public interest concerns such as the effect of the merger on employment may be taken into account.

The error cost framework which requires that assessment be more ready to err on the side of false positives contrary to false negatives, is commonly accepted. The cost of declining a merger that would have had a beneficial effect on the market is considered higher and less desirable than that of approving a harmful merger, which market forces are taken to be capable of counteracting.

Options available after analysis are either structural, which includes prohibition of the merger in its entirety, dissolution in the case of a consummated merger and ordering divestiture to remove the anticompetitive effects of a merger, or behavioural remedies in the form of orders to direct the conduct of the merged firm and prevent anticipated anticompetitive effects. Behavioural remedies are less effective due to the difficulty of monitoring implementation.

The effects of mergers and acquisitions are particularly significant in a developing country. Mergers enable firms to engage in efficient consolidation and increase productivity, thereby increasing their contribution to economic growth. However, they also provide a means for large multinationals to enter developing country markets. These bigger firms may present unequal competition to domestic corporations. Moreover, studies have shown that merging does not guarantee efficiency and only a low percentage of merged firms actually perform better than previously.

While the generally agreed goal of competition policy is maintaining ideal conditions for effective competition, the connotation of competition is usually subjective, being a direct consequence of the domestic environment. The traits of stability, purity and predictability are not inherent in competition law. Instead, according to Ezrachi, competition law is vulnerable to capture by the interests of principal groups that are invested in the outcomes of enforcement. For developing countries, the dominant concern tends to be whether

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competition law goals are flexible enough to adapt to their different jurisdictional setting. A specific concern is usually whether non-economic public interest considerations can be accommodated in competition law, especially in merger analysis.

Though the concept of the normative goals of competition law is of little practical importance in enforcement practice, balance and rationality of the law are dependent on settling the question of what the point of the law is. According to Bork, competition policy cannot be made rational without a firm answer being given to the question of the goals of the law. Articulation of measurable and transparent objectives increases accountability and consistency of decisions. Since most developing countries have nascent competition law regimes, they lack accumulated jurisprudence upon which to base enforcement. As such, they need clearly formulated goals for accurate decision making.

The dichotomy on the goals of competition law can be framed in two questions. The first is whether enforcement should seek enhancement of competition through decentralised atomistic market structures or maximization of consumer welfare through increased efficiency without concern on the number of competitors in the market. This effectively is a means-end dichotomy. The point in issue is whether what is to be safeguarded is the process of competition or its outcome. The process focused model, also known as the structure-conduct-performance approach, focuses on the functioning of the market and presumes that firms with market power will most likely act anti-competitively. Therefore, competition law should be used to secure an environment that fosters markets with many active players. The outcome focused model focuses on the optimal distributional benefits competitive markets supposedly yield. The primary concern should be the outcome of business conduct regardless of the size and number of players in the relevant market. Intervention in markets should be minimal.

The second question is whether the goals of competition law are purely economic or whether non-economic goals such as protection of small and middle size enterprises, poverty alleviation and safeguarding of employment are relevant. Adoption of competition law by developing countries has given fresh impetus to this facet of the debate. They argue that it is unwise to overlook the reality that markets function within social and

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political contexts. Application of the law should yield results that are useful to the needs and ideals of society.

The goals divide plays out most conspicuously in merger control. Mergers have played a central role in the goal trends throughout the seasons of American antitrust. Globally, merger regimes promote a diversity of policy goals. In the developed West, the concerns of merger review are purely economic. In the developing world, the mandates applied, though cognisant of the orthodox economic focus of competition law, are nonetheless sensitive to industrial and social policy considerations.

The trends of American antitrust enforcement from inception of the law to date have been driven by a triad of government policy, dominant economic philosophy, and the judiciary's perception and interpretation of the law. The most significant of the three elements has been the political. The Sherman Act was a political tool from its inception with the statute being intended as an instrument to rein in trusts and check the amalgamation of economic power that could threaten the political arm. Implementation of the Act was similarly political. Successive political regimes deployed the law to achieve pre-determined goals. Allocation of resources for enforcement, appointment of antitrust officials and Supreme Court Justices, are among tools used for political ideology to influence the outcomes of enforcement.

Competition law receives executive support because of its value in advancing not so much economic but political objectives. This position pertains in jurisdictions beyond the United States. An example is in the case of the European Union where protecting and entrenching the common market underlies enforcement.

Economics is not a value-free science and analysis may evolve when applied to a different market reality and political context. An illustration is the mutable connotation and scope of terms used in economic analysis. The meaning assigned to terms such as "consumer welfare" and "efficiency" varies with context. Hovenkamp points out that antitrust has seldom suffered from a shortage of economic theories suggesting why certain behavior should be unlawful. Varied economic theories have been part of antitrust discourse and

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significantly influenced trends in antitrust policy. Extensive judicial reliance on economic theory has institutionalised the link between economics and law.

Competition policies are built on the normative judgments of legal and enforcement institutions. Decisions of courts have been based on the courts' and enforcement agencies' vision of what the economy ought to be. Fox, while tracing judicial approaches to antitrust from late 19th Century to date, characterises them as a war of philosophies on competition policy.

The trends in goals of enforcement of competition law generally are a consequence of external impetus. This supports the argument that what a jurisdiction pursues with its merger analysis should be appropriate for the stage the jurisdiction is at and dictated by its prevailing economic circumstances. United States merger regulation has experienced a significant transformation of goals pursued with little modification of the underlying statute. The weight given to market concentration by federal courts and antitrust agencies has declined from the 1960's presumption against size and ubiquitous use of the doctrine of incipiency, to a more flexible antitrust that accommodates much higher levels of concentration.

The competition laws of other jurisdictions typically take the template of American antitrust. Though today marked differences exist between antitrust and the European Union's competition law, antitrust had a considerable influence on the development of the latter. To date, many competition law cases in the Union are resolved in much the same way as an analogous American case would be. Developing economies have tended to borrow their law from a combination of the competition law regimes of the United States and the European Union. The goals pursued under antitrust are likely to be replicated in these jurisdictions.

At the dawn of antitrust, the Sherman Act was ineffective in halting the trend toward firms of larger scale and scope. In the first case presented to the Supreme Court under the Act, the Court declined to apply section 1 of the Act to sugar production and in so doing allowed a series of mergers that gave the Sugar Trust over 98 per cent control of the country's sugar refining capacity. It was not until 1904 that the Act was enforced to

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effectively forestall conduct in restraint of trade when the Supreme Court declared all mergers between directly competing firms a combination in restraint of trade subject to section 1 of the Act. The *per se* rule on monopolies was overturned in 1911 in favour of the rule of reason. The Supreme Court determined that mergers and other market combinations would be unacceptable only where the resultant enhanced market power reduced output or quality and occasioned higher prices.

This court's direction raised concern in Congress over what was considered "softening" of the law and an imminent further narrowing of antitrust by the courts. There was also fear that Big Business was becoming too big, raising the risk that control of money and credit gave it the power to plunge the nation into a financial crisis. The Clayton Act was passed in 1914 for stricter enforcement to avert that perceived risk. The Act went further than the Sherman Act and make illegal business practices conducive to formation of monopolies.

The shift from light to firm enforcement and back is attributable to adjustment of policy in step with the prevailing political nuances. At the time of passing the Clayton Act, strict enforcement was preferred in order to seal loopholes which could allow large corporations to engage in arrangements which increased concentration.

Antitrust was one of the defining issues in the 1912 election which was won by Woodrow Wilson on the ticket of firm antitrust. A period of reinvigorated antitrust enforcement followed and came to an end with the advent of the First World War. The enforcement approach of the time demonstrates the link between politics and economics, and antitrust. Firm antitrust was not compatible with Big Business having a free rein to support the war effort. The establishment preferred industry-government cooperation and discouraged strict application of the law. Court decisions reflected tolerance and successively narrowed down the competition agency's mandate. Broad market definitions were applied, which made findings of dominance less likely.

Post-war policy remained tolerant of consolidation, cooperation and associationalism. The rule of reason was preferred over the *per se* rule. Centralisation of economic power was necessary to support the contemporary needs of the country. Non-interventionism

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continued through the Great Depression when businesses were urged to cooperate and cartelise as part of national policy. The National Industrial Recovery Act (NIRA) stimulus plan of 1933 which installed controls on prices and output levels further entrenched the non-interventionist approach. The Robinson-Patman Act was passed in 1936 to shield struggling firms from bigger rivals. National retailing chains were prevented from expanding at the expense of smaller stores by limiting their discretion in pricing. Further dilution of antitrust continued during the Second World War when Guidelines were issued for industry collaborations and pooling of small firms in order to support the war effort.

At the end of the War, arguments in favour of increased intervention in markets made a resurgence. It was contended that years of conservative antitrust had favoured the business class to a point that Big Business was powerful enough to present a challenge to legitimate government. A revival of antitrust laws followed, founded on economic theories premised on the dangers of bigness and importance of protecting small firms. Key among these were general economic principles on the relation between market structure and market performance. The first theory was that economies of scale were actually not substantial in most markets and consequently, many markets contained larger firms and were more concentrated than necessary for optimal productive efficiency. The second was that barriers to entry by new firms were very large and could easily be manipulated by dominant firms, and the third was that the non-competitive performance associated with monopoly occurred at relatively low concentration levels.

The structure-conduct-performance standard was advanced and influenced the direction of enforcement that followed. An industry’s structure, that being the number of firms in the market and their relative sizes, was said to determine their performance in that market. Structure determines conduct and in turn conduct determines market performance. The structure-conduct-performance paradigm was adopted by interventionist courts and led to an aggressive enforcement program. *Per se* rules made a comeback, rules for cooperation between firms were tightened, and possession of the power to control prices and curb competition was held to be illegal without more. It did not matter how a firm had become a monopoly, the offence was simply becoming one.

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The efficiencies associated with large-scale enterprises were downplayed by both the courts and economists. This reaffirmed the understanding of competition as rivalry and the law as intended to promote competition through perpetuating and preserving organization of industry in small units which can effectively compete with each other.

A 1948 report by the Federal Trade Commission predicted that giant corporations would presently take over the country and advocated urgent action to counter a rising tide of economic concentration through mergers. Congress responded by passing the Celler-Kefauver Act, also referred to as the Anti-Merger Act in 1950, to strengthen section 7 of the Clayton Act. The Act added vertical and conglomerate mergers as well as asset or stock consolidations which fell short of creating dominance, to the list of possible antitrust violations.

Merger enforcement was used to maintain markets in the ideal state of many small and viable businesses. Mergers leading to very low market shares were barred on account of the incipiency doctrine under which a merger could be precluded on grounds of apparent inclination toward concentration. Efficiency claims were regarded as irrelevant and at times weighed against approval of the merger. In 1967, the Supreme Court blocked a conglomerate merger in part because it was established that one of the merging parties would become more efficient post-acquisition. Vertical mergers were treated to the same standard of incipiency. Non-concentration considerations such as apparent lack of a competitive culture were applied to preclude mergers and social and political considerations were taken into account in analysis.

By the end of the 1960s, there was concern that the law had become too interventionist to the detriment of markets. The notion that big was always bad was challenged by economists, economically trained lawyers and academics, mostly at Chicago University. Chicago thought argued for examination of business conduct from an economic point of view excluding political and social values. It endorsed a non-interventionist approach towards the conduct of Big Business, particularly in merger control. Free markets were stated to be the best means of achieving efficiency, innovation and therefore competitiveness.

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Robert Bork's 1978 book 'The Antitrust Paradox: A Policy at War with Itself' was seminal in turning enforcement from the structure-conduct-performance paradigm towards today's consumer welfare. According to Bork, Congress' purpose in passing the Sherman Act was to prevent trusts and certain other business forms from acquiring monopoly or market power which would give them the ability to artificially raise prices and restrict output, thereby harming the consumer. The ultimate concern was for consumer welfare. Bork further argued that unless there was harm to consumer welfare, intervention in markets was unjustified. The argument supported a lenient approach to mergers and acquisitions, especially vertical integrations.

In the mid-1970s, stronger American firms were needed to effectively compete in the global arena. This reinforced the case for a non-interventionist antitrust. President Reagan's policy of minimalist government and deregulation of domestic markets further supported the rise of Chicago thought on antitrust. Antitrust responded to circumstance and priorities of the season as it had done in previous eras. Harvard's structure-conduct-performance paradigm was replaced by the more benevolent Chicago approach. Merging firms could raise the defence of ease of entry in their support as well as rebut the structural presumption by showing the idiosyncrasies of the relevant market.

By 1990, the applied approach favoured scrutinising the totality of relevant circumstances. Market concentration was no longer the key determinant in evaluating horizontal mergers. Efficiency justifications would be accommodated. Today, antitrust laws have the single end of maximizing economic efficiency for consumer welfare.

Post Chicago ideology criticises Chicago enforcement for excesses of under-enforcement based on the assumption that free market mechanisms will cure market imperfections. The acceptance of increased risks of concentration for the prospect of future efficiencies and innovation is seen as problematic. Chicago's enforcement that is generous to the private sector analysis, is accused of chilling competition. Its merger policies are accused of having allowed firms to become "too big to fail" at the cost of the public. Calls have been increasing for stronger antitrust enforcement as a means of revitalizing the economy.

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Stucke posits that antitrust analysis is poised at a critical tipping point between the Harvard and Chicago Schools. Like the preceding ones, the new policy cycle will be defined by the three fundamental questions, namely: what is competition, what are the goals of competition law and what should be the legal standards to promote these goals? The new movement is likely to go in the opposite direction of the contemporary one and Stucke's view is that over the next thirty years, the goals of competition law will broaden to include political, social, and ethical concerns.

The ends of antitrust are not cast in stone. There is a close link between politics, economics and the law. Competition is the best general process for optimizing market efficiency. It is also a tool for equity, letting in new players and rewarding innovators while weeding out the inefficient. It spreads income and wealth widely by prohibiting monopoly for the few. Competition enlarges freedom of choice for citizens and foster overall economic progress. Sustenance of these benefits requires an effective competition law regime that is enforced consistently and competently. The goals of that law are mutable and often an outcome of jurisdictional priorities.

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CHAPTER 3

DEVELOPING COUNTRIES AND COMPETITION LAW GOALS

3.1 Introduction

3.2 The push to converge

3.3 Aligning developing country merger analysis to context

3.4 Conclusion

3.1 INTRODUCTION

> "[T]here is little value in debating how different economic conditions in different countries compel differences in competition law. The competition laws of all nations should in principle be identical. . . Maximizing competition . . . even [if] at the expense of some members of the citizenry, will increase the wealth of the country more generally."[737]
>
> George Priest - The absolutist view

> "[W]e argue that the basic goal should be to help make the markets work for the good of the people. The overarching goal should be seen as efficient inclusive development. Fairness need not be irrelevant. . . Protecting against significant unjustified exclusions . . . is a fair and economically sound objective."[738]
>
> Michal Gal & Eleanor Fox - Drafting competition law for developing jurisdictions

Whither developing country competition law? What outcomes for merger regimes? Is it maximizing competition or inclusive development? Does inclusive development, if that be an appropriate outcome at all, mandate prioritization of pre-ordained groups and their interests in enforcement? Is not that itself anticompetitive? These are questions those who envision and draft these countries' competition laws must grapple with and settle.

[737] Priest GL "Competition Law in Developing Nations: The Absolutist View" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Priest in Sokol et al. (eds.) (2013) 79 and 84.
[738] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper at 37-38.

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And after them, those who bear the task of enforcement must adopt and give effect to the model of enforcement most aligned to what the drafters intended.

Developing countries, most of whom adopt their competition law virtually wholesale from established Western jurisdictions, soon enough find themselves nudged in the direction of the donor's objective policies as well.[739] On the grand scale, the increased global incidence of competition law has been characterised by a resolute push towards convergence of general principles and themes.[740] Pressure to conform is not only from donating jurisdictions but also from supra-national bodies, such as the United Nations Conference on Trade and Development (UNCTAD), the ICN and the OECD. Some of these have 'good policy settings' and 'indicators' for members to adopt.[741] More usually than not, the convergence call is a prod towards the welfare model with its focus on efficiency outcomes. This 'magic bullet' is ostensibly assured to facilitate the economic growth that developing countries very much need. We seek here to examine the nature of this call and its rationality, or the lack thereof. It is not our intent, however, to sail out into the sea of the convergence discourse.[742] Not when, for our purposes, it would suffice to remain on the shores, concerned as we are only with substantiating that competition law goals must be jurisdiction specific. And further that there is merger regime aligned for the purposes of the developing jurisdiction.

Waked points out that when developing countries adopted Western-inspired legislation, they ended up with the latest versions of such legislation. Decades of evolution during

[739] See Chapter 2 par 2.1 and Gal MS and Padilla AJ "The Follower Phenomenon: Implications for the. Design of Monopolization Rules in a Global Economy" 2010 76(3) *Antitrust Law Journal* 899 at 900 where the authors indicate that this can be exemplified by the merger regulation adopted by most jurisdictions, which follows the *ex ante* notification and authorization regulatory model first applied in the United States via Hart-Scott-Rodino Antitrust Improvements Act of 1976.

[740] Fox & Trebilcock (2012) *New York University Law & Economics Working Papers* 75. See also Dabbah (2003) 5. For detail on convergence see generally Duns et al. (eds.) (2015) and Terhechte (2009).

[741] Among the international bodies, UNCTAD especially has been 'more adroit than most' of its peers in adapting laws to its receiving jurisdictions. Whish WR and Townley C "Introduction" in Whish WR and Townley C (eds.) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (2012) 2. Kenya's Competition Act 2010 is one such example being virtually made up of proposals from a voluntary peer review of the country's competition law and policy carried out by UNCTAD in 2005. United Nations Conference on Trade and Development "Voluntary Peer Review on Competition Policy: Kenya" 2005 hereinafter UNCTAD (2005) 61. For justifications, approach and strategy used to achieve convergence see Hollman HM, Kovacic W and Robertson S "Building Global Antitrust Standards: The ICN's Practicable Approach" in Ezrachi A (ed.) *Research Handbook on International Competition Law* (2012) hereinafter Hollman et al. in Ezrachi (ed.) (2012) 90-93.

[742] So much has been written over the years on this matter that we feel it justified to consider it a sea. A small sample of writing the last four years includes: Gerber (2017) available at https://ssrn.com/abstract=2987002 (accessed 07/07/2017; Kent B "Is Full Transatlantic Competition Law Convergence Realistic, or Even Desirable?" (15 December 2015) (2015) available at https://ssrn.com/abstract=2713994 (accessed 17/07/2017; Hou (2015) available at https://ssrn.com/abstract=2586859 and Gerber DJ "Global Competition Law Convergence: Potential Roles for Economics" in Eisenberg T and Ramello GB (eds.) *Comparative Law and Economics* (2016) hereinafter Gerber in Eisenberg & Ramello (eds.) (2016).

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which policy had been transformed to coincide with locally changing circumstances were either glossed over or not taken into account.[743] In their current state, the adopted laws assume the existence of markets with large numbers of participants, absence of natural monopolies, fully rational economic agents and governments equipped with means to effect redistribution.[744] These are set-ups in which interaction of the market with competition law results in efficiency and increase in consumer or total welfare.

Developing economies are of course far removed from this ideal world. Their lot is one of markets plagued by significant failures, natural monopolies, free riding or collective action problems and worst, high levels of concentration reinforced by equally prohibitive barriers to entry.[745] It would be foolhardy to expect the application of a policy outfitted for the prior described markets to deliver the self-same outcome when applied in the latter. Maybe what is needed is a slanting of policy towards a different but equally desirable outcome - one that suits the political economy.

This chapter is set out in the following manner: First, we consider, the experience of the developing county that adopts competition law in order to reveal the pressure that is brought to bear on these jurisdictions while at the same time revealing the soft underbelly of the convergence argument. While at this, we can explicate the 'why not' of the welfare model. Secondly, we will pore over the political economy of developing countries generally and use what we come up with to locate the most appropriate and pragmatic goal(s) of competition law for such nations. With the best-fit object established, we will move to directly address the nature of the merger analysis that would resonate best with the identified object(s) and how that analysis should pan out. Our deductions in the tail-end of the chapter will comprise the undergirding for the remainder of this thesis.

3.2 THE PUSH TO CONVERGE

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[743] Waked DI "Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges" 2016 12 *Journal of Law Economics and Policy* 193 hereinafter Waked (2016) 12 *Journal of Law Economics and Policy,* at 217.
[744] Waked above at 218.
[745] Gal MS The Social Contract at the Basis of Competition Law "Should We Recalibrate Competition Law to Limit Inequality?" in Gerard D and Lianos I (eds.) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2017) 3.

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3.2.1 Introduction

History has proven that the one and only road to improving the living standards of citizens of nations is putting in place institutional structures that encourage entrepreneurial activity, continuous innovation and market driven change.[746] A core support to such structures is an effective competition policy backed by economy-wide enforcement of rules that deter anticompetitive practices.[747] During the past 20 years, many countries have heeded this wisdom, adopted competition laws and begun to enforce them.[748] In the 1970s, precious few countries, the majority of them in the Western hemisphere, had competition law regimes. This number grew to about 20 in the 1980s, jumping to the current over 130, in 2019.[749] Not remarkably, the bulk of new competition law regimes have been in the developing world. More than half of the world's developing countries now have a law that prohibits certain anticompetitive activities and regulates the markets.[750] Over 20 African countries boasted of national competition laws at the end of 2018, the latest being Ethiopia[751] and Mozambique.[752] As 2018 drew to a close, Nigeria, Angola, Djibouti, Ghana, Liberia, Republic of Congo and Uganda were all on the path towards adopting competition legislation.[753] Nigeria's Federal Competition and Consumer Protection Act was signed into law in 2019, establishing the Competition Commission and Competition Tribunal to enforce the legislation and in Angola the Angolan Competition Regulatory Authority became operational in December 2018, following the earlier

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[746] See chapter 2 par 2.2.1; Kates S *Free Market Economics: An Introduction for the General Reader* (2017).
7 and OECD (2007) Competition and Barriers to Entry *Policy Brief* (January 2007) hereinafter OECD (2007) Competition and Barriers to Entry available at https://www.oecd.org/competition/mergers/37921908.pdf (accessed 13/19/2019) 3, 5 and 6. Available at https://www.oecd.org/edu/ceri/40908171.pdf (accessed 18/07/2018). For the role of innovation in long term growth see Kraemer-Mbula E & Wamae W (eds.) "Innovation and the Development Agenda" (2001) available at https://www.idrc.ca/sites/default/files/openebooks/501-4/index.html (accessed 23/10/2018).
[747] Mehta PS "Introduction: Competition Law in India" in Mehta PS (ed.) *Towards a Functional Competition Policy for India* (2006) 26 and Kitzmuller M & Licetti M "Competition Policy: Encouraging Thriving Markets for Development" 2013 ViewPoint Public Policy for the Private Sector Series, No 331, The World Bank Group, Washington D.C 1. Available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf (accessed 3/10/ 2016.
[748] Waked (2016) 12 *Journal of Law Economics and Policy* at 195,193-230 & Table A.1 at 225; Evenett J "Competition Law and the Economic Characteristics of Developing Countries" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) hereinafter Evenett in Gal (ed.) (2015) at 14.
[749] Membership of the International Competition Network (ICN) gives a close indicator of the actual number. As at Juy 2017, membership comprised 132 member agencies from 120 jurisdictions, 16 of which are from Sub Saharan Africa. The list of current membership is available at https://www.internationalcompetitionnetwork.org/members/?location=africa (accessed 13/07/2019).
[750] Waked (2016) 12 *Journal of Law Economics and Policy* at195. See 195-197 for the pattern of adoption of over the last decade.
[751] Trade Competition and Consumers Protection Proclamation (813/2013).
[752] Competition Law 10 of 2013.
[753] The Nigerian National Assembly passed Federal Competition and Consumer Protection Bill in late November 2017 and it received Presidential assent in February 2019. The other listed countries are yet to conclude on the process of passing the relevant legislation.

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enactment of the Competition Act in May 2018.[754] The remaining countries are still at various stages of progress towards competition legislation.

There is probably today, greater global consensus on the value of competition, competition law and free markets than there has been at any other time in the history of human economic behaviour.[755] What this apparent unanimity masks is an undercurrent of dissent over the legitimate objectives, enforcement priorities and methods of implementation of the law. The contention, peeled back, reveals a more fundamental question: should the newcomers depart from the template of competition policy that is adhered to by most industrialised countries?[756] This query has been the theme of many a conference, symposium and workshop; and motivated volumes of scholarly material.[757] The new "dialogue of the deaf" has protagonists addressing each other "from within their various intellectual silos".[758] On the one hand are practitioners and officials from industrialised countries advocating espousal of economic efficiency as the sole objective of competition law, sceptical of attempts to bring non-efficiency-based objectives, such as poverty reduction, into competition law.[759] The bulk of the non-economic objectives adopted by developing countries, they say, are "unfit for inclusion into competition law, vague and difficult to operationalise".[760] Across the room are experts and officials from these countries, frustrated by what they see as the narrowness of an efficiency objective and insistent that competition law must be put to the service of not just economic but also social development.[761] They root for organic goals that are country-specific and respectful to political and economic history. This, they argue, is indispensable for valuable buy-in

[754] Angola Competition Act approved by Law No. 5/18 of 10 May 2018 and the Regulatory Authority by Presidential Decree No. 313/18 of 21 December 2018.
[755] Whish & Bailey Competition Law (2018) 19 and Waked (2016) 12 *Journal of Law Economics and Policy* at 204.
[756] Budzinski & Beigi (18)1 *Ilmenau Economics Discussion Papers* at 2-3.
[757] For some current reading see Aydin U and Büthe T "Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits" 2016 (*79) Law and Contemporary Problems* 1 hereinafter Aydin & Buthe 2016 (79) *Law and Contemporary Problems at 1* and Fox EM "Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries" in Drexl J, Bakhoum M, Fox EM, Gal M and Gerber J *Competition Policy and Regional Integration in Developing Countries* (2012) hereinafter Fox in Drexl et al. (2012).
[758] Evenett in Gal (ed.) (2015) at 16 and Sokol et al. in Sokol et al. (eds.) (2013) 5.
[759] Evenett in Gal (ed.) (2015) at 16 and 17.
[760] Keynote address by Edith Ramirez, Chairwoman Federal Trade Commission, at Antitrust in Asia Conference, Beijing, China, 22 May 2014 "Core Competition Agency Principles: Lessons Learned at the FTC - Keynote Address at the Antitrust in Asia Conference" available at https://www.ftc.gov/public-statements/2014/05/core-competition-agency-principles-lessons-learned-ftc-keynote-address (accessed 23/02/2019).
[761] Singh (2014) *University of Cambridge Working Paper No. 460* at 5.

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from the public. Ignoring the socio-economic and political environment of competition law would be sounding the death knell for this form of economic regulation.[762]

And so goes the back and forth argument. In the meantime, the "goals of competition law" continues to remain as elusive a concept as ever, more so for the developing country.[763]

3.2.2 The convergence call

The term "convergence" can be vague and misleading.[764] In competition law parlance, it is often applied loosely to refer to the reduction of differences. Often, however, there is no revelation of which specific differences are referred to and in which ways it is perceived that they are to be reduced.[765] The meaning that we use here, as pointed out by Gerber, refers to a reduction of the distance between individual points and a central point.[766] The central point is a competition law model with a particular set of characteristics applied with a view to certain ends. Typically, this prototype is Western and convergence is the process that leads other systems to increasingly resemble that model, not just in terms of the letter but also of the spirit of the legislative framework. Norms, substantive standards, procedures and institutional capability are part of this.[767] To put it in another way, it is the coming to a coherence of general competition law principles, goals and themes across jurisdictions to be in tandem with those of developed jurisdictions.[768]

"Convergence" settled, we must too establish what 'developing country' will refer to for our purposes. If membership of the OECD is anything to go by, over three quarters of the world are developing countries.[769] In most contexts, however, economic development

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[762] Waked (2016) 12 *Journal of Law Economics and Policy* at 217.

[763] Joelson (2017) 10 and Gal MS and Fox EM "Drafting Competition Law for Developing Jurisdictions' in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) hereinafter Gal & Fox in Gal et al. (eds.) (2015) 323.

[764] Gerber DJ "Convergence in Competition Law and Development" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Gerber in Sokol et al. (eds.) (2013) 14 and Gerber in Eisenberg & Ramello (eds.) (2016) 207. On the future of convergence and impact of recent developments including Brexit and ascent of nationalistic movements see Gerber DJ Competition Law: Convergence in Uncertainty: Are We Where We Thought We Were? 2017. Available at https://ssrn.com/abstract=2987002 (accessed 07/07/2017.

[765] Gerber in Sokol et al. (eds.) (2013) 14.

[766] Gerber in Sokol et al. above.

[767] ICN's Vision for the Second Decade (2011) at 6 available at www.internationalcompetitionnetwork.org/uploads/library/doc755.pdf. (accessed 22/03/2017) and Gerber in Sokol et al. (eds.) (2013) 15. See generally William Kovacic, paper based upon a presentation given at the Annual Meeting of the American Society of International Law, Washington, DC, 5 April 2003 "Extraterritoriality, Institutions, and Convergence in International Competition Policy" https://www.ftc.gov/system/files/documents/public_statements/303671/031210kovacic.pdf (accessed 22/03/2017).

[768] Fox & Trebilcock (2012) *New York University Law & Economics Working Papers* 75 and Dabbah (2003) 5. For detail on convergence see generally Terhechte (2009) and J Duns et al. (eds.) 'Comparative Competition Law' (2015).

[769] http://www.oecd.org/about/membersandpartners/#d.en.194378 Has 35 members most of whom are high-income economies and are regarded as developed countries.

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continues to be primarily measured by per capita income levels. The most common definition of a developing jurisdiction is based on the test of the level of gross national income (GNI) per capita.[770] GNI simply is the measure of the gross domestic product (GDP) of a country, that is, the monetary value of all the finished goods and services produced within a country's borders in a specific time period, divided by the number of people in the country.[771] When this level is below a certain threshold, a jurisdiction is classified as developing.[772] The World Bank indicates that the current threshold captures almost half of the jurisdictions of the world, approximately two-thirds of the world's population and all sub-Saharan African countries.[773] There are other measures of economic development and GNI does have its limitations. Nonetheless, it remains the most widely accepted.[774]

The global convergence strategy is based on the fundamental assumption that a large number of countries outside the United States and Europe will voluntarily adopt the "Economics Based Model" conception of competition law.[775] Many components of this model are applied in European competition law.[776] The Economics Based Model relies on economics to provide the baseline values of the law and the standard for liability.[777] If conduct has particular economic effects such as raising prices above what is competitive, it constitutes a violation of the law. If the effects are non-economic, the law will not have

[770] Gerber in Sokol et al. (eds.) (2013) 13.
[771] Indig T and Gal MS "Lifting the Veil: Rethinking the Classification of Developing Economies for Competition Law and Policy" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) hereinafter Indig & Gal in Gal et al. (eds.) (2015) 55.
[772] Per the World Bank available at https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups (accessed 22/7/18. For the current 2018 fiscal year, low-income economies are defined as those with a GNI per capita, calculated using the World Bank Atlas method, of $1,005 or less in 2016; lower middle-income economies are those with a GNI per capita between $1,006 and $3,955; upper middle-income economies are those with a GNI per capita between $3,956 and $12,235; high-income economies are those with a GNI per capita of $12,236 or more.
[773] World Bank 'How We Classify Countries', available at http://data.worldbank.org/about/country-classifications (accessed 22/7/18
[774] Indig & Gal in Gal et al. (eds.) (2015) 55-57. See World Bank 'Why use GNI per capita to classify economies into income groupings'? https://datahelpdesk.worldbank.org/knowledgebase/articles/378831-why-use-gni-per-capita-to-classify-economies-into (accessed 22/7/18. The downside for choosing GNI per capita to allocate countries status includes its static nature that does not explore the sources and factors affecting the low level of productivity. Also GNI may be underestimated in lower-income economies that have more informal, subsistence activities. It does not reflect inequalities in income distribution. Other alternatives are such as Gross National Product (GNP) which measures the economic output of a given nation. Per Capital Real Income (PCRI) is a measurement of income which also factors in population. Physical Quality of Life Index (PQLI) is a measurement of the most basic needs of the people that factors in a wide range of indicators such as health, education, water conditions, nutrition and sanitation.The Human Development Index (HDI) is a quality of life index prepared by the United Nations Development Program. It is a composite index of life expectancy, adult literacy and years of schooling.
[775] Sokol DD, Cheng TK and Lianos I "Introduction" in Sokol DD, Cheng TK and Lianos I (eds.) *Competition Law and Development* (2013) 6.
[776] Gerber in Sokol et al. (eds.) (2013) 13.
[777] Gerber (2014) 3 available at https://ssrn.com/abstract=2426359 (accessed 19/06/2018).

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been violated. The Economics Based Model assumes dynamism and openness of markets, advances use of economic analysis in assessing market conduct, and argues for less intervention and more reliance on the self-correcting capacity of the market.[778]

Whatever the motivation, most developing countries now have competition legislation, complete with a merger regulation regime as well as an active enforcing authority.[779] But that is the easy part. Soon after the law settles in, these countries find themselves on the horns of a dilemma.[780] They need policy that fits their context and yet crave for the gains that come with integration into today's world of interconnected markets.[781] At hand are foreign advisers urging for a system that relies on economic analysis to provide the normative bases of competition law.[782]

Merger policy is soon caught between two forces. As it happens, processes of merger review are key cogs in this standardisation wheel.[783] There is a "follower push", the benefit from transplanting and following the laws of large, developed jurisdictions with efficient and effective merger regimes. On the other hand is the "unique characteristics pull" whereby the individual character of a jurisdiction pulls it towards applying a merger regime in manner that best fits its characteristics.[784] Yielding to the "follower push" has its benefits, the most prominent being outcomes associated with standardisation such as investment-attraction, status enhancement, and cost minimization in cross-border transactions. Not to mention certainty of interpretation and sharing of academic discourse.[785] There are, in addition, content-based advantages of adopting a supposedly superior template. These are said to include rationality, neutrality, and predictability.[786] The Economics Based Model's narrowed-down scope means reduced burden and cost

[778] Gerber in Sokol et al. (eds.) (2013) 14.
[779] Waked (2015) 38 (3) *Seattle University Law Review* at 945; For reasons why DCs adopt Competition law see Waked (2016) 12 *Journal of Law Economics and Policy* at 193-230 and Khemani RS "Competition Policy and Promotion of Investment, Economic Growth and Poverty Alleviation in Least Developed Countries" (2007), *FIAS Occasional Papers* No. 19 at 31.
[780] Gerber (2014) at 2. Available at https://ssrn.com/abstract=2426359 (accessed 12/04/2017.
[781] The impetus for this campaign is the now inexorable globalisation and concomitant need for coordination in international trade, not to mention the virtually conventional membership in global competition bodies which prescribe 'best practice' for adoption by members.
[782] Gerber (2014) at 1. Available at https://ssrn.com/abstract=2426359 (accessed 12/04/2017.
[783] Kolasky (2004). *Wilmer Cutler Pickering Hale and Dorr Antitrust Series.* Working Paper 19 at 30.
[784] Gal MS "Merger Policy for Small and Micro Jurisdictions, More Pros and Cons of Merger Policy" 2013 (11) *Swedish Competition Authority's Pros and Cons Series* at 62 hereinafter Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series,* at 62-63.
[785] Gal & Fox in Gal et al. (eds.) (2015) 6-9 and 9-11 for challenges of convergence. Cheng TK "Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law" 2012 12(2) *Chicago Journal of International Law* 433 at 453-464 for detail on costs and benefits of convergence.
[786] Gerber in Sokol et al. (eds.) (2013) 15-26.

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of enforcement, itself an incentive to competitors to lower prices and improve their market offerings.[787] Use of the Economics Based Model is also said to encourage foreign direct investment.[788]

Thus a quandary is presented. Which motivation to respond to? Is it to enforce the law to produce results that are needed to cater for the special circumstances of a young economy? Or is it the need to go along with the long tried, tested and refined objective prototypes of larger developed jurisdictions? Meanwhile, the world community continues to churn out international shared legal standards for merger analysis, such as those establishing when a merger is anticompetitive.[789] Standards that are largely derived from the market conditions and needs of industrialised developed countries.[790] To this "follower push"/"unique characteristics pull" quandary, there are no easy answers.

The absence of crisp answers notwithstanding, Gal and Fox observe that the world view has slowly but resolutely been shifting in favour of informed divergence.[791] The presumption that the laws of developed jurisdictions necessarily fit the needs of developing jurisdictions is today considered problematic.[792] Instead, epistemic communities speak of a need to adopt a deferential view to competition in the developing world. Rather than transplanting blueprints from one jurisdiction to another, it is thought better to devise "recipe books that adapt the known techniques to different ingredients and maybe different tastes".[793] There is, however, a small minority who still advocate for

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[787] Gerber DJ "Adapting the Role of Economics in Competition Law: A Developing Country Dilemma" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) 250 and 251.
[788] Gerber above 248.
[789] See ICN Merger Guidelines available at http://www.internationalcompetitionnetwork.org/uploads/library/doc321.pdf (accessed 19/09/2017). The ICN states its mission to be as follows: "The ICN's mission statement is to advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide." And the mission of its Merger Working group as "The mission of the ICN Merger Working Group is to promote the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multijurisdictional merger reviews." At http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx.
[790] The ICN set of best practices for coordinating merger reviews released in 2002 was the result of a bilateral United States and European Union joint merger working group effort. See too Kolasky WJ "What is Competition? A Comparison of U.S and European Perspectives" 2004 (49) *Antitrust Bulletin* 29 hereinafter Kolasky (2004) 49 *Antitrust Bulletin,* at 29 and Fox in Drexl et al. (2012) 9. For justifications, approach and strategy used to achieve convergence see Hollman et al. in Ezrachi (ed.) (2012) 90-93.
[791] Gal & Fox in Gal et al. (eds.) (2015) 4.
[792] Gal & Fox in Gal et al. (eds.) (2015) and Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 27.
[793] Evenett in Gal (ed.) (2015) 30.

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convergence. One is Professor George Priest who puts forth an 'absolutist view'.[794] Priest does make an early admission that his work is intended to be provocative and to press opponents to more carefully articulate their arguments.[795] Nonetheless, his is something of a dissenting judgment and for that reason must be probed all the more scrupulously.[796]

In arguing against differentiation, Priest posits that modifying the law to suit local conditions exposes it to the risk of being overwhelmed by local political forces that could "erode its very core".[797] But we have established that competition law as a matter of fact has no core at all. If there is one, it is a moving target, constantly in motion. With antitrust, this target has shifted from taming of monopolies, to favouring efficiency in spite of size, on to engendering atomistic markets and then to protecting consumer welfare.[798] In the European Union, debate continues to rage over whether the core of the law is freedom to compete à la ordoliberalism, or consumer welfare à la the Chicago School's more-economic approach.[799] As for the matter of interference by local political forces, competition law has never been apolitical. Far from it. Antitrust has served interests of regimes and continues to do so, adjusting appropriately for the purpose. In the European Union, the political goal of integration easily trumps efficiency in the event of a conflict. By all means, the law must be shielded from being undermined by a corrupt political class all too often the bane of the developing country.[800] Still and all, it would be an exercise in futility to imagine that the foreignness of a law would insulate it from negative political manipulation. A better solution, we think, would be organically determining what the core of a law will be and then insulating it from erosion by malevolent local political forces using appropriate legal institutions and processes. Further, the standard international approach

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[794] Priest in Sokol et al. (eds.) (2013) 79.
[795] Priest in Sokol et al. (eds.) above at 79-80.
[796] "My experience teaches that there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation.' Ruth Bader Ginsburg in Ginsburg RB "The Role of Dissenting Opinions" 2010 95(1) *Minnesota Law Review* 1 at 3.
[797] Priest in Sokol et al. (2013) (eds.) 81.
[798] See chapter 2, pars 2.4.2-2.4.5.
[799] For a discussion see Marty F. (2015). Towards an economics of convention-based approach of the European competition policy. Historical Social Research, 40(1), 94-111 and Akman P "Searching for the Long-Lost Soul of Article 82 EC" (1 March 2007) CCP Working Paper No 5.
[800] Transparency International Corruption Perceptions Index 2018 virtually all the countries in the bottom 30 are in the Developing World. Available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table and at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 (accessed 23/09/2018). A World Bank survey of indicators of prevalence of different types of bribery in 139 countries again reveals that economies characterized with high corruption, are more likely to be in developing jurisdictions. Available at http://www.enterprisesurveys.org/data/exploretopics/corruption (accessed 23/09/2018).

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does leave some discretion for developing countries with restricted resources to develop their systems on the coat tails of others.

Priest's responses to his opponents reveal the soft underbelly of the convergence argument. Salamao, one such critic, calls attention to defining characteristics that he says should impact objectives of competition law in the developing world. This includes factors such as sluggish markets, high barriers to entry and expansion, an extensive informal economy, scarce human and financial capital and pervasive corruption. Not to mention legacies of colonialism, including the entrenchment of powerful elites with a stranglehold over the economy.[801] These, he says, mandate differentiation in implementation of competition laws.[802] Priest responds that these descriptive themes, while valid, do not decree differential competition or regulatory policies across nations. All countries, he says, suffer from the listed inadequacies to varying degrees.[803] Without doubt, this is true. But a more germane reality and one of greater impact, is that developed and developing jurisdictions are often so far apart that we can no longer speak of different levels - probably different worlds. It would be ill-advised to have Togo orientate its competition law towards the same ends as, say Denmark, on the basis that both grapple with scarce financial capital.[804] It is also beyond dispute that the episodes of colonial rule and, for South Africa, apartheid, left behind distorted markets.[805] The countries in which economic power is most concentrated are former European colonies in South America and Asia.[806] It should be possible for such countries to prioritise tackling of these high levels of concentration while also using the law to remedy the resultant inequities of years of distorted markets. Competition law removed from the realities of a jurisdiction is competition law made ineffectual.

[801] Salomao CF Antitrust, Regulatory Perspectives and Development" (2011) *The Journal of Regulation* 1 at 4 available at https://thejournalofregulation.com/en/article/i-11-antitrust-regulatory-perspectives-and-develop/ (accessed 1/4/2017.
[802] Salomao above.
[803] Priest in Sokol et al. (eds.) (2013) 83. For an apt response see Fox (2011) N*YU Law & Economics Research Paper Series, Working Paper No. 11-04* at 5-10.
[804] As an example, the GNI per capita for Denmark at 2018 was USD 61,260, Ghana USD 2,120 and worse placed Togo USD 880. Available at https://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=DK-GH-TG (accessed 1/02/2019).
[805] See generally chapter 3 par 3.2.
[806] Salomao CF Antitrust, Regulatory Perspectives and Development" (2011) *The Journal of Regulation* 1 available at https://thejournalofregulation.com/en/article/i-11-antitrust-regulatory-perspectives-and-develop/ (accessed 1/4/2017).

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To those concerned that conventional competition law does not deal with the distributional concerns so pertinent to developing economies, Priest recommends the path of stoicism. Maximizing competition, says he, even at the expense of some members of the citizenry, will increase the wealth of the country more generally.[807] We find this argument to be unsustainable. Western jurisdictions, the United States and the European Union included, have in prior seasons engaged competition law for purposes of distribution as was deemed ideal at the time. A case in point would be the Celler-Kefauver Act and the Harvard days of atomistic markets.[808] Where circumstance so dictates, it is in order to engage the law to even out levels of inequality in the market and avail all comers a fair opportunity to compete. Merger analysis is a most apposite place for such a venture.

Professor Priest concluded with an observation that even the best-planned transplanted law can be brought down by serious institutional concerns such as corruption.[809] He does in fact further admit that there may be good reasons, idiosyncratic to a given culture, to depart from 'optimal competition law'.[810] We could not agree more. Peculiarities that influence perspectives on competition law must be taken into account.[811] Institutional, socio-cultural and economic realities of such countries must point us to the ideal competition goals. Legal transplants can be unsuccessful and even harmful if not configured in tandem with the special characteristics of the jurisdiction that applies such transplants.[812] Competition law that is purely focused on economic welfare and efficiency may not be ideal for a developing country.

Thankfully, the intellectual debate in the West as to the goals of antitrust is itself far from settled.[813] Had there been a consensus on record, it would have definitely been delivered along with the transplanted law.[814] The absence of unified clearly defined goals in the lead jurisdictions offers developing countries a chance to make a "political choice" on what outcomes to command from implementation of the law.[815] A further saving grace is

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[807] Priest in Sokol et al. (eds.) (2013) 84.
[808] See chapter 2 par 2.4.2
[809] Priest in Sokol et al. (eds.) (2013) 86.
[810] Priest in Sokol et al. (eds.) above at 75.
[811] See chapter 2 pars 2.5.3 and 2.5.4.
[812] Gal & Fox in Gal et al. (eds.) (2015) 303.
[813] Waked (2015) 38 (3) *Seattle University Law Review* at 948. See chapter 2 pars 2.1 and 2.3.
[814] Waked (2015) 38 (3) *Seattle University Law Review* at 949.
[815] Waked above at 948.

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that policy orientation can differ even with shared law.[816] Similar rules may yield different results.[817] Today's competition laws speak the increasingly similar language of economics yet that has not purchased for it a tension-free international landscape of enforcement.[818] Goal establishing reaches beyond the letter of the law to broader issues of interpretation; and interpretation of a rule may be contested.[819] We must therefore look beyond the shared letter of the law if we are to find the best-fit goals for merger analysis in the developing economy.

3.2.3 Discounting the welfare model

It may be all good to insist that jurisdictional particularities count for something and disparate countries should not be expected to coalesce around any pre-fixed model of competition law. To make a more concrete case, however, one must rationalise the "why not?", which we do next. While today efficiency is held up as the lodestar to which the developing world should fix the eye, it was in fact not the original established end of competition law. Jurisdictions whose contemporary law slants in the direction of efficiency all started off fixated elsewhere. Welfare is an acquired taste, so to speak, and developing countries would too, need time to acquaint with it.

A review of the history of competition law in a number of pioneering jurisdictions reveals that the actual reasons for adoption of competition laws were different from some sort of efficiency standard, as were the objectives that influenced their interpretation and enforcement for years that followed.[820] The law morphed, from a largely social policy to today's economic scheme. For one, America's Sherman Act was motivated by populist political concerns about Big Business. Monopolies in the form of trusts were able to, and did, charge high prices that were regarded as objectionable more on wealth-redistributive

[816] *Waked (2016) 12 Journal of Law Economics and Policy* at *193-230*
[817] Raslan AA "Public Policy Considerations in Competition Enforcement: Merger Control in South Africa" 2016 Centre for Law, Economics and Society (CLES) Research Paper Series 3/2016 hereinafter Raslan 2016, at 1.
[818] OECD (2003) The Objectives of Competition Law and Policy *Global Forum on Competition* hereinafter OECD (2003) The Objectives of Competition Law and Policy, pars 20–21available at https://www.oecd.org/daf/competition/2486329.pdf (accessed 16/03/2018); ICN (2007) The ICN Report 6 available at www.internationalcompetitionnet work.org/uploads/library/doc353.pdf (accessed 17/6/2017.
[819] Shahein in Whish & Townley (eds.) (2012) 35-36.
[820] Bhattacharjea A "Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis" in Sokol DD, Cheng TK and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Bhattacharjea in Sokol et al. (2013) (eds.) 53 and 54-60 for a historical comparative analysis.

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grounds rather than allocative efficiency grounds.[821] Not all agree with this view.[822] Granted, the language of the statute does not outrightly speak to wealth redistribution. Nevertheless, a fair reading of the legislative history of the Act suggests that it was dominated by two concerns: high prices and protection of smaller competitors from the emerging threat of large businesses.[823] Taking away the power to charge high prices reduces what a firm keeps as profits and puts it back in the hands of the consumer. That is redistribution. Trusts and monopolies were condemned because they "unfairly" extracted wealth from consumers; antitrust put that wealth back into the correct hands.[824] It is accurate then to say that the Sherman Act was passed to further economic objectives that were primarily of a re-distributive rather than an efficiency nature.[825] Congress passed the Act because it believed that trusts and monopolies possessed excessive social and political power and reduced entrepreneurial liberty and opportunity, concerns which were valid at the time.[826]

Through the last century, the motivation for enforcement of antitrust was multi-faceted, even contradictory. Concerns were not always economic. The merger statute was applied to equate competition to rivalry, sometimes at the cost of efficiency.[827] The Robinson-Patman Act was motivated by a bare need to protect small struggling retailers from large discount stores. The initial title of the Act, namely "Wholesale Grocers Protection Act', being a dead give-away.[828] The '"ailing-firm defence was born of a congressional desire "to protect the creditors, employees and shareholders of failing companies, if necessary

[821] See chapter 2 pars 2.2.1 and 2.4.1 Most of the legislators whose votes were essential to the enactment of these statutes cared more about the distribution of income and wealth and the welfare of small business and particular consumer groups than they did about allocative efficiency. In any event, the economics profession itself had at that early point no enthusiasm for antitrust policy.
[822] Crane argues that such interpretations rest on the simplistic claim that antitrust violations involve wealth transfers from relatively poor consumers to relatively rich producers, which is not always true. Crane DA "Antitrust and Wealth Inequality" 2016 *Cornell Law Review* 1171 at 1172
[823] Hovenkamp (2017) *Faculty Scholarship* 1769 at 3. Available at http://scholarship.law.upenn.edu/faculty_scholarship/1769 (accessed 19/6/2017).
[824] Lande (1982) 34 Hastings *L J* 65 at 84 and 94.
[825] Lande (1982) above at 68.
[826] Lande (1982) above at 82-83. However, see Hovenkamp (2011) Distributive Justice and Consumer Welfare in Antitrust (August 3, 2011) at 3. Available at https://ssrn.com/abstract=1873463 (accessed 19/6/2017) where he argues that what we construe as protection of small players and some sort of distribution and balancing out of market players in the Warren Court jurisprudence isn't what it seems to be.
[827] See chapter 2 par 2.4.2
[828] 15 U.S. Code section 13 - Discrimination in price, services, or facilities - It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . For significance of the Act see Hallsworth AG, Jones KG and Muncaster R "The Planning Implications of New Retail Formats Introduction in Britain and Canada" in Akehurst G and Alexander N (eds.) *The Internationalisation of Retailing* (2005) 154 where the Act is described as "a talisman for retailer-supplier relationships in the United States, brought in to protect the small trader."

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at the cost of permitting monopoly pricing."[829] Only the ascent of Chicago School antitrust barely forty years ago precipitated abandonment of these other ideals in favor of efficiency.[830] And whether they have actually been abandoned or still linger on is the substance of a different debate.

For the European Union, it was not efficiency first and neither is it, even today. Integration of the European market has always been the paramount objective. Through the 1970s, decisions of the Commission and Community courts "were not based on economics or consumer welfare . . . they were based on the protection of the economic freedom of market players as well as on preventing firms from using their economic power to undermine competitive structures."[831] At a point in its development in the 1980s, European competition law and policy even accommodated 'crises cartels' to protect local production and shield it against foreign imports, a practice generally frowned upon today.[832] For the EU, the duality of competition ends is not as definite as in the US. In fact, it is still unclear whether the pro-efficiency arguments of the more-economic approach will ever impact the prohibition of what are regarded in the Union as hard-core horizontal and vertical restraints.[833]

Notably the modern world's first antitrust statute, Canada's 1889 Wallace Act, was widely regarded by contemporaries as "an empty political gesture".[834] The language of the Act subordinated it to the common law of restraint of trade which allowed most combinations.[835] No agency was created to enforce it and provincial governments would not enforce the legislation for the threat it posed to local interests.[836] The Act was replaced successively by three other competition laws, two of which were equally redundant for various reasons. One was struck down for being *ultra vires,* the other was applied only

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[829] Posner (2001) at 27–28.
[830] Bhattacharjea in Sokol et al. (eds.) (2013) 55.
[831] Bhattacharjea above at 57.
[832] European Commission Decision 84/380/EEC of 4 July 1984, *Synthetic fibres*, OJ 1984, L 207/17.
[833] Guidelines on Vertical Restraints Commission Notice 2022/C 248/01.
[834] Bhattacharjea in Sokol et al. (eds.) (2013) 53. Halladay says the law was populist and similarly to that of the United States driven largely by the trust-busting rhetoric which had proven to be so popular with American voters Halladay (2012) 25(1) *Canadian Competition Law Review* 157 at 158-159. For detailed history of Canada's competition law see Trebilcock et al. (2003).
[835] Halladay *Canadian Competition Law Review* (2012) 25(1) 157 at 157.
[836] Bhattacharjea in Sokol et al. (2013) (eds.) 53.

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once before being disposed of.[837] When it finally found a voice, Canadian competition law was put to use in service of an array of goals, including *inter alia* fighting Big Business - sometimes simply for being big, and protecting domestic firms from international competition.[838]

British anti-cartel laws began to be more strictly enforced only in the 1950s and even then with ample room for exemptions. Restrictive agreements could be defended on various public interest grounds, including protection of employment and exports.[839] Wilks observes that the law did not deliver economic efficiency or consumer welfare because "it was never intended to".[840] Other rationales were given greater priority at various times as became imperative.[841]

Very apparently, while efficiency and the resultant low prices was a consideration in the minds of early policy makers in trail-blazing jurisdictions, it was not the key one. From where we stand, that can be simply put down to the reality that efficiency was not the call of the jurisdictions at the time. The law grew organically into the goal. So too, it is submitted, must the developing country's competition law be enforced to suit the appropriate season the country finds itself at.

There exists further reason why the efficiency model should not be a first choice. Proponents for convergence have been accused of overlooking a fundamental tension between the goals of economic development and the strategy of global competition law convergence.[842] For a start, low levels of enforcement against dominant firms advocated by the Economics Based Model have two kinds of effects very pertinent to domestic firms.[843] Positively, increased freedom and reduced compliance may enlarge the range of strategy options available to domestic producers, pushing up their profitability and

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[837] Bhattacharjea in Sokol et al. (2013) (eds.) 53. The Combines Investigations Act in 1910, which was used only once; the Combines and Fair Prices Act in 1919, which was struck down the very next year by the judiciary as ultra vires of the Canadian constitution; and then the second Combines Investigation Act in 1923.
[838] Bhattacharjea in Sokol et al. (eds.) (2013) 53; Trebilcock et al. (2002) 32 and Ross T "Viewpoint: Canadian Competition Policy: Progress and Prospects" (2004) 37(2) *Canadian Journal of Economics* 243 at 252.
[839] Section 10 of the U.K. Restrictive Trade Practices Act of 1956.
[840] Wilks S *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (1999) at 340.
[841] Bhattacharjea in Sokol et al. (eds.) (2013) 55-56. These would include export promotion via building 'national champions', full employment and balanced distribution of industry.
[842] Gerber in Sokol et al. (eds.) (2013) 14.
[843] Gerber above 29-31.

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growth. But on the other hand, the more limited scope of enforcement provides fewer constraints on the conduct of foreign rivals, allowing them opportunities to abuse their often greater market power to the detriment of domestic firms.[844] Light enforcement may in point of fact draw more foreign firms thereby pushing weaker local ones to the periphery of the market.[845] While probably useful in the long run, this calls for circumspection given the possible short term impact of the Economics Based Model on domestic players.

Another factor militating against the Economics Based Model is its impact on SMEs, often a crucial component of the young economy.[846] The Economics Based Model archetype of enforcement may permit dominant firms to engage in conduct that is detrimental to SMEs. Examples of such conduct includes imposing particularly onerous supply and purchase conditions. Gerber notes that the cooperative arrangements which SMEs use most to foster their growth may be deterred by aggressive enforcement against horizontal agreements and cartels.[847] Given that SMEs punch above their weight in emerging economies, a model that could potentially push them out of the market may not be ideal for such economies.[848] Gerber concludes that since the Economics Based Model does not accommodate a broad conception of goals, it is not in tandem with the needs of the developing country.[849]

Finally, the expertise required to support costly forms of economic analysis is seldom available in developing countries.[850] As pointed out by Gerber, this struggle with scarcity is most felt at the place of merger control.[851] For instance, assessing possible efficiency benefits of a proposed merger requires sufficient factual data to enable economists to apply their analytical tools effectively. Such data is often difficult and costly to acquire. And that is not all. Once the data is obtained, experts in the form of industrial organisation

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[844] Lipimile GK "Competition Policy as a Stimulus for Enterprise Development" (2004) Competition, Competitiveness and Development: Lessons from Developing Countries 176 hereinafter Lipimile in UNCTAD 2004 available at http://unctad.org/en/docs/ditcclp20041ch3_en.pdf (accessed 30/4/2017).
[845] Gerber in Sokol et al. (eds.) (2013) 32.
[846] See for instance Kenya's Vision 2030, the country's long-term national planning and strategy development. available at http://www.vision2030.go.ke/resources/ (accessed 2/10/2017) and Lipimile in UNCTAD (2004) 180-181 available at http://unctad.org/en/docs/ditcclp20041ch3_en.pdf (accessed 30/4/2017).
[847] Gerber in Sokol et al. (eds.) (2013) 30.
[848] See chapter 2 pars 2.5.4 and 2.5.6
[849] Gerber in Sokol et al. (eds.) (2013) 31.
[850] Gerber (2014) at 5 available at https://ssrn.com/abstract=2426359 or http://dx.doi.org/10.2139/ssrn.2426359 (accessed 30/4/2017.
[851] Gerber in Sokol et al. (eds.) (2013) 31.

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economists and econometricians are required to analyse the merger under review.[852] Such technical expertise must either be imported or purchased at a high premium, which puts further pressure on the meager resources. In the absence of such expertise, flawed decisions on competitiveness of mergers can be expected.

As indicated, competition law was born and framed in the developed nations of the West. The economic thinking it has relied upon is based on industrial organisation, a sub-discipline of neoclassical theory which emphasises the importance of markets, not entire economies.[853] The neoclassicals' version of this law moves on the assumption of the existence of a market economy with some competition.[854] In this market, interactions between producers and consumers are mediated through the price system, leading to an efficient equilibrium.[855] The developing country must find its way to a place of effective competitive markets where competition law is used to enhance the efficient equilibrium markets need. Such a market would be one that contributes directly to the core need of a jurisdiction in the given space and time. From there, it is possible to pinpoint what the law should have as its goal and the character of its merger analysis.

3.2.4 A call to economic development

There was a time when the majority of people asked to identify solutions to the needs of the populations of developing countries would promptly proffer direct provision of basic necessities such as material human needs and education. The wiser view of course is that what these countries need is economic development. To be more precise, they need inclusive, sustainable economic development.[856] Once achieved, this directly addresses material and empowerment needs without cultivating over-dependence on hand-outs. The efficiency focused Economics Based Model has been found to be incompatible with this one thing want of which defines a developing country. It would be self-defeating, to

[852] Kolasky (2004) 49 *Antitrust Bulletin* at 39.
[853] See chapter 2 par 2.2.1. Lianos I, Mateus A and Raslan A Competition law and Development "Is There a Tension Between Development Economics and Competition?" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Lianos et al. in Sokol et al. (eds.)(2013) 35. For nature of development economics see Todaro MP and Smith SC *Economic Development* (2015) hereinafter Todaro & Smith (2015) 9-10.
[854] For a sketch of the parallel intellectual history of development economics and neo-classical economics see Lianos et al. in Sokol et al. (eds.) (2013) 37-39.
[855] Lianos et al. above at 37.
[856] Fox (2012) *NYU Law and Economics Research Paper No. 11-04 at* 3.

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say the least, for a jurisdiction to adopt a law whose congruence with its most urgent need has been questioned.

The terms "economic growth" and "development" tend to be used interchangeably.[857] Not every development scholar, however, believes that the two are the same.[858] Growth is an increase in a country's real level of national output, this being value of goods and services produced by every sector of the economy. While there remains widespread disagreement as to the ideal measure of economic growth, there is unity on the point that what should be evaluated is the contribution of economic activity to the achievement of higher states of human welfare.[859] Still, the focus is on output or income growth. Economic development, on the other hand is a normative concept. Todaro defines it as an increase in living standards, improvement in self-esteem needs, greater choice as well as freedom from oppression.[860] For Nobel laureate Amartya Sen, development should not be parochially focused on growth in income but should aim to increase human capability so as to allow individuals to take advantage of life's opportunities and freedom to fulfill their full potential.[861] The implicit premise of the growth-focused view that the best way to achieve broad-based improvement in living standard is to obtain an increase in indicators like GDP and per capita income, is rejected. So too is the supposition that wealth generated through economic growth trickles down to eventually reach all segments of society.[862]

It is today fairly uncontroversial that growth must be broad-based to be sustainable in the long run. Its breadth must cut across sectors in the economy as well as populations.[863] It must encapsulate both improved participation and benefit sharing. It must be "inclusive growth".[864] Countries that take off from more equitable initial distributions grow faster and

[857] Sokol et al. in Sokol et al. (eds.) (2013) 4.
[858] Meyer DF "The Relationship between Economic Growth and Economic Development: A Regional Assessment in South Africa" 2017 4(26) *Journal of Advanced Research in Law and Economics* 1377 at 1377.
[859] Fraumeni B *Measuring Economic Growth and Productivity* (2019) 16 and Weil D *Economic Growth* (2016) 24. Also see Shearer RA "The Concept of Economic Growth" 1961 14(4) *International Review for Social Sciences* 497 at 506.
[860] Todaro & Smith (2015) 16.
[861] Sen A *Development as Freedom* (1999) hereinafter Sen (1999) 4 and 5.
[862] Pastor M and Benner C *Equity, Growth, and Community: What the Nation Can Learn from America's Metro Areas* (2015) hereinafter Pastor & Benner (2015) chapter 1.
[863] Montmasson-Clair G and Nair R "South Africa's Renewable Energy Experience: Inclusive Growth Lessons" in Klaaren J, Roberts S and Valodia I (eds.) *Competition Law and Economic Regulation: Addressing Market Power in Southern Africa* (2017).89.
[864] A phrase interchangeably used with 'broad-based', 'shared' or 'pro-poor growth'.

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more stably.[865] By the by, inequity has been found to inhibit growth even in the developed West.[866] Sustainable growth is consistent with equity considerations.[867] Bakhoum asserts that developing countries expect from competition law enforcement a solution to their development challenges.[868] He goes on to say that to achieve that objective, it is essential to build a framework where efficiency takes into account development concerns.[869] It follows then that the principal variable to be taken into consideration in determining the contours of a developing nation's competition law and policy is going to be the development dimension.[870]

Competitive markets are the basic fundamental without which economic development cannot be achieved. Productivity is the key to economic progression. Competition is linked to increased productivity levels and resultant growth, in both developed and developing countries.[871] It pushes firms to higher levels of efficiency and re-allocates resources to the more productive sectors.[872] As entry barriers are reduced, incumbent firms can no longer be supported through monopoly rents and are forced to become more efficient.[873] Distortions and inefficiencies in markets are the most significant impediment to productivity.[874] As such, effective regulation which facilitates and reinforces proper functioning of markets positively impacts economic performance.[875] Adopting competition

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[865] Pastor & Benner (2015) 26.
[866] Pastor and Benner articulate a few lessons emerging from the new realities of America's metropolitan regions, the most critical for our purposes being that inequity is bad for economic growth. See especially Pastor & Benner above at 26.
[867] "Growth cannot be chased at the cost of equity. On the fundamental issue of growth versus equity, it is not possible for either side to take an extreme position. Sustained high growth may not be possible in developing economies unless sufficient attention is also paid to equity. In the absence of attention to distribution of income and equity, social tensions will rise and this could block sustained high growth. Rangarajan (2013) Comments at launch of Growth and Equity: Essays in Honour of Pradeep Mehta 2013.
[868] Bakhoum M "A Dual Language in Modern Competition Law? - Efficiency Approach versus Development Approach and Implications for Developing Countries" 2011 (34) *World Competition Law and Economics Review* 3 hereinafter Bakhoum *World Competition Law and Economics Review* (2011) 34(3) at 505.
[869] Bakhoum above.
[870] Adhikari R & Knight-John M "What Type of Competition Policy and Law Should a Developing Country Have? Competition Policy & Pro-poor Development: A report of the Symposium on Competition Policy & Pro-poor Development" 2003 Centre for Competition, Investment & Economic Regulation (CUTS) hereinafter Adhikari & Knight-John (2003) 29.
[871] Lianos et al. in Sokol et al. (eds.) (2013) 48 and Mateus A "Competition Law and Development: What Competition Law Regime?" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Mateus in Sokol et al. (2013) 117. Dutz MA and Aydin H "Competition and Development: What Competition Law Regime? Does More Intense Competition Lead to Higher Growth?" (1999) World Bank Policy Research, Working Paper No. 2320. See International Competition Network (ICN) website for a comprehensive list of recent studies available at http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy/benefits/messages/productivity.aspx (accessed 24/09/2018).
[872] Mateus in Sokol et al. (2013) 118.
[873] Sokol et al. in Sokol et al. (2013) 1-2.
[874] Sokol above at 4.
[875] For a review of selected studies for impact of competition law and policy on Development see UNCTAD (2010)(a) 14 available at http://unctad.org/en/Docs/tdrbpconf7d3_en.pdf (accessed 23/09/2017; Mateus in Sokol et al. (2013) 118; Dutz M and Hayri A "Does More Intense Competition Lead to Higher Growth?" 1999 *World Bank Policy Research, Working Paper* No 2320 at 1 and Lianos et al. in Sokol et al. (2013) 47. In fact, reforms which improve administrative and fiscal policies have been found to help poor nations to

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laws is a fundamental first step to higher competition intensities which generate increased growth.[876] More important than adoption, however, is directed application.[877]

Before one can establish the kind of law that will support competitive markets and hence economic development, they must assess the markets wherein this law is to be transplanted. Fox and Gal pick out four economic characteristics of markets in developing country markets that are evidence of, as well as direct, contributors to the low levels of competitiveness in these countries. The first is ideology and methodology of market control.[878] The stage of transition of the economy towards assimilation of free market principles matters in introducing and applying a competition law.[879] For many countries, the move towards a more market-oriented economy is a recent phenomenon. Trade liberalization, deregulation and the endorsement of foreign direct investment have been part of this move.[880] As a matter of fact, some are indeed still engaged in the shift which tends to slow down entrenchment of competition law.[881] On top of that, long periods of state ownership debilitated competition in ways that carry over well into the post-privatization period. As observed by Lewis. agencies have to contend with "uncontested firms in incontestable markets" - players whose pricing is "unconstrained by actual or potential competition or by regulation".[882]

Second, markets in developing economies generally suffer from high entry barriers which depress the levels of competition in the market.[883] Oftentimes, these blockades are the

grow faster. See Messaoud B and Teheni EG "Business Regulations and Economic Growth: What Can Be Explained?" 2014 2(2) *International Strategic Management Review* 69 at 77.

[876] Competition laws have a "significant effect in increasing the number of firms in the longer run, which indirectly lowers industry mark-ups, especially in the highly concentrated markets". Krakowski M "Competition Policy Works: The Effect of Competition Policy on the Intensity of Competition - An International Cross-Country Comparison" (2005) HWWA Discussion Paper, No. 332, Hamburg Institute of International Economics (HWWA), Hamburg 193 at 204-205.

[877] Waller SW and Muente R "Competition Law for Developing Countries: A Proposal for an Antitrust Regime in Peru" 1989 21(2) *Journal of International Law* 159 at 159 and Sokol et al. in Sokol et al. (2013) 4.

[878] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 12-14.

[879] Gal & Fox above at 12.

[880] Kovacic WE "Institutional Foundations for Economic Legal Reform Transition Economies: The Case of Competition Policy and Antitrust Enforcement" 2001 (77) *Chicago-Kent Law Review* 270 at 270-271.

[881] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 12; Lewis D "Embedding a Competition Culture: Holy Grail or Attainable Objective" in Sokol D, Cheng T and Lianos I (eds.) *Competition Law and Development* (2013) hereinafter Lewis in Sokol et al. (eds.) (2013) 230.

[882] Lewis (2006) Speech of David Lewis Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf (accessed 03/12/2018).

[883] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 13.

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very cause of the low levels of competition.[884] High barriers to entry reinforce the market power of large firms, lead to higher prices, lower levels of innovation and overall less competitive economies.[885] In such markets, incumbent firms have every incentive to lobby and employ strategies to retain these barriers and thus secure their position.[886] Easy entry and exit are important conditions for competition to prevail. Where the likelihood of new entry or expansion in the market is high, incumbent firms are constrained by the fear that increased prices would lead to actual or potential loss of business. However, if it is difficult and costly for new entrants to join in, incumbents are able to profitably raise prices without a new firm entering the market and driving prices and profits down.[887]

Third is extreme inequality in the distribution of wealth and opportunity.[888] Most of the wealth is held by a small group within society which generally controls both economic and political power and locks all would be-participants out.[889] This of course suppresses competition and allows monopolies to thrive. The fourth identified handicap is the high economic vulnerability of markets, defined as the risk that economic growth will be significantly and extensively reduced by external shocks.[890] As pointed out by Guillaumont markets in the developing world are highly vulnerable to disturbances such as steep drops in international commodity prices, global collapse in investor confidence and climate change.[891]

To these four can be added a handful others. The most pervasive as well as most deleterious obstacle to inclusive economic development is the highly concentrated nature of developing country markets, the other side of the" high barriers to entry"-coin.[892] Many developing countries tend to have markets with one or two big, sometimes currently or

[884] Roberts S "(Re)Shaping Markets for Inclusive Economic Activity: Competition and Industrial Policies Relating to Food Production in Southern Africa" 2017 Center for Competition, Regulation and Economic Development (CCRED) Development Working Paper 12/2017 at 3.
[885] Paelo A, Robb G and Vilakazi T "Competition and Incumbency in South Africa's Liquid Fuel Value Chain" in Klaaren J, Roberts S and Valodia I (eds.) *Competition Law and Economic Regulation: Addressing Market Power in Southern Africa* (2017) hereinafter Paelo et al. in Klaaren et al. (eds.) (2017) 173.
[886] For a theoretical discussion of barriers to entry see Paelo above at 173-175.
[887] Paelo et al. in Klaaren et al. (eds.) (2017) 174.
[888] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 14.
[889] See chapter 2 par 2.5.3.
[890] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 14 and Guillaumont P "An Economic Vulnerability Index: Its Design and Use for International Development Policy" in Naude W, Santos-Paulino AU and McGillivray M *Measuring Vulnerability in Developing Countries: New Analytical Approaches* (2012) hereinafter Guillaumont in Naude et al. (eds.) (2012) 15-16.
[891] Guillaumont in Naude et al. (eds.) (2012) 16.
[892] Waked (2016) 12 *Journal of Law Economics and Policy* at 207.

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formerly state-owned firms, alongside a myriad, often struggling, small firms.[893] With high concentration, comes tacit or explicit collusion and foreclosure which hurt the market and by extension, the economy.[894] Concentration may result in cost increases to rivals, reduce incentives to enter the market and ultimately harm the consumer.[895] Higher prices for basic goods and services eat into wages that are already low and compound poverty.[896]

Added to highly concentrated markets is a dearth of resources, both human and financial, to dedicate to competition law endeavours.[897] Developing countries often set up agencies to please donor institutions and international organisations but do not endow them with the necessary resources to realise their mission.[898] Sufficient resources are however the bedrock of efficient enforcement.[899] An agency's past performance has a direct bearing on expectations of economic actors and their incentives to engage in anticompetitive conduct in the first place.[900] The reverse is also true. Weak enforcement emboldens would-be offenders.[901]

There are also institutional limitations in the form of absent or weak supporting apparatuses. Developing countries want for independent effective judicial and appeal systems, public administrations as well as strong professional associations and consumer groups.[902] Sans this, government intervention and crony capitalism thrive as does

[893] Mehta PS, Qureshi MS and Bansal A (2003) "Competition Policy and the Poor" in Competition Policy and Pro-poor Development, *Report of the Symposium on Competition Policy & Pro-poor Development 2003* CUTS Jaipur hereinafter Mehta et al. 2003, at 4.
[894] Hylton (2003) *311*-312.
[895] Hylton above at 312. The notion that high levels of concentration are likely to lead to high prices is generally accepted and an operating assumption of enforcement agencies. For the debate of concentration and impact on market see Hylton at chapter 3.
[896] The example of hike in prices of corn, a staple in Mexico and in Kenya the monopolization of the public transport industry. Chowdury M "The Political Economy of Competition Law Reform in New Jurisdictions" in Whish R and Townley C (eds.) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (2012) 72.
[897] Waked (2016) 12 *Journal of Law Economics and Policy* at 207; Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 15; Aydin & Buthe 2016 (79) *Law and Contemporary Problems* at 2 & 11; Waked (2011) at 12-13 available at https://ssrn.com/abstract=2044047 (accessed 13/06/2017). Also see generally Gal MS "When the Going Gets Tight: Institutional Solutions when Antitrust Enforcement Resources are Scarce" 2010 41(3) *Loyola University Chicago Law Journal* 417 hereinafter Gal (2009) 41(3) *Loyola University Chicago Law Journal* and International Competition Network, Competition Policy Implementation Working Group (2006) 27 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf (accessed 12/17/2017).
[898] Waked (2011) at 12 available at https://ssrn.com/abstract=2044047 (accessed 13/06/2017.
[899] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 18 and Waked DI "Do Developing Countries Enforce their Antitrust Laws?" (2011) at 13 hereinafter Waked (2011). Available at file:///C:/Users/pnjako/AppData/Local/Temp/SSRN-id2044047.pdf accessed 13/06/2017.
[900] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 19. This requires, *inter alia*, adequate technical competence of the decision-maker in all stages of the enforcement process from the investigative body until the final reviewing body.
[901] On impact of limited capital resources and human resources see International Competition Network, Competition Policy Implementation Working Group (2006) 23-34 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc369.pdf (accessed 12/12/2017) and Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 62. For the effects on limited resources on competition law see Gal (2009) 41 *Loyola University Chicago Law Journal* at 417.
[902] Waked (2016) 12 *Loyola University Chicago Law Journal* at 208.

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corruption. Rent-seeking and favouritism become entrenched. Political instability affects the ability of governments to commit to long-term changes in the market while systemic corruption distorts competition by raising the barriers faced by some market players, regardless of their comparative advantages.[903] This does not augur well for any quality of enforcement let alone the carefully targeted variety that would support vibrant economic development.

Another set of relevant characteristics are socio-cultural.[904] Economists and the competition law community have tended to overlook the role of cultural considerations in competition law and policy because of the perceived lack of precision in articulation and measurement. This dismissive attitude is largely attributed to the Chicago School.[905] But cultural values do matter.[906] In many developing jurisdictions there remains a patent lack of acceptance of competition as a "primary allocation device" as is the case in the more established jurisdictions of the West. Competition is at times frowned upon, being perceived as a means to undermine rivals not on the merit through legitimate means, but rather through recourse to tactics that involve dishonest practices.[907] All things considered, it may become necessary, as observed by Cheng, to adjust analytical frameworks and enforcement priorities to take into account pertinent cultural differences.[908]

What "a competitive market" exactly means is a bone of contention. The choice lies in the "means-end" dichotomy. The end game of a developing country's merger analysis will fall between a conceptualisation of the law as facilitator of the process of markets functioning

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[903] Gal & Fox in Gal et al. (eds.) (2015) 309 and Mehta et al. 2003 at 32.

[904] Cheng T "How Culture May Change Assumptions in Antitrust Policy" in Lianos I and Sokol, DD (eds.) *The Global Limits of Competition Law* (2012) hereinafter Cheng in Lianos & Sokol (eds.) (2012) 205.

[905] Cheng above at 206-207.

[906] For Impact of culture on cartel enforcement and other horizontal restraints, vertical restraints and abuse of dominance see Cheng in Lianos & Sokol (eds.) above at 214-219.

[907] Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 17; Budzinski O and Beigi MHA "Generating instead of protecting competition" in *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition* Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) (2015) hereinafter Budzinski & Beigi in Gal et al. (eds.) (2015) 223. For further readings on the place of culture in competition regulation see M. Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33(3) World Competition 457–475 and for perspectivr on North East Asia Lee KJ "Promoting Convergence of Competition Policies in Northeast Asia: Culture- Competition Correlation and Its Implications" in Sokol DD and Lianos I (eds.) *The Global Limits of Competition Law* (2012) hereinafter Lee in Lianos & Sokol (eds.) (2012).

[908] Cheng in Lianos & Sokol (eds.) (2012) 2019. For more reading on culture and competition see Lee KJ in Sokol and Lianos (eds.) 2012 and Peña J "The Limits of Competition Law in Latin America" in *The Global Limits of Competition Law* Sokol DD and Lianos I (eds.) (2012).

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at their optimum and another where the law safeguards the socially desirable distribution that competitive markets are presumed to yield. Put otherwise, the central purpose of competition law enforcement, and hence merger analysis, will be either to encourage decentralization of economic power so that as many as possible can participate in the market or to promote total or consumer welfare as an outcome. The question will also be asked whether the law takes into account only economic considerations or should cater for multiple goals, both economic and non-economic.

There are parallels to be drawn between present day developing markets and those of the markets that precipitated the Harvard structure-conduct-performance-era.[909] Chief of them are the three elements of highly concentrated markets, prohibitive barriers of entry and markets stunted by years of *laissez faire* or absent antitrust. Developing countries need development but are faced with markets woefully wanting in that direction. Markets that either suffer from absence of competitiveness or are nominally competitive.[910] In this paradigm, the Chicago School's commitment to efficiency above growth and inclusion is unworkable.

So which way for developing country competition law goals? The ideal approach Budzinski and Beigi urge, is one that values competition as a process rather than an outcome. Instead of approaching competition law as a legal tool to protect competition, they argue that developing jurisdictions should first strive to have a policy that engenders competitive markets, which is taken to mean inclusive markets.[911] The goal of inclusiveness is as important as efficiency in jurisdictions yonder. Efficiency is given a wider meaning beyond the more familiar increase in aggregate wealth to encompass a wider group being enabled to participate on their merits in the economic enterprise.[912] Bakhoum points out that an orientation that only focuses on aggregate wealth or welfare goals would not necessarily be welcome or suitable for developing countries.[913] Access

[909] See chapter 2 par 2.4.2.
[910] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 11.
[911] Budzinski & Beigi in Gal et al. (eds.) (2015) 224.
[912] Gal & Bakhoum in Gal et al. (eds.) (2015). Sen A "Growth and Other Concerns" in Mehta PS and Chatterjee B (eds.) *Growth and Poverty: The Great Debate* (2011) at 97-98 though not writing about competition law argues not just for growth but for equity within the growth paradigm. That there is a place for economic growth as a means for achieving 'good things'. At 99 and 100 he says that as valuable as economic growth is, equity is more impactful. But Amartya is not without opponents. See Panagariya in Panagariya A "I Beg to Differ, Prof Amartya Sen" in Mehta PS and Chatterjee B (eds.) *Growth and Poverty: The Great Debate* (2011) at 104.
[913] Bakhoum *World Competition Law and Economics Review* (2011) 34(3) at 502.

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to basic needs and participation to the economy are no longer a big concern in developed countries. However, developing countries are still dealing with those basic concerns. To be meaningful, competition law there should afford regard for distributional and inclusion concerns. He reiterates Fox's argument that a policy that is not inclusive and does not increase business opportunities of the majority is unsuitable.[914]

Bakhoum argues that economics of competition law that take into account development concerns look different. Development concerns and non-economic goals can be taken into account by reinventing an approach to efficiency that combines a sound economic analysis built into a greater framework of development concerns. This he terms "efficient development".[915] Developing countries seek efficient development, and efficient development is inclusive development.[916] Bakhoum observes further that the understanding of "efficiency" in the developed world is different from that in the developing world. In the former, it may have the effect of preserving the freedom of firms with power. For developing countries, however, a more inclusive approach is required. However, he cautions that it is only in the cases where efficiency does not correspond with non-economic goals that the competition authority might want to consider whether competition law is the best instrument or whether it would require undesirable trade-offs between efficiency and access to basic needs.[917]

For Roberts, in the developing country, a "competitive market" will be taken to denote one with many participants, low barriers to entry and returns which reward the investment made.[918] In such a market, the focus of policy makers will be on creating markets in which firms compete to introduce better prices or products, reduce costs and achieve returns which reward dynamism, innovation and effort.[919] The goal of the law should be creating a dynamic and entrepreneurial economy and addressing high levels of concentration in the economy.[920] By creating firm rivalry and stimulating productivity, welfare outcomes

[914] Bakhoum above at 503.
[915] Bakhoum above at 505.
[916] Bakhoum above.
[917] Bakhoum above.
[918] Roberts S, Vilakazi T and Simbanegavi W "Competition, Regional Integration and Inclusive Growth in Africa: A Research Agenda" in Klaaren J, Roberts S and Valodia I (eds.) *Competition Law and Economic Regulation: Addressing Market Power in Southern Africa* (2017) hereinafter Roberts et al. in Klaaren et al. (eds.) (2017) 268.
[919] Paelo et al. Klaaren et al. (eds.) (2017) 173.
[920] Paelo above.

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such as lowering of prices and increasing consumer choice can be secured - achieving not just economic growth but sustainable development objectives such as poverty eradication.[921]

Drexl advocates a dynamic approach where analysis of market conduct is wide and contextualised enough to protect all market participants - producers, consumers and people active in the informal markets.[922] Aydin and Buthe emphasise that a developing country should implement its competition laws in ways that foster rather than delay or impede economic development.[923] Empirical studies have shown that a fall in concentration leads to a fall in prices and in price cost margins.[924] Markets become open and therefore competitive. The effective rivalry that results forces and encourages firms to produce better quality goods and offer lower prices. It also forces more prudence in use of the resources available thereby eliminating inefficient use of resources, cutting down wastage.[925] Directly addressing the market power of large and entrenched firms and lowering barriers for more to join in the market therefore stimulates economic growth.[926] As observed by Fox, merger analysis should be aimed at facilitating inclusion and mobility, preventing creation of new barriers and prohibiting restraints by powerful and abusive market actors, both private and public.[927] Naturally, such an orientation raises concern. Protecting weak firms from competition is actually anticompetitive.[928] However, some justification may be found in the peculiarities of the developing economy's needs.[929] As Gal and Fox point out fairness and inclusivity need not be irrelevant in competition law concerns.[930]

The need for economic development is a need for inclusive and equitable economic growth.[931] It is a need to facilitate markets to work for the good of the people and prohibit

[921] Singh & Dhumale (1999) 9-10 and Waked (2015) 38 (3) *Seattle University Law Review* at 985.
[922] Drexl in Gal et al. (eds.) (2015) 248. Drexl J "Economic Integration and Competition Law in Developing Countries" in *Competition Policy and Regional Integration in Developing Countries* Drexl J, Bakhoum M, Fox EM, Derenberg WJ, Gal MS and Gerber J (eds.) (2015).
[923] Aydin & Büthe (2016) at 7.
[924] Roberts et al. in Klaaren et al. (eds.) (2017) 266.
[925] Paelo et al. in Klaaren et al. (eds.) (2017) 175.
[926] Paelo et al. in Klaaren et al. (eds.) (2017) 173.
[927] Fox in Drexl et al. Fox (2012) *NYU Law and Economics Research Paper No. 11-04* at 4.
[928] Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 38.
[929] Gal & Fox above.
[930] Gal & Fox in Gal et al. (2015) 328.
[931] Fox (2012) *NYU Law and Economics Research Paper No. 11-04* at 3-4. See also the Millenium Development Goals at http://www.un.org/millenniumgoals/ (accessed 12/02/2019

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practices that create and abuse power and hamper inclusivity.[932] In light of this, Fox indicates that the law that fits the bill for the developing country would be one focused on opening up markets and constructing a market environment conducive to participation.[933] The expectations on this branch of law are condensed well in the statement by the South African Competition Commissioner, Bonakele, that: "Our competition laws are an expression of aspirations going beyond the conventional efficiency approach to competition regulation, embracing the notion of inclusive growth."[934] Opening up access to markets is key.

Gal and Fox remark that the most common goals of jurisdictions, either in enacting or interpreting their competition laws in the twenty-first century, "are economic goals: efficiency, including static and dynamic, allocative, productive and dynamic consumer welfare sometimes including consumer choice; total welfare or protecting the competition process from the creation of private artificial barriers."[935] They however state that this narrow approach is not expedient for the developing country. The goal of promoting long-term productive and dynamic efficiency should be center stage, even at the cost of some harm to allocative efficiency in the short term.[936] Gal and Fox holds the view that the optimal degree of competition for developing countries might require a combination of competition and cooperation, rather than maximum competition, in order to promote long-term economic growth.[937] Inclusive economic growth, for the developing economy, is of as paramount importance as aggregate efficiency or welfare. Therefore, Shahein comments that competition laws enacted in emerging countries should take cognisance of distinctive features of the socio-economic environment and be tailored accordingly.[938] The answer to the question of what the point of the law is, must be a result of assessment of jurisdictional needs to establish what is valuable.[939] The resultant policies must be evidence-based, globally informed yet jurisdictionally located.[940]

[932] Fox in Drexl (ed.) (2012) at 3-4.
[933] Fox above at 4 and 14.
[934] Bonakele *Sunday Independent newspaper* 5 October 2014.
[935] Gal & Fox in Gal et al. (eds.) 324.
[936] Gal & Fox above 345.
[937] Gal & Fox above 345.
[938] Shahein in Whish & Townley (eds.) (2012) 63.
[939] Waked (2015) 38 (3) *Seattle University Law Review* at 945.
[940] Waked above at 947.

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3.3 ALIGNING DEVELOPING COUNTRY MERGER ANALYSIS TO CONTEXT

3.3.1 Introduction

Competition law decisions are often made under conditions of uncertainty.[941] Profound uncertainty can arise in merger review due to the unsettled nature of the analytical models employed in markets and because of the large amount of material agencies must process during the course of investigation.[942] Not to mention that the information an agency or court has at its disposal for *ex ante* review is incomplete and futuristic. Interpreting the massive amount of information, where conflicts within the evidence abound, introduces a substantial measure of uncertainty in the review process. This handicap is felt most keenly by developing countries.[943]

The basic challenge in designing merger analysis policy is the same everywhere - creating an efficient cost-effective regime. An additional concern is identifying which parties or causes to give precedence, seeing that merger evaluation fundamentally is a balancing of interests.[944] Gal thus observes that the search is for an optimal balance between a theoretical merger regime which “gets it right” every time and the practical costs, including error costs such a review creates.[945] Essentially, of course, the task of merger analysis remains weeding out the few bad mergers from the many good ones.[946] It is a task that should be performed in a way that does not interfere unduly with the market for corporate control, itself as important as any other in pressuring firms to perform efficiently.[947] Prospective merger enforcement is vital for protecting competition in a dynamic economy, and sound merger policy can effectively deter even the negotiation of anticompetitive mergers.[948]

The merger analysis regimes of developed and developing jurisdictions do not necessarily always lead in different directions. Aspects of merger analysis may fit both

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[941] Jennejohn (2015) 41 *Journal of Corporation Law* 110.
[942] Jennejohn (2015) 41 *Journal of Corporation Law* 122-125.
[943] See chapter 2 par 2.5.3.
[944] Fridolfsson SO "A Consumer Surplus Defense in Merger Control" in Ghosal V and Stennek, J (eds.) *The Political Economy of Antitrust (Contributions to Economic Analysis, Vol. 282* (2007) 288.
[945] Gal (2013) 11 *Swedish Competition Authority’s Pros and Cons Series* at 67.
[946] See chapter 2 par 2.2.3.
[947] Kolasky (2004) 49 *Antitrust Bulletin* at 39.
[948] Seldeslachts et al. (2009) 52 *Journal of Law and Economics* at 631.

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well. That explains the broadly shared SSNIP and HHI tests for establishing markets and market shares.[949] While many rules of merger analysis may be optimal for all jurisdictions, developing jurisdictions' unique characteristics, nonetheless affect some aspects of merger law.[950] For the developing country, the challenge is to resolve those instances in which the 'unique characteristics pull' leads in a different direction and is stronger than the 'follower push' and to design rules accordingly.[951] An interpretation of law which may promote efficiency under conditions abroad might instead generate high error costs partly due to the inferior institutional conditions of developing countries.[952]

3.3.2 Design of ideal merger analysis framework

In consonance with the rest of competition law, a developing country's merger analysis must be angled towards growth and sustenance of robust inclusive markets.[953] Happily, merger control is the one component of competition law that takes well to the goal of inclusive economic development.[954] In fact, merger policy has been said to be the most effective tool in a competition law agency's toolbox for preventing market contraction and limiting oligopolistic coordination.[955] Mergers and acquisitions are one of the fastest routes to highly concentrated markets. Virtually all of the huge firms that straddle markets in the United States and in South Africa as well, as shall become apparent shortly, are a result of mergers of the past.[956] Mergers must therefore be assessed with a clear understanding of their role in structuring markets.

We have pointed out some parallels between markets in the developing world today and Harvard day markets.[957] Which leads us to ask; is the best approach to merger analysis in these jurisdictions the Harvard approach? Is it a regime that applies a "significantly stricter more prophylactic" [958] merger paradigm? Such would also be one open to a 'hotchpotch' of considerations - economic, grey zone and purely public interest

[949] See chapter 2 par 2.2.4.
[950] Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 66 and 71.
[951] Gal above at 62.
[952] Gal above at 66 and Dutz and Vagliasindi (2000) 44 *European Economic Review* 770.
[953] Fox (2013) 81 *Fordham Law Review* at 2161.
[954] Ga & Fox in Gal et al. (eds.) (2015) 346.
[955] Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 66
[956] See chapter 4 par 4.2.
[957] See chapter 3 par 3.2.4.
[958] Lande (2001) 68 *Antitrust Law Journal* at 875.

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considerations.[959] The answer to the question, we believe should be in the affirmative. In any event, the merger laws of many developing jurisdictions, driven by the countries' circumstances already lean the way of Harvard thought, with object clauses that are essentially catch-all provisions and public interest considerations in merger analysis.[960] It should be easy to align enforcement accordingly. Not to mention that Brandeisian thought supportive of atomistic markets and a more interventionist antitrust policy is on the comeback.[961] There are too, increasingly louder calls for a return to Harvard merger regulation or at the least the ideas promoted by the Harvard approach in the US.[962] Recent years have seen ever increasing rates of dissatisfaction with the free market economy. Many now believe that the promises of the competition-based market system, have come to nought and markets only work for a few. A small number of large firms dominate key markets and wealth inequality is at its worst. Calls have been made for more stringent regulation to right the situation.

The findings of a symposium held to consider the intersection of competition policy and pro-poor development, were that the merger analysis of a developing country should be focused on preventive as opposed to curative measures.[963] A structural, as opposed to a conduct, approach is the better tool to prevent anticompetitive practices.[964] At any rate, the latter involves rule of reason analysis that requires specialised capacity, often lacking in developing countries' competition agencies.[965] Considerable discretionary power left in the hands of authorities of economies characterised by poor governance may facilitate rent-seeking activities.[966]

According to Lande, merger analysts in developing countries, must be wary of even small reductions in competition in the market.[967] Since errors of both over-enforcement and

[959] See chapter 2 par 2.2.3.
[960] See for examples the preamble, section 3 and section 46 Kenya Competition Act 2010; Preamble, section 5 and section 12(A) SA Competition Act; section 13(1) of Tanzania's Fair Competition Act of 2003 and section 52(2) of Botswana Competition Act (2018).
[961] Khan (2018) 9(3) *Journal of European Competition Law and Practice* at 131-132. See chapter 2 pars 2.4.2 and 2.4.3 for Brandesian economics.
[962] See chapter 2 pars 2.4.4 and 2.4.1. Lande asserts that in fact, there are aspects of the incipiency doctrine that could be revived without returning to the "misguided" Von's Grocery approach - Lande (2001) 68 *Antitrust Law Journal* at 875.
[963] Mehta et al. 2003 at 37.
[964] Mehta et al. 2003 above.
[965] Adhikari & Knight-John (2003) 31.
[966] Adhikari & Knight-John above at 32.
[967] Lande (2001) 68 *Antitrust Law Journal* at 881.

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under-enforcement are inevitable, merger enforcement should err on the side of over-enforcement, the so-called 'Type I' errors.[968] A practical way to implement this would be to have especially strict enforcement for the largest mergers in the most highly concentrated industries where there is unduly large probability that erroneously allowing the merger would adversely affect competition and consumer welfare. While an outcome-focused approach discourages interventionism, the cost of non-intervention in the circumstances of a developing economy market is likely to be higher than that of intervening. For instance, where small businesses will be pushed out if two large firms are allowed to proceed with an efficient merger, the long term impact of such approval will be the high concentration in markets discussed earlier. The outcome is short-term efficiency and long-term distortions. The chief concern should be ensuring that a sufficient number of competitors operate in each market.[969]

For Kolasky, the understanding of competition for use in merger analysis should be that of rivalry.[970] In developed jurisdictions, a market is said to be perfectly competitive when firms price their output at marginal cost and costs are minimized by internal efficiency. Allocative and productive efficiency can be perfectly aligned - even at relatively high levels of concentration.[971] Here firms strive motivated both by the hope of success and fear of failure and authorities intervene only in the event the market cannot correct itself.[972] On the definition of competition as rivalry, there is good company. The principle of "protecting competition not competitors" does not resonate quite the same way in Europe as it does in the United States, being viewed rather as an empty slogan.[973] One cannot, after all, have competition without competitors.

Waked argues that small business protection should guide enforcement in developing countries.[974] Merger analysis can aim to protect small businesses to assure that the free market does not cause them harm.[975] As pointed out by Waked, interests of small firms

968 Lande above at 881-882. See chapter 2 par 2.2.3.
969 Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 93.
970 Kolasky (2004) 49 *Antitrust Bulletin* at 31.
971 Kolasky above at 35.
972 Kolasky above at 36.
973 Kolasky above at 30.
974 Waked (2015) 38 (3) *Seattle University Law Review* at 994.
975 Waked above at 969.

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have historically affected competition policy. Warren-era decisions were more inclined to condemn practices that reduced costs because they harmed rivals who were unable to match them.[976] There were times when courts condemned mergers because of, rather than in spite of, efficiencies.[977] Even today, several European countries, among them France and Germany, endorse protection of small and medium-sized enterprises as a goal of merger and cartel enforcement.[978] Canada's law has similar protections.[979] Protecting small businesses from competition could result in higher prices and inferior quality for consumers. Nonetheless, there is a sense in which applying competition law in a manner that protects some competitors, is a matter of justice.[980] For instance, in markets where entrenched powerful elites have a stranglehold over the economy or in the scenario of "uncontested firms in incontestable markets".[981] As Roberts states, a country's competition regime can be understood as its "economic constitution".[982] The right to participate in markets is safeguarded in this "constitution". However, providing indiscriminate and perennial protection without any checks and balances, to small players could be dangerous. It cannot be a long-term strategy.[983] This is especially important given that the consumers in developing jurisdictions tend to be vulnerable.

De Leon advocates an "access-to-markets approach" in merger analysis to tackle the causes of market failure and improve market access.[984] Competitiveness or otherwise, of a market can be measured from the perspective of ability of economic actors to enter and compete in markets.[985] Markets that do not allow ease of entry and are concentrated are

[976] Waked above 969, see chapter 2 par 2.4.3.
[977] See chapter 2 par 2.4.2
[978] French competition law allows for group exceptions for individual types of agreements by way of regulations "if they are aimed at an improvement of the management of small or medium-sized undertaking." Article 10.2 of the French Competition Law.
[979] Canadian Competition Act of 1985 R.S.C. 1985, c. C-34, section 1.1 "The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices."
[980] Schwartz (1979) 127 *University of Pennsylvania Law Review* at 1078.
[981] Lewis (2006) Speech of David Lewis Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf (accessed 30/08/2018).
[982] Roberts (2017) *CCRED Working Paper 13/2017* at 13.
[983] Mehta et al. 2003 at 36.
[984] De Leon IL "What features measure economic competition in developing Countries" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) 31.
[985] Fox E in OECD Imagine: Pro-Poor (er) Competition Law: The role of competition law and policy in helping to empower the poorer populations of the world. Roundtable on: The Impact of Cartels on the Poor" 2 July 2013 4.

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likely to be anticompetitive since incumbents do not have to worry about competition that could be posed by new entrants.

Gal and Fox advocate for simple merger law.[986] Complex law significantly increases chances of poor decisions.[987] Real cases may fail to fit into the detailed specificities of the legal provisions therefore reducing enforcement.[988] Fox argues that merger policy can be simplified by adopting clear legal presumptions with regard to the economic effects of mergers. If there are simple analysis rules that are good proxies and that do not distort the market, they are best adopted.[989] The definition of 'market' used to establish whether a putative violator has market power is one place where flexible rules make sense.[990] Because rules that are too simple can lead in some cases to mistaken judgments, Gal and Fox state that they should only be applied where the cost of mistaken presumptions is lower than without them.[991]

According to Waked, international competitiveness of domestic firms should guide merger enforcement in developing countries.[992] Bullard argues that competition authorities should allow large domestic firms to merge so that they can go some way toward competing on more equal terms with multinationals from abroad. [993] In analysis, Waked as well as Singh and Dhumale indicate that agencies should be guided by dynamic efficiency, the most likely of the three efficiencies to be in line with an overall development agenda.[994] Dynamic efficiency is best promoted by a combination of co-operation and competition between firms rather than by maximum or unfettered competition.[995]

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[986] Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 21-22. Singh (2014) *University of Cambridge Working Paper No. 460* at 8-9.

[987] In a study of 18 Eastern European countries that are newcomers to antitrust, Dutz and Vagliasindi found that the 'Institutional Effectiveness' variable showed the strongest impact on domestic competition Dutz M and Vagliasindi M "Competition Policy Implementation in Transition Economies: An Empirical Assessment" 2000 (44) *European Economic Review* 762 hereinafter Dutz and Vagliasindi (2000) 44 *European Economic Review* 762 at 770.

[988] UNCTAD, Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe (2012), pp. 8, http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf (accessed 19/08/2019).

[989] Fox EM in OECD (2013) Competition and Poverty Reduction *Global Forum on Competition* hereinafter Fox OECD (2013) Competition and Poverty Reduction available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2013)4&docLanguage=En (accessed (15/09/2019)) 11.

[990] Fox above at 9.

[991] Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 22-23.

[992] Waked (2015) 38 (3) *Seattle University Law Review* at 994.

[993] Bullard A "Competition Policies, Markets Competitiveness and Business Efficiency: Lessons from the Beer Sector in Latin America" 2004 in UNCTAD *Competition, Competitiveness and Development: Lessons from Developing Countries* 143.

[994] Waked (2015) 38 (3) *Seattle University Law Review* at 945 and Singh & Dhumale (1999) 72.

[995] Singh & Dhumale (1999).

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Agencies should adopt a relatively flexible balancing approach that gives much weight to long-term dynamic considerations.[996] It is expected that doing so will maximise long-term growth of industrial and overall productivity.[997]

Gal recommends that merger regimes in developing countries operate with a wider lens than is usual elsewhere.[998] Analysis should not be focused solely on the effects of the merger in the specific market in which the merging parties operate. The sweep should be wide enough to investigate other markets in which the parent or holding companies of the parties to the merger operate.[999] Such analysis is cognisant of the nature of markets within developing countries where large conglomerates which have not just economic, but also political clout, have a web of influence across the economy.[1000] The downside of this broad approach is that it introduces a high level of complexity into a law which ideally should be as uncomplicated as possible. Gal accordingly remarks that a possible cure would be setting clear guidelines on when aggregate concentration concerns are deemed relevant.[1001] Importantly, this approach must be only for the short-term given the generally benign nature of conglomerate mergers and the risk of losing out on the benefits they proffer.[1002]

Markets that operate well should reward efficiency and innovation, spread wealth and decentralise economic power. This, however is not always the case in unequal societies such as developing economies.[1003] Redistribution satisfies a need for legitimacy.[1004] Availing opportunities in the market only to the already powerful prevents a country from making efficient use of the talents and potential contributions of large segments of its population.[1005] Waked points out that merger analysis is a useful tool for reducing

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[996] Gal (2013) *Swedish Competition Authority's Pros and Cons Series* (11) at 73-73.
[997] Waked (2015) 38 (3) *Seattle University Law Review* at 946; Amsden AH & Singh A "The Optimal Degree of Competition and Dynamic Efficiency in Japan and Korea" 1994 (38) *European Economic Review* 941 at 941 and Waked (2015) 38 (3) *Seattle University Law Review* at 994.
[998] Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 79-80.
[999] Gal above at 80-81.
[1000] Large conglomerates, especially, courtesy of their size and economic clout have been known to successfully translate their economic power into political power in order to create, protect and entrench their privileged positions. Morck R, Wolfenzon D & Yeung B "Corporate Governance, Economic Entrenchment, and Growth" 2005 43(3) *Journal of Economic Literature* 655 at 674-675.
[1001] Gal (2013) 11 *Swedish Competition Authority's Pros and Cons Series* at 81.
[1002] Gal above at 74-77.
[1003] Sutherland & Kemp (2017) 68.
[1004] Gal & Fox, (2014) *New York University Law and Economics Working Papers* Paper 374 at 9-10.
[1005] Gal & Fox above at 10.

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inequality in the distribution of benefits created in the marketplace.[1006] Wider industrial policy or socio-economic considerations which many developing countries incorporate into their merger analysis are a useful tool for redistribution.[1007] Such considerations include, *inter alia*, the protection of national champions, promotion of employment and increasing the ownership status of historically disadvantaged persons.[1008] It may be in order to block some mergers with positive welfare effects for the sake of protection of competition.[1009] It may also be justifiable to incorporate into analysis such considerations as the impact of a proposed merger on employment or on SMEs in the relevant market.[1010]

Some scholars pick out sectors where merger analysis should be carried out with due regard to current and would be competitors, consumers and other stakeholders.[1011] Mergers impacting the agricultural and informal sectors are commonly proposed as meriting special attention.[1012] Others root for a law where mergers affecting specific groups receive particular consideration. For instance, Fox and Mateus advocate a targeted application of competition law for practices that have a significant impact on the most vulnerable - the poor.[1013] Such a law has a distinct priority for those restraints that harm the poor most, such as mergers in healthcare.[1014] In such mergers, defences must be narrowly drawn.[1015]

For developed countries the main driving force of competition law is efficient allocation of resources and consumer welfare. This is not always the case in developing countries where efficiency concerns may be fundamentally at odds with social goals such as

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[1006] Waked (2015) 38 (3) *Seattle University Law Review* at 946 and 992-993.
[1007] Gal & Fox (2014) *New York University Law and Economics Working Papers* Paper 374 at 55. See chapter 2 par 2.2.3.
[1008] Waked (2015) 38 (3) *Seattle University Law Review* at 979,981.
[1009] Gal MS Extra-Territorial Application of Antitrust - The Case of a small Economy in Cooperation, Comity, and Competition Policy" in Guzman A (ed.) *Cooperation, Comity and Competition Policy* (2009) 200-201.
[1010] Sokol et al. in Sokol et al. (eds.) (2013) 4.
[1011] Evenett urges for distinctive consideration of sectors and products where people spend most of their income specifically food, housing and clothing Evenett in Gal (ed.) (2015) at 20.
[1012] Bakhoum M "The Informal Economy and Its Interface with Competition Law and Policy" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) hereinafter Bakhoum in Gal et al. (eds.) (2015) 177. At 2009 estimates were that the informal economy is large in many developing countries, often amounting to more than 50% of their GDP. In contrast, within industrial countries, it is estimated to be 15% of the GDP. OECD (2009) Competition Policy and the Informal Economy *Policy Roundtables 2009* hereinafter OECD (2009) Competition Policy and the Informal Economy, 24 available at https://www.oecd.org/daf/competition/44547855.pdf (accessed 17/08/2019).
[1013] Lianos et al. in Sokol et al. (eds.) (2013) 50.
[1014] Fox EM "Imagine: Pro-Poor (er) Competition Law: The role of competition law and policy in helping to empower the poorer populations of the world. OECD Roundtable on: The Impact of Cartels on the Poor" 2 July 2013 at 4.
[1015] Fox above at 7. Also see Mehta et al. 2003.

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employment, poverty alleviation, and the empowerment of previously marginalised groups.[1016] It becomes necessary to consider a multiplicity of goals beyond the economic.[1017] Some conflict is inevitable. As Waked observes, protecting small businesses and promoting international competitiveness of domestic firms means higher prices for consumers.[1018] Emergent consensus is that it is sub-optimal, at least once a country has reached a certain level of development, to use competition law and policy to promote such non-economic goals.[1019] But until then, it is in order if not necessary, to factor in public interest concerns in developing country merger analysis. As David Lewis states, "[I]t is wholly possible to carry out a statutory mandate which requires sensitivity to a number of industrial and social policy considerations without compromising the core objectives and approaches of orthodox competition law and policy."[1020]

Analysis must be flexible enough to accommodate the definition that is most felicitous for inclusive development.[1021] While this may not lead to the perfect outcome in all cases, it will provide clarity and a relatively good answer in most cases.

3.3.3 Identifying a prototype

Fox sets out six possible models that could form a template of merger analysis for developing jurisdictions, zeroing down to two top contenders.[1022] First, she considers the European Union model which focuses on openness and access as a means to produce and sustain efficient, dynamic markets. Whereas American law looks first and essentially to whether the merger will lessen output and raise prices thereby creating inefficiency, the former also looks to whether market actors are "sealing off the market" and frustrating access and entry. To that extent, it is a good fit for the developing economy. Aspects of European law also limit abuses by the state and state-privileged firms.[1023] De Leon too acknowledges the relevance of the European Commission's merger analysis given its focus on achieving short-run competitive rivalry rather than as opposed to economically

[1016] Sokol et al. in Sokol et al. (eds.) 4.
[1017] Gal & Fox (2014) *N Y U Law and Economics Working Papers* Paper 374 at 34, quoting from Chua (1998) 108 *Yale Law Journal* at 1.
[1018] Waked (2015) 38 (3) *Seattle University Law Review* at 980.
[1019] OECD (2003) Substantive Criteria used in the Assessment of Mergers 4.
[1020] Lewis (2006) Speech of David Lewis Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf (accessed 3/12/2018).
[1021] Lewis (2012) at 100-112.
[1022] Fox in Drexl et al. Fox (2012) *NYU Law and Economics Research Paper No. 11-04* at 12.
[1023] Fox in Drexl et al. Fox (2012) *NYU Law and Economics Research Paper No. 11-04* at 15-16.

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efficient outcomes based on "self-correcting" markets.[1024] While the Commission strives to create open markets in line with its integration goal, developing jurisdictions would be doing so to create sustainable development and inclusion of all in the economic channels.[1025]

Fox then moves to consider the South African model which she approves as the perfect fit, tailored specifically as it is to the goal of inclusive development. Combined with the European Commission's attentiveness to openness and access, the South African model is most ideal.[1026] Fox observes that the South African merger regime shifts burdens of proof on certain critical but minimal showings of dominance or discrimination and does not require sophisticated economic analysis that only mature authorities with large teams of economists and lawyers can handle.[1027] Not just that, the merger jurisprudence emerging from the South African Competition Tribunal, she says, has built-in checks to ensure that enforcement is efficient and serves the people. To that extent the law qualifies in terms of legitimacy.[1028] Hence Fox remarks that, "Of all outstanding coherent bodies of competition law, the case law of the South African Tribunal may have the best fit with the Spence principle of efficient inclusive development."[1029]

Fox is not alone. By global standards, South Africa is considered fairly successful in its competition enforcement initiatives.[1030] Possibly, per Fox because, "[t]he competition law and the institutions that enforce it capture . . . its heritage, and the constant struggle to emerge . . . as an equal society with opportunity and dignity for the people. Ensuring the

[1024] McMahon K "Developing Countries and International Competition Law and Policy" *2009 Warwick School of Law Research Paper No. 2009/11* at 17.
[1025] Yeater in Ginsburg & Wright (eds.) (2016) and Drexl J "Consumer Welfare and Consumer Harm: Adjusting Competition Law and Policies to the Needs of Developing Jurisdictions" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) 253.
[1026] Fox in Drexl et al. Fox (2012) *NYU Law and Economics Research Paper No. 11-04* at 15-16.
[1027] Fox above at 16
[1028] Fox above.
[1029] Fox in Drexl et al. above. By the end of the 1990s, the failings of the Washington Consensus were accepted and was followed by a search for modification of recommendations for achieving efficient inclusive development. One that matched the context of the country. The World Bank Commission on Growth Department chaired by Nobel Laureate Michael Spence (The Spence Growth Commission) identified common characteristics of sustained high growth including, engagement with the global economy, macroeconomic stability, market incentives and decentralization. These were accepted as supportive of efficient inclusive development. "Commission on Growth and Development. 2008. The Growth Report: Strategies for Sustained Growth and Inclusive Development. Washington, DC: World Bank. World Bank. Available at https://openknowledge.worldbank.org/handle/10986/6507 (accessed 12/10/2018).
[1030] Hazel DR "Competition in Context: The Limitations of using Competition Law as a Vehicle for Social Policy in the Developing World" 2015 37(2) *Houston Journal of International Law* 275 hereinafter Hazel (2015) 37(2) *Houston Journal of International Law,* at 312.

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right of competition on the merits, and breaking the power and privilege of the few, fit the country's mandate."[1031] Fox's judgment may well be the explanation behind South Africa's trailblazing ways in competition law and merger regulation on the continent. That is for us to find out next.

3.4 CONCLUSION

It is generally accepted that putting up structures supportive of entrepreneurial activity, key among which is an effective competition policy, is essential for improving the standards of citizens. The competition law adopted by most developing countries often corresponds to that of established Western jurisdictions. This adoption is accompanied by recommendations that the enforcement of the new competition law be aligned to the template of the competition policy of the country of origin. The question asked is whether enforcement of these new laws should be directed at maximizing competition or at inclusive development.

There is dissent over the legitimate objectives, enforcement priorities and methods of implementation of competition law. Industrialised countries support adoption of economic efficiency as the single objective of competition law. Developing countries back organic goals that are cognisant of political and economic histories of jurisdictions and which accommodate social non-efficiency objectives.

The push towards convergence of general principles and themes of competition law is given support by supra-national competition bodies. Convergence pulls jurisdictions towards the central point of a model with particular characteristics and applied to achieve certain ends. The process of convergence is expected to lead all systems to increasingly resemble the Western standard which is based on the Economics Based Model conception of competition law. The model is focused on efficiency outcomes, applies economic analysis in evaluating market conduct and espouses less intervention and greater reliance on ability of markets to self-correct.

[1031] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African Competition Authorities: Unleashing rivalry: 1999-2009* at 10.

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It is argued in favour of convergence that standardisation along the laws of developed jurisdictions comes with the benefit of investment-attraction, cost minimization in cross-border transactions, certainty of interpretation, sharing of academic discourse and neutrality, and predictability of law. It is particularly argued that applying the law any differently draws it away from its core of consumer welfare. This argument however wrongly supposes that competition law has an established core and overlooks the fact that over the years, the law has adjusted to accommodate the interests of the political economy. Disparities between markets in developed and those in developing jurisdictions are often too wide to justify shared enforcement models.

Processes of merger review are key components in the convergence movement. Consequently, the merger law of developing countries is caught in a "push and pull" between the benefits of adopting developed jurisdictions' schemes of enforcement and a "pull" towards an organic scheme that takes into account jurisdictional priorities. Yielding to the latter means applying the merger regime in a manner that best fits a jurisdiction's characteristics.

The absolutist view supportive of convergence is based on the argument that modifying the law to suit local conditions exposes it to erosion of its core by local political forces and further that maximizing competition, even if at the expense of some members of the population will increase the overall wealth of the country. These arguments overlook the fact that historically, competition law has not been apolitical and further that Western jurisdictions, including the United States and the European Union, have previously engaged competition law for distribution concerns.

Today, the preference is for informed divergence as opposed to transplanting blueprints from one jurisdiction to another. Though efficiency considerations undergird present day enforcement in developed jurisdictions, they were not the original intent. Protecting small businesses from the exercise of market power by Big Business and domestic firms from international competition have all been goals of competition law in leading jurisdictions. In the United States, it is the ascent of the Chicago School thought which occasioned abandonment of distributional ideals in favor of efficiency. To date, integration of the

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common market and protection of the economic freedom of market players is the key goal for European Union enforcement. Light enforcement endorsed by the economic based model may allow dominant firms to leverage market power to the detriment of small domestic firms and small and medium enterprises which are a crucial component in developing economies. The expertise required to apply complex economic analysis is seldom available in developing jurisdiction.

According to Amartya Sen, development should not be focused on growth in income only but must comprise both improved participation and benefit sharing. Focus on efficiency is not always compatible with economic development defined in that manner. Economies in the developing world face hurdles that inhibit inclusive growth. These include markets stunted by years of state ownership and control, high barriers to market entry and inequality in the distribution of wealth and opportunity. Competition law in the developing country should therefore focus on achieving inclusive, sustainable economic development by encouraging decentralization of economic power so that more can participate in markets and foster inclusive development.

Fox advises that factors which define markets of developing countries markets should influence the objectives of competition law in those countries. These include sluggish markets, high barriers to entry and expansion and an extensive informal economy. Fox and Gal identify four economic characteristics of markets in developing countries that are specifically pertinent, these being the stage in the process towards assimilation of free market principles, presence of high entry barriers in markets, extreme inequality in the distribution of wealth and opportunity and high vulnerability of markets to external shocks.

Parallels can be drawn between present day developing markets and the markets that precipitated the structure-conduct-performance era in the United States. The shared qualities include high concentration, prohibitive barriers of entry and markets stunted by years of laissez faire or absent antitrust. Commitment to efficiency goals is not practical in that set up. Budzinski and Beigi argue for an approach that deems competition to be a process rather than an outcome and competitive markets are understood to be inclusive markets with access to participate in the economic enterprise.

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According to Bakhoum, the law should have regard for distributional and inclusion concerns. Economic analysis should be built into an overall framework of development concerns which factors in non-economic goals. Fox recommends that the policy be inclusive and increase business opportunities of the majority. For Roberts, the goal of the law should be achieving economic growth but also sustainable development objectives such poverty eradication. Drexl advocates a dynamic approach where analysis of market conduct is wide and contextualised enough to protect all market participants. Aydin and Buthe emphasise reduction of concentration in markets to open them up.

It is submitted that the ideal approach from all recommendations is one that takes cognisance of distinctive features of the socio-economic environment and consider competition as a process rather than an outcome. It should aim at lowering barriers to entry, addressing high levels of concentration, facilitating inclusion and mobility and preventing creation of new barriers in order to open up markets. Analysis of market conduct should be wide and contextualised to protect all market participants. It should go beyond the conventional efficiency concerns to accommodate non-economic values such as dispersing power and opportunity.

With regard to merger analysis Fox advises that assessment should be aimed at facilitating inclusion and mobility, preventing creation of new barriers and prohibiting restraints by powerful and abusive market actors. Promoting long-term productive and dynamic efficiency should be center stage even if at the cost of some harm to allocative efficiency in the short term. A combination of competition and cooperation, rather than maximum competition will achieve and promote long-term economic growth. Merger analysis for the developing country should therefore be focused on opening up markets and creating a market environment that is conducive to participation.

Adhikari and Knight-John argue for merger analysis that is focused on preventive as opposed to curative measures and based on a structural as opposed to a conduct focused approach. Lande cautions that merger analysts in developing countries, must be wary of even small reductions in competitiveness of markets. The cost of non-intervention for developing economy markets is likely to be higher than that of intervening and agencies

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should err on the side of over-enforcement. According to Kolasky the meaning given to competition should be that of rivalry and for Waked, overall enforcement should be guided by small business protection. Employing competition law in a manner that protects some competitors, such as in markets where entrenched powerful elites have a stranglehold over the economy, is a matter of justice.

De Leon supports an access-to-markets approach where the state of competition in a market is gauged from the ability of economic actors to enter and compete. According to Gal and Fox, merger analysis must be kept simple so as to reduce chances of poor decisions. Bullard argues that agencies should be guided by dynamic efficiency, which is the most likely efficiency to be aligned with the overall development agenda. Dynamic efficiency is best promoted by a combination of co-operation and competition rather than by maximum or unfettered competition. Gal posits that analysis should be wide enough to investigate other markets in which the parent or holding companies of the merging parties operate, given the nature of developing country markets where large conglomerates wield not only economic but also political influence.

The contribution of mergers to concentration of markets should be acknowledged and placed against the need to safeguard robustness and inclusivity of markets. There are parallels between markets in the developing world today and those that led to the Harvard approach to analysis of mergers. The similarities support adoption of a significantly stricter, more prophylactic merger paradigm that is open to both economic and public interest considerations.

Merger policy is the most effective tool for preventing market contraction and merger analysis should be aligned to jurisdictional context. Evaluation of mergers is essentially a balancing of interests. Merger analysis for a developing country should be angled towards development and sustenance of robust inclusive markets. Small business protection should guide merger analysis as was done in the Warren-era courts but indiscriminate and perennial protection should be guarded against. Analysis should be simple and focused on preventive as opposed to curative measures. Analysis should sweep widely enough to investigate other markets beyond the directly relevant one. Broader industrial

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policy or socio-economic considerations should form part of the analysis. Considerations such as protection of national champions, promotion of employment and increasing the ownership status of historically disadvantaged persons are valid considerations.

With regard to public interest concerns, an analysis that is flexible enough to accommodate the most felicitous definition for inclusive development is favoured. Wider industrial policy and socio-economic considerations such as protection of national champions, promotion of employment and increasing the ownership status of historically disadvantaged persons are a useful tool for redistribution and should be taken into account. Some recommend an approach that pays special attention to sectors that are critical to the economy. The agricultural and informal sectors are commonly proposed as meriting special attention. Others, including Fox and Mateus, advocate a law where mergers affecting specific groups, such as the poor receive particular consideration.

Fox sets out six possible models that could form a prototype for merger analysis for developing jurisdictions. She approves the South African model which is tailored specifically to the goal of inclusive development as well as being focused to openness and access. It has built-in checks to ensure it responds to minimal showings of dominance or discrimination and does not require economic sophistication to give effect.

Competition law enforcement and broader competition policy are a function of the prevailing economics and politics of any country at any given time. The presence of a modern competition law is of little avail if the institutional and political climate is inimical to its enforcement. It is for the law to adjust to fit into the country, not vice versa. Merger analysis too will have to be suited to the domestic environment of the country both in terms of what qualifies as effective enforcement and in perception of the end goals. The unique characteristics of the latter affects analysis of mergers.

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CHAPTER 4

MERGER ANALYSIS UNDER SOUTH AFRICAN COMPETITION LAW

4.1 Introduction

4.2 Historical development

4.3 Substantive merger analysis

4.4 Conclusion

4.1 INTRODUCTION

> "I hope and believe that I am not influenced by my opinion that [the Sherman Act] is foolish law. I have little doubt that the country likes it and [as] I always say . . . if my fellow citizens want to go to hell I will help them. It's my job."[1032]
>
> Justice Oliver Wendell Holmes Jr. 1841 - 1935 Associate Justice of the Supreme Court of the United States
>
> 'The people of South Africa recognise [t]hat credible competition law, and effective structures to administer [it] are necessary for an efficient functioning economy.'[1033]
>
> Preamble Competition Act 89 of 1998

Justice Holmes's declaration is rendered elsewhere in more dramatic fashion thus: "Of course I know, and every other sensible man knows, that the Sherman law is damned nonsense, but if my country wants to go to hell I am here to help it."[1034] Holmes's sentiment is anchored in the conviction that free markets are perfectly capable of adjusting to their proper equilibrium. Any intervention is not only unwarranted but also capable of causing harm.[1035] Markets can self-regulate, self-discipline and self-

[1032] Quoted in Posner (2000) 222. For an interesting reading of Holmes' place in American Antitrust jurisprudence, see Waller SW "The Modern Antitrust Relevance of Oliver Wendell Holmes" 1993 59 *Brooklyn Law Review* 1443.
[1033] Preamble Competition Act No. 89 of 1998.
[1034] McChesney FS and Shughart II WF "Introduction and Overview" McChesney FS and Shughart II W in T*he Causes and Consequences of Antitrust: The Public-Choice Perspective* (1995) hereinafter McChesney & Shughart II (eds.) (1995) 1.
[1035] Holmes stance was shared by the economists of the time. See chapter 2 par 2.4.1.

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correct.[1036] If this reasoning is cogent, for the developing country there exists at least a double layered rationale for steering well clear of antitrust. First, there is the fear of upsetting an institution well able to manage itself. Second, given the dearth of development such nations typically labour under, adopting competition law is engaging a misplaced priority - something akin to handing a silk scarf to a starving man. In reality though, the good Judge's view has been overtaken by events and would obtain little, if any concurrence today. Popular opinion long shifted in favour of broad adoption and implementation of competition law.[1037]

In out-and-out contrast to Judge Holmes's cynicism is the buoyant expectation captured in the preamble to South Africa's competition legislation. Here competition law is a key cog in the wheel that turns the economy, and more. It is a vital component of the democracy toolkit. That faith in the power and place of competition law saw the country pass a one-of-a-kind law that has piqued curiosity, motivated much writing and inspired "copy" acts.[1038] It is a law that aims to achieve the traditional concerns of lower prices and greater choice for consumers, and while at that, to also cater for what are essentially macro-economic or wider public-interest goals - typically the substance of industrial policy.[1039] It is at the place of mergers that this exceptionality is most alive.[1040] To use borrowed language, the 'battle for the soul' of South Africa's competition law is most impactfully fought at the place of merger analysis.[1041]

If Judge Holme's vexation was with the fairly lean Sherman Act, one can only imagine his dismay at South Africa's grandiose law. But maybe, the judge would find some comfort in the detail that the current law is a progression; as a matter of fact, a resolute jump from a past of 'competition law lite'. For decades, South Africa's antitrust was of the non-interventionist variety. Under its watch and even facilitated by it, market phenomena such

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[1036] Brassey (ed.) (2002) 4.
[1037] See chapter 3 par 3.2.1.
[1038] See chapter 2 par 2.1; Hazel (2015) 37(2) *Houston Journal of International Law* at 329. Many African jurisdictions have borrowed from South Africa especially the inclusion of public interest concerns into their competition legislation. See Kenya's Competition Act No. 12 of 2010; Zambia's Competition and Consumer Protection Act No. 24 (2010); Zimbabwe's Competition Act of 1996 and Botswana's Competition Act No. 17 of 2009.
[1039] Neuhoff et al. *(*2017) 8.
[1040] See chapter 2 par 2.2.3 and chapter 3, par 3.3.2. Neuhoff et al. *(*2017) 9; Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 603.
[1041] (1987) 75 Fox *California Law Review* 917.

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as high levels of concentration and prohibitive barriers to entry subsisted. Writing in September 1915, Roderick Jones, Head of Reuters South Africa, observed that "South Africa is a country of monopolies, and those who are outside them do very little."[1042] To consolidate its position at the top of the pile, Reuters had needed to beat off the competition of three leading newspapers that had formed an amalgamated press agency financially backed by two mining houses.[1043] That calibre of market structure pertains to date as testimony to long years of non-interventionist law.[1044]

Competition law is not famed for its autonomy, in spite of protestations otherwise. This is a law that is often a handmaiden of policy, a sponge into which one may force the influences of prevalent social, economic and political preferences.[1045] South Africa's version, as becomes evident in this chapter, is no different. The story is told of how competition law speaks to particular moments and how composite pictures of it reveal formations, patterns and themes spanning epochs. How one can see reflected in it an ebb and flow of attitudes and assumptions. [1046] If South Africa's law of yore was 'hands-off', that is because it was in lock-step with the political economy of the time. The contemporary Act, the Competition Act 89 of 1998 (hereafter the 1998 Competition Act) is itself an excellent specimen of a law fitting its season.

In this chapter, we peer into the historical development of South African competition law to affirm the position that the 1998 Competition Act and the outcomes it is customised to yield are a direct response to jurisdictional realities.[1047] Importantly, this looking back will serve to contextualise the current Act along with its merger regime. That done, in line with the focus of this study, we move to a detailed appraisal of substantive merger analysis under section 12A of the 1998 Competition Act as practised by the South African Competition Agencies and the courts. Specifically, ours will in the first place be an examination of how, if at all, this practice feeds into the intended goals of the Act; and

[1042] Read (1996) 11(2) *S Afr J Econ Hist* 104 at 125. See also Bekker EE "Monopolies and the Role of the Competition Board" 1992 (625) *Journal of South African Law* 618 hereinafter Bekker (1992) *Journal of South African Law* 618 at 618 .
[1043] Read (1996) 11(2) *S Afr J Econ Hist* 104 at 125 and 126.
[1044] See chapter 4 par 4.2.
[1045] See chapter 2 pars 2.1 and 2.4.1
[1046] For an analysis of thirteen cases spanning cartels, monopolies and mergers and revealing the shifting landscape of competition law see Fox & Crane (eds.) 2007.
[1047] See generally chapter 2.

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second, how it scores on the scale of the merger analysis paradigm constructed in the previous chapter and whether Fox's approval is deserved.[1048]

In the study of one's own legal system it is now increasingly expected that there will be a casting of the eye across borders to comparable jurisdictions to see what may be useful there.[1049] Needless to say such an exercise is woefully deficient if it only stops at comparison for comparison's sake. The comparative investigation of Kenya's merger analysis here as against its South African counterpart will gravitate around assessing how each of the two countries meet the challenge of analysing mergers in ways that produce optimal results in consonance with the bigger national socio-economic picture. We will be curious in the coming chapter to establish how the practice under section 46 of Kenya's Competition Act compares to that of its South African counterpart, one by the account of some, the "crown jewel" in the highly successful enterprise that is South African competition law enforcement.[1050] What lessons there are to be picked for Kenya will be our concern.

4.2 HISTORICAL DEVELOPMENT

4.2.1 Introduction

To appreciate how South Africa came to a world-class competition law framework, it is necessary that we look back into South Africa's history and competition evolution.[1051] A sequential study of the law alongside the contiguous economic atmosphere is crucial for an appreciation of the present-day Act - itself a consequence of history and a subtle balancing of interests.[1052] South Africa's political and economic history has had a significant bearing on its competition law regime.[1053] In South Africa, competition legislation has sought to establish a regulatory system in tandem with the economic focus

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[1048] See chapter 3 par 3.3.2.
[1049] Glenn HP "The Aims of Comparative Law" in Smits JM (ed.) *Elgar Encyclopedia of Comparative Law (2014)* 65. Comparative law is a suitable instrument for improving domestic law and legal doctrine. However, importing rules and solutions from abroad may be unworkable especially because of differences in context. A more thorough contextual approach is needed. Van Hoecke M *Methodology of Comparative Legal Research* (2015) 1–35 and Bussani M and Mattei U "Diapositives versus Movies – The Inner Dynamics of the Law and Its Comparative Account" in Bussani M and Mattei U (eds.) *The Cambridge Companion to Comparative Law* (2012) hereinafter Bussani & Mattei in Bussani & Mattei (eds.) (2012) 1-9.
[1050] Lewis (2013) 3. See chapter 3 par 3.3.2.
[1051] Kelly L, Unterhalter D, Youens P, Goodman I, and Smith P *Principles of Competition Law in South Africa* (2017) Kelly et al. (2017) 8 and Lewis (2013) 13.
[1052] Brassey (ed.) (2002) 61.
[1053] Buthelezi & Njisane *Without Prejudice*, December 2014 at 31.

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of the time.[1054] By casting a backward glance at the markets and economic policy of eras gone by, one might be able to make sense of the nature of the laws then, as well as the outcomes they were contrived to produce. To that end, we engage in a chronological overview of the law used to regulate competition in South Africa from the dawn to the twilight years of the last century.

While there is a sense in which 1998 can be considered ground zero, the 1998 statute was by no means the country's first such venture.[1055] Scrutiny of the period prior to the advent of representative democracy that entered the scene in 1994 may surprise
many who, with good reason, believe that the apartheid state had little interest in competition matters.[1056] In point of fact, starting from very early in the last century a host of statutes were passed for exactly the purpose of managing competition. These would be updated, repealed and replaced as became necessary; either for material deficiencies or for simply being out of touch with the changing socio-economic and political environment. Most writers consider the Regulation of Monopolistic Conditions Act of 1955 as the country's first competition legislation.[1057] A few, the more exacting, start at the Maintenance and Promotion of Competition Act of 1979.[1058] For our purposes, we will move a little further back to the collection of mainly short statutes passed at the start of the 20th century.

Admittedly, the rudimentary and even haphazard legislation that passed as anti-monopoly laws of the early 20th century were a far cry from what we know today to be competition law.[1059] But if competition law be those rules set up to ensure that markets operate effectually and efficiently, and vigorous competition results in efficient allocation of resources, then we dare say that this rudimentary diverse collection of statutes made up

[1054] Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 603.
[1055] Lewis (2013) 5 13 and candhapter 4, par 4.2.
[1056] Lewis (2013) 17-18.
[1057] See Smith (1994) 6(1) *SA Merc LJ* 63 at 63; Lewis (2013) 17; Sutherland & Kemp (2017) par 3.1; Brassey (ed.) (2002) 61; Kelly et al. (2017) 8; Prins D and Koornhof P "Assessing the nature of competition law enforcement in South Africa" 2014 (18) *Law, Democracy and Development* 136 hereinafter Prins & Koornhof (2014) 18 *Law Democracy and Development,* at 137 and Bekker (1992) *Journal of South African Law*618 at 626; Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 10 and Chabane (2003) *University of Cape Town Forum Papers* at 4 hereinafter Chabane (2003).
[1058] Neuhoff et al. *(*2017) 7 and Brooks PEJ "Redefining the Objectives of South African Competition Law" November 2001 (34) *The Comparative and International Law Journal of Southern Africa* 295 hereinafter Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 297.
[1059] Sutherland & Kemp (2017) par 3.1; Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 602.

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the South African competition law of their time.[1060] The Sherman Act, running as it does into a little more than a page, would not for want of detail measure up were it to be passed today. Not to mention that, while current practice is to have a composite comprehensive legislation, no questions are raised as to the legitimacy of American antitrust which to date remains a collection of federal and state government laws.[1061] Our study will therefore fall into four phases: the period before 1955; the period under the Regulation of Monopolistic Conditions Act of 1955; that under Maintenance and Promotion of Competition Act of 1979 and finally, the 1998 Competition Act.[1062] For this last phase, as is only fit, we will engage more closely with the circumstances, conversations and controversies leading up to the passing of the Act. This with the intention of fleshing out the goals of the law as they were envisioned.

To set a backdrop for the historical analysis, we commence with a synopsis of South Africa's economic policy through the last century. We have noted to keep this exercise as plain and as basic as possible, taking to heart Michael Moore's counsel that no one is entertained by economics.[1063]

4.2.2 Overview of South African Economic Policy through the 20th Century

It would be dishonest to engage in a clinical study of South Africa's past economic landscape as if it was always economics as usual. That would call for a shutting of the eye to the injustices of the era before 1994 and the coming to an end of the policies of apartheid. Not only were these policies the very antithesis of democracy, but the laws that propped up the system barred most citizens from any significant participation in the country's economy, that on its own a dire contradiction to the tenets of a free market-oriented economy on which competition law rests.[1064] These

[1060] See chapter 2 par 2.2.1.
[1061] See chapter 2 par 2.2.1
[1062] Sutherland & Kemp (2017) at par 3.2.1 divide the phases into three - 1907 to the Mouton Commission, Mouton Commission to the dawn of the 1979 Act and evolution of the 1998 Act to date.
[1063] Prof. Michael Moore, George Washington University. Xplore Inc, 2018. https://www.brainyquote.com/quotes/michael_moore_579979 (accessed September 20, 2018.
[1064] Brooks (2001) 34(3) *THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA* 295 at 295-296.

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skewed policies contributed to the emergence of a distorted, inherently non-competitive business environment, a legacy the country continues to grapple with.[1065]

Yet, we would be equally guilty of cherry picking were we to shut the eye to the fact that within the macrocosm of that pre-1994 political system was the microcosm of a running, in fact for most part of the century, thriving economy. Organised regulated markets fed into that economy. Markets whose architects sought to align along favoured economic theories and trends of the day.[1066] Those responsible for policy ensured anti-monopoly laws were passed to ward off conduct that would threaten market efficiency. These laws were updated as was found necessary to keep them fit for purpose. Naturally, in the face of the grave economic and political abnormalities of the time, these competition laws had little or no impact on the collective well-being of citizens. But they did impact how the markets' structures turned out.[1067] One can limit the study to the effectiveness of this legislation in managing perceived competition concerns and in playing alongside established policy direction. We intend to do only that.

The economic scenario of yesteryear South Africa can be summed up thus - a small white minority governing and owning almost all of the business enterprises with the state playing a significant role both as producer and regulator.[1068] The genesis for this is historical, apartheid, only finding a ready foundation on which to build further. Following the discovery of diamonds along the Orange River in 1867 and gold reefs along the Witwatersrand in 1886, large numbers of foreigners made their way to South Africa in the hope of making a fortune. The business of mining was, as it is today, a high risk venture that demanded large capital outlays, forcing small mining enterprises to amalgamate in order to benefit from economies of scale and conduct business profitably. Those were the

[1065] From World Bank Statistics and estimates, of 149 countries and territories assessed, South Africa is the world's most unequal country. Data available at http://databank.worldbank.org/data/reports.aspx?source=2&series=SI.POV.GINI&country=# (accessed 19/08/2018).
[1066] See for instance from speech by the President of the Economic Society of South Africa Pretoria 23/08/1955 in Busschau W "The Need for Currency Stabilization: Speech by the President of the Economic Society of South Africa Pretoria" 23 August 1955 23(3) *South African Journal of Economics 179* at 179.
[1067] Brooks (2001) 34(3) *THE COMPARATIVE AND INTERNATIONAL LAW JOURNAL OF SOUTHERN AFRICA* 295 at 296.
[1068] Hazel (2015) 37(2) *Houston Journal of International Law* at 312.

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beginnings of the highly concentrated mining sector dominated by entities with considerable economic power.[1069]

As the mining sector expanded, supporting industries emerged around it to meet the demand for manufactured goods such as dynamite and mining equipment.[1070] In its infancy, this sector's stock of capital was too low to enable it to meet the ever increasing demand for manufactured goods. In contrast, the mining sector was making good export earnings and had at its disposal the capital that the supporting sectors lacked.[1071] Mining houses, seeing the opportunity to diversify, moved into the manufacturing market both directly and indirectly, investing the capital accumulated from their mining enterprises.[1072] Thus grew mining conglomerate control, extending initially from the mining to the manufacturing sector and in due course to other productive sectors. This also marks the origins of the power and organisational structures of conglomerates in the South African economy.

Alongside these developments, the state was investing in industries that produced the key inputs for the mining and supporting sectors via state-owned production. To protect from the risks of over-specialisation the government began to implement policies to reduce reliance on the mining sector by encouraging farming and local manufacturing. These industries were granted monopoly concessions and benefited from low costs of inputs such as steel and electricity supplied by state monopolies. They also enjoyed the cover of protective tariff barriers.[1073] The Pact government elected in 1924 upped the *ante* on the inwardly oriented industrialisation policy, this time seeking to create employment opportunities for the poor whites.[1074] The strategy of choice was greater direct and indirect

[1069]Mouton DJ, Benadé DVDM, Bräsler DG, Emdin S, Franzsen DG, Morrison WL, Paxton DG, Pretorius WS, Ridsdale FJ, Weyers JL & Scribante GS "*Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act* 1955 Pretoria" 1977 Government Printer, South Africa RP 64 hereinafter Mouton Report (1977) at 30; Lewis (2013) 7 and Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 8-9. See Smit at 9-10 for the connection between the mining and manufacturing sectors and how this fed into the conglomerate culture.
[1070] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 9.
[1071] Smit above at 11.
[1072] Smit above at 9.
[1073] OECD (2003) Competition Law and Policy in South Africa - *OECD Country Studies: South Africa - Peer Review of Competition Law and Policy* 11 (February 2003) hereinafter OECD (2003) Competition Law and Policy in South Africa, at 2 available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/34823812.pdf (accessed 12/12/2019). On protection and restriction of imports in early South African markets see Laight (1955) 23(3) *South African Journal of Economics* 213.
[1074] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 9. Formation of the Pact Government in South Africa in 1924 was part of the push for independence from Britain. In 1923 the National Party and the Labour Party (LP) formed a pact

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government involvement in markets. By the 1930s state owned enterprises dominated manufacturing.[1075] Policies of import substitution, market controls, and state ownership in key sectors persisted through the early part of the century.[1076]

The apartheid era, which commenced after the National Party won the 1948 election, saw the escalation of policies that protected the South African economy from external competition. The outcome was ever increasing concentration of markets.[1077] By the 1970s, the government owned or managed nearly 40 per cent of the country's productive assets.[1078] Henceforth, and for virtually the entire 20th Century, the country's economic policy was shaped by two things: a high dependence on extractive industries and isolation from many world markets.[1079] Policies of autarky and import substitution intensified in the 1980s in response to increasing international economic and financial exclusion of the regime.[1080] Things came to a head in 1985, when the country experienced a debt crisis. Exchange controls restricting the amount of capital that domestic firms could take out for foreign investment were imposed, forcing firms to invest locally. On the other hand, corporate restructuring, especially mergers and acquisitions were loosely regulated, leaving firms to use these avenues to grow domestically.[1081]

In 1987 the National Party agreed to the privatization of large state corporations, through which the economic power of powerful state-owned monopolies could be broken and the high concentration levels lowered.[1082] It was by then abundantly clear that a more equal spread of economic power away from conglomerates was a prerequisite for democracy. Significant policy changes that were nearly a complete reversal of those hitherto prevailing, were implemented.[1083] Import substitution gave way to export promotion and deregulation became the order of the day.[1084] Market forces began to exert an influence

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to win the general elections held the year after. It is the Pact Government that worked on establishing a new South African identity including creation of a new flag and recognition of Afrikaans as an official language.

[1075] OECD (2003) Competition Law and Policy in South Africa 2.

[1076] OECD above.

[1077] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 9.

[1078] OECD (2003) Competition Law and Policy in South Africa 3.

[1079] OECD above 2.

[1080] OECD above 4.

[1081] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 9.

[1082] Smit above.

[1083] Jones S and Inggs J "Economic History of Developing Regions "1994 9(2) *South African Journal of Economic History* 1 hereinafter Jones & Inggs (1994) 9(2) *South African Journal of Economic History,* at 10.

[1084] Jones & Inggs (1994) 9(2) *South African Journal of Economic History* at 6.

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upon prices.[1085] By 1994, the economic environment was markedly different from that at the beginning of the century. Entrenched structures would, however, take much longer to undo.

4.2.3 The Period before 1955

South Africa did not start strongly off the blocks with regard to competition law. Early Roman-Dutch law bequeathed to the country a *laissez faire* attitude towards regulating private conduct between market players.[1086] Consequently, Brassey remarks that South African common law proved a fairly blunt tool in fighting anticompetitive practices and controlling economic power concentrations.[1087] The principle of sanctity of contract meant that parties could lawfully, by way of private agreement, set up anticompetitive arrangements, as long as these were not against public policy.[1088] Not only was the common law maladroit at the task of keeping market players in the straight and narrow but it instead supported monopolies.[1089] The "restraint of trade" doctrine censured only covenants that were shown to be against the public interest.[1090] Going by the precedents of that early era, it is fair to conclude that the absence of directed competition law largely left cartels to their own devices and the remainder of anticompetitive market conduct unchecked.[1091]

The lethargy though was not entirely only on the part of the law. There was overall, a reluctance to interfere in the economy to rectify market failures. The prevalent thought, was that deviant conduct was not fatal since competitors would soon fill in the gap created by it.[1092] Firms of larger scale and scope were preferred and the market was seen as

[1085] Jones & Inggs (1994) 9(2) *South African Journal of Economic History* at 7.
[1086] OECD (2003) Competition Law and Policy in South Africa 4 and Bekker (1992) *Journal of South African Law* 618 at 620 and 622.
[1087] Brassey (ed.) (2002) 61.
[1088] Brassey (ed.) (2002) 63.
[1089] Bekker (1992) *Journal of South African Law* 618 at 622.
[1090] *Ex parte Malan's Executors & others* 1911 TPD 1188 at 1911 and *Jewish Colonial Trust, Ltd v Estate Nathan* 1940 AD 163. Prior to the decision *in Magna Alloys and Research (SA) (Pty) Ltd v Ellis (1984 (4) SA 874 (A),* South African courts applied the English Law standard that a restraint of trade agreement was prima facie contrary to public policy. A party who sought to enforce the agreement had to show that the restraint was reasonable between the parties. The court overturned this approach and held that restraint of trade agreements are enforceable, unless they were unreasonable and therefore contrary to public policy.
[1091] Brassey (ed.) (2002) 10; *Kock & Schmidt v Alma Modehuis (Emds) BPK*1959(3) SA 308 A; S*A Wire Co (pty) Ltd v Durban Wire and Plastics (Pty) Ltd* 1968(2) SA 777 (D). But see *Spa Food Products Ltd & others v Sarif* 1952 (1) SA 713 (SR).
[1092] Brassey (ed.) (2002) 10. Compare with chapter 2 par 2.4.2.

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capable of righting itself.[1093] With time, however, the manifest weakness of civil law in the face of market abuse was glaring, making it obligatory to pass law to cover the lacuna.[1094]

Unsurprisingly, early legislation was minimalist, configured for intervention only where the need was palpable.[1095] With mainstream thought favouring abstentionism, no broad legislative framework was going to be put together. Instead, the law designed was incidental and fragmentary in nature, domiciled in assorted legislation. Particular competitive situations and trade in particular sectors were compartmentalised in particular laws, some of them transitory.[1096] The tone of most of these Acts was rudimentary, an example being the Cape Meat Trade Act 15 of 1907 which at section 3 provided that it was enacted 'to prevent a monopoly of the meat trade'. Every act, contract, combination or conspiracy that would have that effect was illegal as were all contracts and undertakings in support of any combination to control the sale of meat in order to arbitrarily control or regulate prices.[1097] The Profiteering Act 27 of 1920 was enacted to deal with the operation of trusts, combines, agreements and arrangements in so far as they led to the creation of monopolies or to the restraint of trade in all forms of trade, including manufacturing. Other legislation in similar vein included the Post Office Administration and Shipping Combinations Discouragement Act 10 of 1911 and the Patents, Designs, Trade Mark and Copyright Act 9 of 1916.

The passing of the Board of Trade and Industries Act 28 of 1923 brought in some focus. This Act gave the Board of Trade and Industry *inter alia* the task of enquiring into, and advising the government on, competition policy, monopoly situations and restrictive practices. The Board was to investigate into and advise on "[c]ombinations, trusts, monopolies and restraint of trade tending to the detriment of the general interest, especially by restricting production or maintaining or raising prices, and the prevention thereof".[1098] Though a major step forward, this was not exactly a turnaround.[1099] The

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[1093] Brassey (ed.) (2002) 103-104.
[1094] Brassey (ed.) (2002) 63 and Bekker (1992) *Journal of South African Law* 618 at 619.
[1095] Brassey (ed.) (2002) 4.
[1096] Such as the Profiteering Act 27 of 1920 passed only for the duration of an inflationary period and expiring at the end of a year.
[1097] Section 3. Contravention of the section constituted an offence with a penalty not exceeding £500, or imprisonment with or without hard labour not exceeding 12 months. A butcher's licence could be cancelled under section 4.
[1098] Section 2(1).
[1099] Bekker (1992) *Journal of South African Law* 618 at 623.

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Board was only an advisory body, having neither administrative powers nor powers to sanction. These resided in the Minister of Trade and Industry. He would receive and publish in the Gazette reports of the Board on any industry protected by a customs duty, which was charging unduly high prices or acting in a manner leading to restraint of trade or establishment of a monopoly.[1100] Should the censured parties fail to take adequate curative steps within six months, he could reduce the tariff applicable thus exposing players in the industry to import competition.[1101] The measure of illegality was whether a specific situation was in the public interest.[1102] Exactly what public interest was though, remained undefined. The Board produced several reports in which restrictive practices, monopolistic conditions and Government policy regarding monopolistic tendencies in the economy were addressed.[1103]

Alongside the Board of Trade and Industries Act of 1923 operated other legislation, such as the Unlawful Determination of Prices Act 24 of 1931, by which it was an offence for any person selling petrol to compel or induce another to charge a specific price, refrain from purchasing petrol from any source or to limit the quantity of petrol to be sold.[1104] In an attempt to consolidate all the laws relating to the Board of Trade and Industries, the Board of Trade and Industries Act of 1923 was repealed by the Board of Trade and Industries Act 19 of 1944. Though the Board was reconstituted, its role in matters of competition law remained the same, namely a merely consultative one.[1105]

In 1949, the Minister directed the Board to investigate certain practices and monopolistic tendencies. While awaiting conclusion of investigations and issue of a report, Parliament enacted the Undue Restraint of Trade Act 59 of 1949. The power to inquire into and report on certain anticompetitive practices on the direction of the Minister continued to vest in

[1100] Sections 2(1) and 2(1)(f).
[1101] Section 4. The Customs Tariff and Excise Duties Act 36 of 1925, protected certain local industries by imposing tariffs and duties on imported products. This measure was not very successful because, where a single distributor was the sole offender, the manufacturers could not be penalized - Bekker (1992) *Journal of South African Law* 618 at 624.
[1102] Section 2 Board of Trade and Industries Act 28 of 1923.
[1103] Mouton Report (1977) par 9.
[1104] Section 1.
[1105] Section 9(1)(f).

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the Board. In addition, the Board could now also inquire into or advise on any method of, or arrangement for, fixing, maintaining, or raising prices or restricting production, distribution, sale or competition, or in any other manner tending to the restraint of trade.[1106] The powers of the Minister were also extended. Upon receipt of a report from the Board, he could request the person or combination of persons implicated to discontinue such practice within a fixed period, failure to which he could publish such information as he thought fit, including the names of the persons concerned.[1107] Failure to comply could result in prosecution. It was expected that the combination of unfavourable publicity and fear of prosecution would fetch compliance, an expectation that turned out to be off beam.[1108] It did not help that there was too much reliance on voluntary complaints, the criteria of public interest was still unclarified and the Minister was vested with immense discretion in choosing whether or not to act on the Board's reports.[1109]

Overall, what pertained was not the ideal antitrust scenario. At least not when looked at in current times. The question then begs, how does one explain this mildness of laws ostensibly to combat market abuse, where the enforcing agency was merely advisory and the Minister had both the first and the last word? Where the enforcement standard of public interest was a concept no one made an effort to define or at least provide guidelines on? And where sanction was exposure to competition or publicity in the hope that this would fetch compliance? On close inspection, one sees that there was, in a manner of speaking, a method to the madness. Like the American antitrust enforcement of the Harvard era, what pertained was closely managed regulation with the Minister at the helm to ensure enforcement in tandem with economic policy. Seen in the light of the involvement of the state in industry, pervasive state intervention in agriculture, manufacturing and labour, pro-active support of alternatives to mining and tacit approval of Big Business in mining, the law and its enforcement scheme begin to make sense.[1110]

[1106] Section 9.
[1107] Section 9(4).
[1108] Union of South Africa "Regulation of Monopolistic Conditions" 1951 Board of Trade and Industry Report No. 327 Government Printer Pretoria hereinafter BTI Regulation of Monopolistic Conditions Report 1951 par 244 and Bekker (1992) *Journal of South African Law* 618 at 625.
[1109] BTI Regulation of Monopolistic Conditions Report 1951 pars 249–256 and Bekker (1992) *Journal of South African Law* 618 at 625.
[1110] Fedderke J and Simkins C "Economic Growth in South Africa, Economic History of Developing Regions" 2012 27(1) *Economic History of Developing Regions* 176 hereinafter Fedderke & Simkins (2012) 178.

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An independent agency such as is the norm today would have injected incoherence into overall policy. Competition law in South Africa was, at the time, a tool of political expediency in much the same manner as antitrust in the Wilson years when antitrust was largely ignored so as to facilitate centralization of economic power and support the contemporary needs of the country.[1111]

As instructed in 1949, the Board proceeded with studies into specific industries, surveying monopolistic tendencies and evaluating competition policy in South Africa over the years.[1112] A complete report was submitted in 1951.[1113] In it, the Undue Restraint of Trade Act 1949 and sections of the Board of Trade and Industries Act of 1923 were criticised, with recommendation that there be passed "proper legislation formulated on the basis of identified principles and objectives".[1114] The legislator obliged with the passing of the Regulation of Monopolistic Conditions Act 24 of 1955 which came into operation on 1 January 1956.

4.2.4 The 1955 Act

The Regulation of Monopolistic Conditions Act of 1955 should have been a more comprehensive wide-ranging competition legislation. But, as observed by Smith, if there was an early give away to how little things were going to change, it is in the pledge to pragmatism.[1115] Like its predecessors, the law was going to be a mere enabling measure containing no prohibitions against any market arrangement or conduct. No part of it could be contravened. Enforcement was via an administrative machinery.[1116]

The Act applied to "monopolistic condition"' - agreements, arrangements or business practices, acts or omissions which, by restricting competition, had a negative effect on prices charged, output or distribution of a commodity, entry into a branch of trade or technical development of a market. "Commodity" was widely defined to include most

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[1111] See chapter 2 par 2.4.2.
[1112] By 1951 the Board had produced Reports on 15 industries - Mouton Report (1977) par 14.
[1113] BTI Regulation of Monopolistic Conditions Report 1951.
[1114] Mouton Report (1977) par 21 and Prins & Koornhof (2014) 18 *Law Democracy and Development* at 137.
[1115] Smith (1994) 6 *SA Merc LJ* 63 at 69.
[1116] See Mouton Report (1977) par 49 for the actual way in which investigations operated.

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products or services.[1117] Monopolistic conditions would today roughly fit into the mould of restrictive practices.[1118] As defined, the offending conduct was inclusive enough to catch a wide array of anticompetitive conduct. It was even generally accepted that regulation of horizontal and vertical mergers was possible within the ambit of the Act.[1119] So if in implementation there was any lethargy, the same cannot be attributed on the letter of the law, at least not entirely.

The Board of Trade and Industry remained the enforcement body but it could only commence investigation in response to a directive of the Minister.[1120] Legality or otherwise of conduct was anchored on possible justification in the public interest.[1121] Yet again, the legislature did not oblige with a definition. That omission reduced the practice of the Board to one of weighing up advantages and disadvantages and concluding on the preponderance of the evidence whether the conduct under investigation could pass competition muster.[1122] If the finding was in the negative, the Board initiated negotiation with the persons concerned towards an arrangement to remove the conduct.[1123] Any arrangement reached would then be conveyed to the Minister who had the power to confirm it with or without modification and thereafter publish it in the Government Gazette.[1124] He could also set the arrangement aside and proceed in accordance with section 6 of the Act which gave him power to apply his own mind to reports of the Board and impose remedies as he saw fit.[1125] One such remedy was to request the Minister of Finance to suspend a duty that protected goods or a service of the same nature as those affected by the monopolistic condition.[1126] Where the Board was unable to arrive at arrangement with the offending party, it would refer the matter under the same section 6.[1127] Though section 7(1) of the Act provided for appeal to a special court,

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[1117] Section 2(1).
[1118] Brassey (ed.) (2002) 63.
[1119]Legh in Brassey (ed.) (2002) 64 and 68; Mouton Report (1977) par 137.
[1120] Section 3(1).
[1121] Section 3(2).
[1122] Brassey (ed.) (2002) 64 and *Mouton Report (1977)* par 30,
[1123] Section 3(2).
[1124] Section 3(3) read with section 6(1)(b).
[1125] Section 3(3). He could by notice in the Gazette require any party to terminate or to cease to be a party such agreement, or to refrain from applying such business practice or method of trading, or from committing such an act or bringing about such a situation. Remedial steps could include dissolution of a body corporate or unincorporate. Section 6(1)(b)(ii).
[1126] Section 6(1)(a).
[1127] Section 3(2).

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this was a right never used during the existence of the Act, pointing to the lethargy towards enforcement.[1128]

To the critics, the failings of the 1955 Act were many. It only applied to existing monopolistic conditions - letting slide potentially harmful conduct.[1129] As pointed out by Bekker, the Board was no competition watchdog but a tariff body without independent power - either of investigation or relief.[1130] At the worst, this reduced it to a political instrument in the hands of the Minister.[1131] While the activities of the State were not expressly excluded, it could not be expected that the Minister would order an investigation into state activity.[1132] State monopolies were not prosecuted but were left to exercise mostly unfettered market power.[1133] For many, a major sticking point was the failure by the Act to deal with mergers and dominance directly.[1134] While the wording of the legislation could have been extended to cover horizontal and vertical mergers, conglomerate mergers were certainly outside of its scope.[1135] In any event, the prospective nature of the legislation meant that it could not be used to prevent future anticompetitive conduct, mergers included, from taking place.

Expressions commonly used to score the Regulation of Monopolistic Conditions Act include 'cautious', 'permissive', 'of modest impact'.[1136] The statistics, if a tally of interventions is a good gauge of effectiveness, seem to confirm as much.[1137] Twenty years later, the Minister had ordered only eighteen investigations into suspected monopolistic conditions - roughly one for each year the Act had been in existence.[1138] Restraints in liquor, pharmaceuticals, tyres, and matches were endorsed as consistent with the public interest, and no person was ever jailed for acting anti-competitively in

[1128] Bekker (1992) *Journal of South African Law* 618 at 627, Brassey (ed.) (2002) 65.
[1129] Brassey (2002) 63-64; Mouton Report (1977) pars 26, 138–140.
[1130] Bekker (1992) *Journal of South African Law* 618 at 629; Mouton et al. Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act 1955 (1977) par 14; OECD (2003) Competition Law and Policy in South Africa 4; Beacham A "Competition Policy in Britain and South Africa" 1974 (42) *South African Journal of Economics* 121 hereainafter Beacham (1974) 42(2) *South African Journal of Economics* 121 at 124 and Prins & Koornhof (2014) 18 *Law Democracy and Development* at 138.
[1131] Brassey (ed.) (2002) 65.
[1132] OECD (2003) Competition Law and Policy in South Africa 4.
[1133] Brassey (ed.) (2002) 63 and 66 and Kelly et al. (2017) 8.
[1134] Lewis (2013) 18; OECD (2003) Competition Law and Policy in South Africa 4; Prins & Koornhof (2014) 18 *Law Democracy and Development* at 138.
[1135] Mouton Report (1977) par 137; Legh in Brassey (ed.) (2002) 64 and 68.
[1136] Competition Law and Policy in South Africa at 4 and Prins & Koornhof (2014) 18 *Law Democracy and Development* at 138.
[1137] Brassey (ed.) (2002) 65.
[1138] Brassey (ed.) (2002) 65. For the results in terms of this Act generally, see Mouton Report (1977) pars 51-55 and 142-148.

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contravention of the Act.[1139] Negotiated settlements were the customary way the Board concluded most of its indictive findings.[1140] Is it possible yet again that there was a method to the madness? We believe so. While there may have been deficiencies in the legislation detracting from its efficacy, part of the "lack of impact" must be credited to the management of implementation. After all, Roberts observes that "rather than the strength of the legal provision, the most important issues for understanding the operation of the Competition Board are its link with the government and its institutional capacity."[1141] The impact of the Board essentially depended on how the government wished to use it as a tool for pursuing policy goals. If the Act was cautious and permissive, it is because there was no political will to have it otherwise.[1142]

Reducing competition law to the level of regulation enforceable through administrative procedures and subject to executive oversight was part of an economic strategy.[1143] The 1950s and early 1960s were years of a long post-war boom, the most spectacular growth being that experienced in manufacturing as government policy of diversifying away from agriculture and mining began to bear fruit.[1144] In keeping with the conventional development strategies of the post-World War II period, many economic sectors were completely state dominated.[1145] State ownership of basic industrial products and services - steel, energy, transport, and telecommunications - was the prevalent feature of the structure of the South African economy.[1146] Overarching policy was focused on creation and support of a self-reliant, diversified economy which in turn required some level of tolerance for concentration. The small size of the economy, reduced options for investment and importance of size in the critical mining sector would have been incompatible with firm-handed merger regulation. And this not a uniquely South African

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[1139] Brassey (ed.) (2002) 66 and Beacham (1974) 42(2) *South African Journal of Economics* 121 at 121-122.
[1140] OECD (2003) Competition Law and Policy in South Africa 4.
[1141] Roberts S "The Role for Competition Policy in Economic Development: The South African Experience" 2004 21(1) *Development Southern Africa* 227 hereinafter Roberts (2004) 21(1) *Development Southern Africa*, at 232.
[1142] Brassey (ed.) (2002) 66.
[1143] Lewis (2013) quoted in Kelly et al. (2017).
[1144] Simkins C "The Political *Economy* of *South Africa* in the 1970s" 1999 14(1-2) *South African Journal of Economic History* 11 hereinafter Simkins (1999) 14(1-2) *South African Journal of Economic History*, at 13. See Table 1 Fedderke & Simkins (2012) 27(1) *Economic History of Developing Regions* at 178.
[1145] Brassey (ed.) (2002) 66 and Simkins (1999) 14(1-2) *South African Journal of Economic History* at 35.
[1146] Lewis (2013) 8.

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phenomenon. In past eras with widespread state intervention in economic activity, merger control was generally never a priority.[1147]

4.2.5 The 1979 Act

Government confidence at the beginning of the 1970s decade was underpinned by the more than two decades of rapid and sustained growth.[1148] The tide was about to turn. The 1970s would bring with them a turbulence that peaked in the decade after, ebbing somewhat only in the late 1990s.[1149] The economy was buffeted by factors, both international and domestic. Among the former was the oil price shocks of 1973 and 1979, a fluctuating gold price and the stagflation that was a global feature of that decade.[1150] On the domestic front, re-emergence of African trade unionism set the stage for the political struggle of the next two decades.[1151] With the social and political unrest, investor confidence took a beating.[1152] Simkins points out that multinational companies which had typically re-invested upwards of 60 per cent of their South African earnings were re-investing only 30 per cent at 1977.[1153] January 1979 came with a United Nations General Assembly resolution for an oil embargo and full economic sanctions against South Africa, up-scaled to include financial sanctions in 1985.[1154] By the end of the 1980s, steady decline had pushed GDP growth to a level below that of 1970.[1155]

It was not just the sanctions and the unrest that took their toll. The chicken of years of costly economic policies were coming home to roost. Investment in bloated, often inefficient, public enterprises and running an insular economy made up of concentrated market structures had taken a toll on the economy.[1156] Change was on the horizon and as always happens, competition law was going to be carried along.

[1147] Grimbeek S, Koch S and Grimbeek R "The Consistency of Merger Decisions at the South African Competition Commission" 2013 81(4) *South African Journal of Economics* 561 hereinafter Grimbeek et al. (2013) 81(4) *South African Journal of Economics,* at 566.
[1148] See Figure 1 Simkins (1999) 14(1-2) *South African Journal of Economic History* at 13.
[1149] Fedderke & Simkins (2009) at 26-27.
[1150] Simkins (1999) 14(1-2) *South African Journal of Economic History* at 13 and Figure 2 at 14.
[1151] Fedderke & Simkins (2009 at 181.
[1152] Simkins (1999) 14(1-2) *South African Journal of Economic History* at 33.
[1153] Simkins above.
[1154] United Nations "The Question of Namibia" (21 December 1978) General Assembly Resolution 33/182 and United Nations Security Council Resolution 569 (1985) 26 July 1985. The resolutions are ailable at https://undocs.org/en/A/RES/33/182 and http://www.un.org/documents/ga/res/40/a40r064.htm for 1979 and 1985 respectively (accessed 21/07/2018). The 1979 embargo was a consequence of failure by the Government to abide by a 1968 declaration granting independence to Namibia and subsequent resolutions to that effect through the 1970s .
[1155] Jones A and Kovacic W "Antitrust Law and Economics in a Nutshell" 2002 17(1-2) *South African Journal of Economic History* 49 hereinafter Jones & Kovacic 2002 17(1-2) *South African Journal of Economic History*, at 51.
[1156] Jones & Kovacic 2002 17(1-2) *South African Journal of Economic History* at 53 and 61.

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In the midst of the turbulent 1970s, in particular in August 1975, the President appointed a Commission of Inquiry to investigate and report on "the efficacy of the 1955 Act, economic concentration in South Africa, the advantages and disadvantages of such concentration, and the legislation necessary for controlling economic concentration".[1157] One cannot miss the new attention paid to concentration. The Commission presented its report, more familiarly known as the *Mouton Commission Report*, in 1978.[1158] From it would spring the country's next competition legislation.

The Mouton Commission moved from the premise that competition law was necessary for promoting effective or workable competition.[1159] This, it envisaged to be what exists in a market with alternative sources of supply; no one trader being so powerful that they can impose terms on customers or coerce competitors; no barriers to entry into a market; and no preferential status for participants conferred by law.[1160] The free enterprise system, supportive of unfettered competitive behaviour by entrepreneurs, was held up as an inherent part of the country's philosophy. The Commission believed that state enterprises should be subject to the same monopoly control as firms in the private sector.[1161] They recommended that the economy be viewed as a total concept in which both the private and public sector are included.[1162] With this in mind, they further advised creation of an autonomous enforcement body with considerably wider powers and functions than the Board of Trade and Industry, and especially, the ability to initiate investigations *suo motu*.[1163] Evidently, there was an inching closer to what we today accept to be competition law and regulation.

Empirical research confirmed the already known fact - South Africa's was an exceptionally concentrated economy.[1164] So much so that the market structure of the economy was predominantly oligopolistic.[1165] This state of affairs the Commission attributed to the small

[1157] Mouton Report (1977) (1977) at v. See v–vi and vii–x for how the Commission understood its brief and Spandau A "Towards a New South African Competition Policy - (Review Article)" 1977 45(3) *South African Journal of Economics* 300 *at* 322–323.
[1158] Mouton Report (1977).
[1159] Mouton Report above pars 8 and105.
[1160] Brassey (ed.) (2002) 67.
[1161] Naude W, Santos-Paulino AU and McGillivray M "Measuring Vulnerability: An Overview and Introduction" in Naude W, Santos-Paulino AU and McGillivray M *Measuring Vulnerability in Developing Countries: New Analytical Approaches (2012)* 5.
[1162] Mouton Report (1977) par 195 and Brassey (ed.) (2002) 69.
[1163] Mouton Report (1977) pars 206 and 209; Brassey (ed.) (2002) 69.
[1164] Mouton Report above chapter 2. The Commission analysed concentration of economic power in the four major divisions of the economy; manufacturing, wholesale and retail, construction, and transportation and allied services.
[1165] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 12.

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size of the economy and to unregulated mergers and take-overs which over the years had given rise to vertical and horizontal combinations and conglomerates.[1166] Severe limitation of investment options had engendered business patterns of a compound nature. The Commission found that in fact, there was to boot, increasing movement towards even larger units via mergers, take-overs and other forms of acquisition of control. This notwithstanding, the Commission refrained from general condemnation of holding of economic power. Concentration was not found to be irreconcilable with effective competition. Larger firms were overall better able to cope with business cycles and provide security for employees. An oligopoly, or even monopoly, could be perfectly within the public interest.[1167] The upshot was that a case-by-case analysis in which the promotion of the public interest would remain the balancing factor, was recommended.

The 1955 Act was indicted especially for its inability to deal effectively with mergers prior to their conclusion, allowing harmful unions that were *fait accompli* by the time the Board could take action.[1168] Special focus on merger and takeover activity was prescribed, but only for those transactions which would have a serious impact on competition and the economy generally.[1169] What the Mouton Commission was proposing was a moderated approach, competition law within the framework of a rule of reason.[1170] Not a radical shift.

New legislation was proposed and the legislature passed the Maintenance and Promotion of Competition Act 96 of 1979 assented to on 21 June 1979 and effective from 1 January 1980.[1171] In moving the motion for adoption of the statute, the responsible Minister stated;

> "Our object with the Bill is to create more effective legislation in the interests of the business sector as well, and especially for the preservation of the free market system, which is the cornerstone of our country's economic life. *It has never been the intention to disrupt, through the implementation of monopoly legislation, the economic growth and progress of the country*. . . In fact, . . . *state interference should be restricted to a minimum*." [emphasis added][1172]

[1166] Mouton Report (1977) pars 90–91.
[1167] Mouton Report (1977) pars 106, 107, 201- 206 and 228.
[1168] Mouton Report above par 138.
[1169] Mouton Report (1977) at par 211.
[1170] See chapter 2 pars 2.2.2.1 and 2.2.3.
[1171] Mouton Report (1977) par 196.
[1172] Hansard 84 (2.5.1979) 5427.

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On concentrated markets, because concentration led to easy creation of monopolistic conditions, provision would be made for "*taking of preventive action where absolutely necessary*."[1173] And on mergers, he noted that "[A]ll acquisitions are not per se disadvantageous to public interest. [It] is the Government's wish and desire that *this policy should be applied with the greatest circumspection* to ensure the least possible inconvenience and harm to the parties involved, to proposed acquisitions and to the country's economy as a whole". [1174]

The message was unequivocal and could well have come straight from one of Bork's or his protégés' writings. 'Competition law lite' was preferred, antitrust could be disruptive to business and mergers were not the menace they were made out to be.[1175] Nonetheless, there was an undeniable willingness to move towards a firmer version of antitrust than had so far prevailed.

The 1979 Maintenance and Promotion of Competition Act initially covered two areas of conduct; namely acquisitions and restrictive practices. To this were later added monopoly situations, defined as situations where 'any person(s) with a substantial economic connection controlled wholly or to a large extent the class of business in which they are engaged in respect of any commodity.'[1176] In many respects, otherwise, this new law resembled the old one.[1177] It was enabling legislation that did not provide for *per se* offences.[1178] All conduct was lawful until declared to be unlawful, and that only by the Minister,[1179] following investigation by the Board, whose members the Minister appointed.[1180] The standard of evaluation was the still undefined "public interest".[1181] This time though, there was generally read into the notion a requirement that the conduct in

[1173] Hansard above. Emphasis added.
[1174] Hansard above at 5438 and 5461-5465. Emphasis added.
[1175] See generally chapter 2 par 2.4.4.
[1176] Section 1(b) of Act No. 5 of 1986. 'Commodity' was broadly defined to include any make or brand of any commodity, any book, periodical, newspaper or other publication, any building or structure and any service, whether personal, professional or otherwise, including any storage, transportation, insurance or banking service.
[1177] OECD (2003) Competition Law and Policy in South Africa 5.
[1178] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 297.
[1179] Sections 12, 13 and 14.
[1180] Sections 6, 10 and 11. For further reading on the functions of the Board see Bekker (1992) *Journal of South African Law* 618 at 638-643.
[1181] Section 6(b) for monopoly situations; Section 6(2)(a) with regard to acquisitions; sections 11(1)(b) and 12(2)(b); Fourie FC "Issues and Problems in South African Competition Policy" 1987 (55) *The South African Journal of Economics* 333 hereinafter Fourie (1987) 55(4) *South African Journal of Economics* at 334–337 and Van Heerden HJO and Neethling J *Unlawful Competition* (2008) hereinafter Van Heerden & Neethling (2008) 37.

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question have the effect of restricting competition directly or indirectly.[1182] In every other sense, the test was open-ended, variable and elastic.[1183] As one commentator quips, the "purpose [was] to foster a degree of social harmony by fudging and compromising".[1184]

At times, interpretation was wide enough to accommodate social and political considerations. At other times, the Board would constrict it to only economic elements and yet in others whittle it down even further to lay stress purely on efficiency, even if that meant possible abuse of monopoly power.[1185] This flexibility permitted the Board to pursue 'workable competition' "in accordance with the dictates of commercial common sense by taking into account the peculiarities, vicissitudes and business realities of that market".[1186] Manifestations of anticompetitive conduct and dominance were thus accommodated as needed.[1187]

This time around though, the Competition Board was definitely more independent and specialised, with an advisory mandate on all aspects of competition policy.[1188] But that was about it. Though empowered to review and adjudicate over mergers, restrictive practices and monopoly situations, final decision-making still lay with the Minister who had discretion to accept or reject any of its recommendations.[1189] Rejection was more frequent in practice.[1190] In two high-profile cases Ministerial veto power was used to reject the Board's recommendations that anticompetitive corporate structures and cross shareholdings be dismantled.[1191] As observed by Brooks, political expediency rather than sound competition analysis would appear to have prompted the Minister's decisions.[1192]

[1182] Section 1 and Brassey (ed.) (2002) 75.
[1183] Brassey (ed.) (2002) 75.
[1184] Gershon 'Concentration of Ownership, Unbundling and Antitrust', a speech to the Financial Mail Investment Conference, 28-29 October 1993.
[1185] Fourie (1987) 55(4) *South African Journal of Economics* 333 at 334-336; Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.
[1186] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 301; Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13; For further reading on public interest under the Act Fourie (1987) 55(4) *South African Journal of Economics* 333.
[1187] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 301; See also Bekker (1992) *Journal of South African Law* 618 at 643-644.
[1188] Section 6 1979 Act. As recommended in Mouton Report (1977) pars 206, 209.
[1189] Section 3(1) and Bekker (1992) *Journal of South African Law* 618 at 631-634.
[1190] Brassey (ed.) (2002) 75.
[1191] Competition Board Report No.10 *Investigation into Restrictive Practices in the Supply and Distribution of Alcoholic Beverages in the Republic of South Africa* Pretoria: Government Printer, 1982.
[1192] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 299.

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The extension by the 1979 Act to merger review powers was no doubt an important moment in the history of competition enforcement in South Africa.[1193] The Act initially expressly provided that pre-notification of an acquisition was not necessary.[1194] This provision was scrapped in 1990, but with no effect, as notification was still not required by law.[1195] Proscription would be spared only for those mergers that went against the elastic "public interest".[1196] Most merger hearings were conducted under conditions of secrecy, a system "ineluctably skewed in favour of those seeking a favourable merger decision from the Board".[1197] Following investigations, the Board would make a ruling and convey it for approval by the Minister.[1198] It could also conduct "consultations" in relation to proposed transactions and issue a type of "no-action" letter.[1199] This procedure allowed for circumventing of the detailed formal procedures.[1200]

In terms of ideological commitment, enforcement under the 1979 Act was sensitive to Chicago type arguments.[1201] Key voices within the Board backed big firms as a powerful engine for "meaningful competition through investment, expansion and efficiency".[1202] There was no presumption against concentration.[1203]

Much like its predecessor, the Board has been accused of being generally cautious and lacking in dynamism.[1204] It remained, for want of independence, a division of a government department, reluctant to investigate the commercial activities of state enterprises and agricultural control boards.[1205] It was further handicapped by want of resources for its task, including expert staff.[1206] In an attempt to address egregious anticompetitive practices more effectively, the Minister declared resale price maintenance, horizontal collusion on price conditions of supply and market share, as well

[1193] Kelly et al. (2017) 9.
[1194] Section 6(3).
[1195] Section 2 of Act 88 of 1990. See Bekker (1992) *Journal of South African Law* 618 at 640.
[1196] Hansard 84 (2.5.1979) 5441.
[1197] Lewis (2013) 17.
[1198] Section 6(2)(a) as amended by section 2 of Act 88 of 1990.
[1199] Section 6(1) of the Act. On Board procedures in the case of acquisitions see Mouton Report (1977) par 225.
[1200] Legh in Brassey (ed.) (2002) 76; Mouton DJ and Lambrechts JA "Competition policy in the Republic of South Africa" 1982 (4) *Modern Business Law* 58 at 67.
[1201] Fourie (1987) 55(4) *South African Journal of Economics* 333 at 351.
[1202] Dr. Mouton, Chair of the Board quoted Fourie in (1987) 55(4) *South African Journal of Economics* 333 at 338.
[1203] Fourie (1987) 55(4) *South African Journal of Economics* 333 at 340 and Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.
[1204] Brassey (ed.) (2002) 80.
[1205] Lewis (2013) 18; Brassey (ed.) (2002) 78 and OECD (2003) Competition Law and Policy in South Africa 5.
[1206] Roberts (2004) 21(1) *Development Southern Africa* at 232.

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as collusive tendering, illegal in 1986.[1207] Contravention of these prohibitions constituted offences without more.[1208] It was possible though to apply for an exemption and for many years, the cement industry operated as a lawful cartel between the three main manufacturers on the terms of such exemption.[1209] According to Lewis, there was not a single successful prosecution in terms of the Maintenance and Promotion of Competition Act.[1210]

What one hears of the 1979 regime is an acknowledgment that concentration and dominance carry risks and there is a place for intervention by competition law to cull such. But even with this, there cannot be blanket condemnation of size and power.

4.2.6 The 1998 Act

By the close of the 1980s it was clear that democracy and peace were imperative for the sustained economic growth and development of South Africa. Persistent economic decline, to say nothing of years of apartheid policies, had shaped South African society into one with highly unequal distribution of wealth and income, rising unemployment, poverty and the attendant socio-economic imbalances.[1211] Swathes of the economy were concentrated in the hands of an affluent, mostly white minority. The rest was under the control of state-owned enterprises that had for too long been insulated from competition.[1212] Only by democratisation of the development process would those hitherto excluded be brought to the table.[1213]

This crossroad coincided with a time of fundamental shifting of thought on the part of political economists.[1214] Previous theories that economic growth was sufficient for sustained development had been discredited.[1215] A distinction was now being made between the concepts of economic growth and development. Even in South Africa, the latter was favoured. Fair distribution, meeting of basic needs such as education, health

[1207] GN 801 of 2 May 1986 issued by the Minister in terms of section 14(5) 1979 Act.
[1208] Section 14(7) MCPA 1979.
[1209] GN 801 of 2 May 1986 pars 8 and 9 read with section 14(5)(b) MCPA 1979.
[1210] Lewis (2012) at 18 and OECD (2003) Competition Law and Policy in South Africa 5.
[1211] Coetzee above at 121 and 123 and Roberts (2000) 68(4) *South African Journal of Economics* 607 at 607.
[1212] Kelly et al. (2017) 9; Brooks PEJ "Future Developments in South African Competition Law and Policy" (1992) Journal Storage (unpublished discussion paper) 2-3 and Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.
[1213] Coetzee 1991 *Article based on an inaugural address delivered at the University of South Africa*, 19 March 1991 at 123.
[1214] Coetzee above at 121.
[1215] See chapter 3 par 3.2.4.

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and housing and increasing human capability to take advantage of life's opportunities was a priority.[1216]

Upon taking power in 1994 the African National Congress (hereafter ANC) committed to restructuring to create a robust, adaptive economy characterized by growth, employment, and equity.[1217] The ambition was to set South Africa on the path of economic development ensuring fair, just and politically necessary redistribution outcomes.[1218] The high levels of concentration in the economy, both in terms of ownership and market shares, were considered the chief thorn in the flesh.[1219] Addressing them dominated the overarching policy debate and competition policy became a rallying point within that debate. In fact, many in South Africa viewed competition law as the instrument that would render valuable support to other policies in the battle against excessive concentrations of private economic power and unequal spread of ownership.[1220] Developmental concerns such as addressing poverty and unemployment, equity and redistribution were as much a part of discourse as were the traditional concerns of promotion of competition and economic efficiency.[1221] With this for a backdrop, whichever law materialised was destined to have a broader than normal span.

In the meantime, the country had been making strides towards a more liberal economy and reaffirmation of the importance of the free market and private enterprise.[1222] Financial and trade sanctions were coming to an end paving the way for the country to rejoin the international fraternity.[1223] Four years into the coming to power of the ANC, the Competition Act No. 89 of 1998 (1998 Competition Act) was passed, as much a disjuncture from past legislation as was the election of the ANC itself; both events driven

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[1216] Coetzee 1991 *Article based on an inaugural address delivered at the University of South Africa*, 19 March 1991 at 121.
[1217] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.
[1218] OECD (2003) Competition Law and Policy in South Africa 5 and Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.
[1219] Hartzenberg T "Competition Policy and Practice in South Africa: Promoting Competition for Development 2006 (26) 2 *Northwestern Journal of International Law and Business 667* hereinafter Hartzenberg (2006) 26 (2) *Northwestern Journal of International Law and Business*, at 668
[1220] Hazel (2015) 37(2) *Houston Journal of International Law* at 315.
[1221] Hazel (2015) 37(2) *Houston Journal of International Law* at 315-316; Hartzenberg (2006) 26 (2) *Northwestern Journal of International Law and Business* at 668; Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry:1999-2009* at 2.
[1222] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13; Jones S "Economic History of Developing Regions" 2003 (18) *South African Journal of Economic History* 1 at 7-8,14 and Table 4 at 15.
[1223] On 2 December 1994 South Africa joined the World Trade Organisation (WTO), committing to liberalising trade over time and reducing protectionist tariffs; Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.

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by narratives of dispossession, poverty and inequality.[1224] A background to the context leading up to the Act follows.

As at 1992, the Freedom Charter of 1955 was the only broad statement of social and economic policy for the ANC. The economic clause of this Charter endorsed nationalisation, proclaiming simply; 'The People Shall Share in the Country's Wealth!'[1225] Nationalisation, however, would not come to pass. The political transition coincided with the height of the Washington Consensus whose structural adjustments mandated among other things privatisation, freeing trade and reducing government expenditure, dictates very removed from nationalisation.[1226] In May 1992 the tripartite alliance of the ANC, the South African Communist Party (SACP) and the Congress of South African Trade Unions (COSATU) published its election manifesto to replace the Charter with regard to policy direction. The 'Reconstruction and Development Programme' (hereafter RDP) linked growth, development, reconstruction and redistribution in an integrated programme.[1227] The RDP would in due course be refined and replaced with a coherent economic policy published in June 1996 and titled 'Growth Employment and Redistribution: A Macroeconomic Strategy' (hereafter GEAR).[1228] GEAR placed emphasis on enhancing competitiveness and employment. Measures to achieve this included among other things the strengthening of competition legislation.[1229] By 1997, those who had seen strong competition law as the antidote, or at least a core means, by which to resolve the economic imbalances of South Africa; to wit the trade unions, consumer groups and small

[1224] Lewis (2013) 5.
[1225] The clause provides further as follows: "The heritage of all South Africans, shall be restored to the people; The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole; All other industry and trade shall be controlled to assist the well-being of the people; All people shall have equal rights to trade where they choose, to manufacture and to enter all trades, crafts and professions." Available at http://www.historicalpapers.wits.ac.za/inventories/inv_pdfo/AD1137/AD1137-Ea6-1-001-jpeg.pdf (accessed 19/09/2018).
[1226] The Washington consensus was a set of ten economic policy prescriptions considered to make up the standard reform package for the economies of developing countries by Washington D.C.-based institutions such as the International Monetary Fund (IMF), World Bank and United States Department of the Treasury in the 1980s. The Consensus has since been widely discredited. For more reading on the Consensus and its impact on growing economies see Kuczynski P and Peterson JW (eds.) *After the Washington Consensus: Restarting Growth and Reform in Latin America* (2003).
[1227] African National Congress (1994) *The Reconstruction and Development Programme: A Policy Framework* hereinafter Reconstruction and Development Programme available at https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02103/05lv02120/06lv02126.htm (accessed 31/06/2018). See especially pars 1.3 and 4.0.
[1228] Department of Finance 1996 Pretoria Available at http://www.treasury.gov.za/publications/other/gear/chapters.pdf (accessed 03/07/2018).
[1229] Department of Finance above par 2.2.

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businesses, were increasingly putting pressure on the Government to pass a new competition law before the 1999 elections.[1230]

All serious students of South African competition law are familiar with David Lewis' captivating account of the events surrounding the passing of the 1998 Competition Law in his book *Thieves at the Dinner Table: Enforcing the Competition Act: A Personal Account*.[1231] Rendered in a refreshingly non-academic style, the volume affords a more than welcome break from all the cheerless reading that can be so much part of the discipline. Lewis paints a battle royale, pitting on one side the new government and its allies in the trade union movement and on the other an old somewhat coddled business establishment.[1232] With little love lost betwixt the two, theirs was in the words of Lewis, a relationship of "mutual suspicion, marked by fairly regular bouts of considerable turbulence."[1233] The subject matter of the battle - the intention by the former to establish a robust competition policy - centred on a new antitrust statute.[1234] As it turned out, the business establishment may well have had good reason for their apprehension. The "robust policy" in the works turned out to be a public policy intervention steeped in narratives of concentration of ownership of wealth in the hands of a small number to the exclusion of many.[1235]

At the centre of the battle stood the conglomerates - that small number of highly diversified mining, finance and industrial establishments that virtually controlled the economy.[1236] The origins of this corporate structure, as already seen, were complex.[1237] Opening up of the economy and trade liberalisation in the early 1990s had triggered even further concentration in many sectors as inefficient firms were either acquired by more efficient ones to create competitive entities or simply shut them down.[1238] Thus the pre-eminence

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[1230] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry: 1999-2009* at 5 and Kelly et al. (2017) 9.
[1231] Lewis (2013).
[1232] Lewis (2013) 1.
[1233] Lewis above.
[1234] Lewis above.
[1235] Lewis above.
[1236] Lewis above at 5.
[1237] Lewis above at 6-7.
[1238] Table 1 Roberts (2004) 21(1) *Development Southern Africa* at 228 and Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 13.

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of these amalgamations did not always point to a past of predation or privilege.[1239] Be that as it may, no amount of nuance was going to distract from the fact that the highly skewed ownership of South Africa's wealth was a direct outcome of apartheid and reflected the racial exclusion of the system.

For South Africa, competition law was not just going to be another project for the market liberalisation agenda but a central feature of the democratisation process. More than anticompetitive conduct, broadening ownership was the greater concern.[1240] Had the goal been the orthodox concerns of competition law, the 1979 Act with a little sprucing up would well have done the job.[1241] Barely two decades earlier, size and concentration had been explained away as an inescapable part of the South African economic landscape. Times had changed and as had happened with antitrust's turn to Harvard, the tide was about to turn against size.

The policy documents that fed into the 1998 Competition Act, and the debates making up the conversation around its passing, give invaluable insight into the heart of the legislation. To begin with was the RDP of 1992 which blamed concentration of economic power for the myriad economic and social ills.[1242] High degrees of monopolisation and other anticompetitive tendencies were blamed for stifling the development of a dynamic small-scale and micro-enterprise sector, and especially those owned by black people.[1243] The cure envisioned was "strict antitrust legislation" that would create more widely spread control, more effective competition and democratic solutions.[1244] The White Paper on Reconstruction and Development that followed in 1994 committed government to introducing new legislation in almost identical terms as those set out in the RDP.[1245] By

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[1239] Lewis (2013) 7-8; Brassey (ed.) (2002) 82.
[1240] Lewis (2013) 9; Brassey (ed.) (2002) 82.
[1241] Reekie D "The Competition Act 1998: An Economic Perspective", 1999 67(2) *The South African Journal of Economics* 257 hereinafter Reekie 1999 67(2) *South African Journal of Economics*, at 285; Lewis D "The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency" *OECD Global Forum on Competition* (10-11 February 2003) available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2486466.pdf (accessed 19/12/2018
[1242] The Reconstruction and Development Programme pars 4.1.5–4.1.6; See also generally Dollery B "A History of Inequality in South Africa, 1652-2002" 2002 *University of New England School of Economics Working Paper Series No 2003-16*
[1243] The Reconstruction and Development Programme pars 4.1.5 and 4.1.6) and Brassey (ed.) (2002) 82.
[1244] The Reconstruction and Development Programme par 4.4.6.2; Brassey (ed.) (2002) 82–83; Department of Trade & Industry (1997) "Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development", 27 Nov. 1997. South African Government information. 27 Oct. 2000 available at http://www.polity.org.za/govdocs/policy/competition.html (accessed 15/09/2020 hereinafter DTI (1997) Proposed Guidelines for Competition Policy, par 2.2.2.
[1245] South Africa (1994) The Government's White paper on Reconstruction and Development *33 Government Gazette 16085 of 23 November 1994.*

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this time though, rhetoric had somewhat toned down and what was envisaged now was a competition law to promote the traditional economic goals alongside broader social and political purposes.[1246] The GEAR document, coming two years later in 1996, spoke for a "credible competition policy among whose objectives was curtailment of excessive economic power and its abuse, prevention of exploitation of consumers, ensuring the participation of efficient small and medium-sized enterprises in the economy and protecting the interests of workers".[1247]

These three documents and their ambitions were funnelled into a Department of Trade and Industry (hereafter DTI) document of late 1997 titled 'Proposed Guidelines for Competition Policy: A Framework for Competition, Competitiveness and Development'.[1248] On the admission of one of the Guidelines' authors, this document was rife with contradictory statements and extravagant undertakings, "the consequence of an important policy document straining to be acceptable to as many divergent interest groups as possible in a still deeply divided society."[1249] Given the legacy of economic distortion, DTI recommended a *uniquely South African approach* [emphasis added] to competition policy that would pursue orthodox efficiency objectives, while taking into account broader social and industrial policy concerns.[1250] Competition policy could no longer be aimed purely at the promotion of efficiency of markets, it also had to be developmental.[1251] Access to the economy for previously disadvantaged persons and distributional consequences were valid ends.[1252] State-owned enterprises would have to be subject to competition legislation and Ministerial intervention could no longer form part of the enforcement process.[1253] Put in a nutshell, the DTI saw a law that could achieve competition in markets, greater economic efficiency, greater international competitiveness and facilitation of entry into markets - all within a developmental

[1246] Brassey (ed.) (2002) 83; DTI (1997) Proposed Guidelines for Competition Policy par 2.2.3.
[1247] GEAE par 3.38. See Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 301.
[1248] DTI (1997) Proposed Guidelines for Competition Policy..
[1249] Lewis (2013) 29.
[1250] Lewis (2013) 32. See also Brassey (ed.) (2002) 84.
[1251] DTI (1997) Proposed Guidelines for Competition Policy pars 1.3.2–1.3.3.; 2.4.1; 2.4.11 and 10.1.
[1252] DTI (1997) above par 8.1.
[1253] DTI above chapter 5 especially par 5.1.7. See also par 10.2.1.7. There was recognition that state ownership served to promote certain policy goals par 8.3.1.

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context that consciously attempts to correct structural imbalances and past economic injustices.[1254]

The National Economic and Labour Council (NEDLAC) was the forum in which primary debate on a new competition law would take place, with the Proposed Guidelines serving as the basis for negotiations.[1255] The interests represented at NEDLAC were starkly opposed.[1256] Big Business saw the process as a battle against "a bunch of ideologues and idealists determined to dismember the conglomerates by using an aggressive form of United States' antitrust policy."[1257] Organised labour saw an opportunity for "blunting some of the sharper edges of the labour market".[1258] For labour, goals such as promotion of employment opportunities and avoidance of job losses were merit-worthy.[1259] Business emphasised the need for certainty and protections on the discretionary exercise of powers, labour pressed for far reaching effects such as forced unbundling of inherited concentrations.[1260] Business asked for 'normal' antitrust, a conception precluding easy resort, if at all, to the power to break up firms.[1261] The inclusion of politically loaded and arbitrary public interest criteria into the legislation was especially objectionable.[1262]

With the breadth of positions to reconcile so wide, concessions were going to have to be made.[1263] As attractive as lean antitrust may have been, its proponents were no fundamentalists. There are times when non-economic imperatives trump those outcomes dictated by market based interactions.[1264] Here was one such time. The political scenario was somewhat akin to the season of the passing of the Sherman Act, when voting against the Antitrust Bill made for a risky political choice. There was little prospect that

[1254] DTI above par 2.4.12.
[1255] A forum made up of representatives from government, organized labor, organized business, and the community; established by the National Economic Development and Labour Council Act 35 of 1994. Hazel (2015) 37(2) *Houston Journal of International Law* at 316.
[1256] Kelly et al. (2017) 10 and Lewis (2013) 28-29.
[1257] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry: 1999-2009* at 35.
[1258] Lewis (2013) 37 and 42.
[1259] Lewis above 39.
[1260] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry: 1999-2009* at 5, 37-38.
[1261] Lewis (2013) 39.
[1262] Lewis above 39.
[1263] Lewis above 38.
[1264] Lewis above 11.

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public interest factors such as employment and the racially skewed ownership structures could be excluded from the reach of this legislation.[1265]

NEDLAC's Report was issued on 20 May 1998. Drafting of a Competition Bill had been going on concurrently with the NEDLAC process and DTI published the Bill for comment in May 1998.[1266] The overriding objective of competition policy was stated as being the promotion of competition in order to underpin economic efficiency and adaptability, international competitiveness, market access of small, medium and micro size enterprises, diversification of ownership in favour of members of historically disadvantaged communities and the creation of new employment opportunities.[1267] At the Second Reading of the Bill, the Minister clarified the Government standpoint thus:

> "The approach of this Government is not that big business *per se* is bad. On the contrary, big is sometimes necessary. . . *The Bill seeks to encourage competition* . . . We need to ensure efficiency and adaptability if we are to survive in the global economy. *Consumers must have access to a wide range of high quality products and services at lowest possible prices.* It is essential that we see the *development of a vibrant small medium and micro enterprise sector*. There is necessity for a *diversification of ownership* in favour of historically disadvantaged communities. These are potential outcomes of high levels of competition, and these are the objectives enshrined in the Bill before the house." [emphasis added][1268]

Like the statement of his counterpart in the 1979 House, his too, is self-explanatory.

The Bill was voted on and passed with minor amendments.[1269] The President gave his assent on 20 October and the Act was gazetted on 30 October 1998.[1270] The Maintenance and Promotion of Competition Act of 1979 and all its amendments were thereby repealed, although Schedule 3 provided for several transitional arrangements.[1271]

Like other competition legislation, the 1998 Competition Act intervenes in the free market to regulate practices that are harmful, or potentially harmful to competition. These include

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[1265] Lewis above 40-41.
[1266] Competition: Bill and Explanatory Memorandum Notice 841 of 1998 *Government Gazette* 18913 of 22 May 1998. Available at https://www.gov.za/sites/default/files/18913.pdf (accessed 16/06/2018).
[1267] Competition: Bill and Explanatory Memorandum above at Explanatory Memorandum.
[1268] Hansard (22.9.1998) 19 at 6830.
[1269] A good deal of the Bill's substantive provisions was uncontroversial. However, certain aspects attracted serious criticism. See Lewis (2013) 43-44; Sutherland & Kemp (2017) par 3-44; Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 304 and Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry*: *1999-2009* at 5.
[1270] Government gazzette No 19412 Volume 400 Cape town 30th October 1998 RSA
[1271] Section 83 Schedule 2.

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horizontal agreements that restrict competition, vertical agreements that restrict competition, abuse of dominant position and regulation of mergers and acquisitions.[1272] But while competition law is generally underpinned by economic theory, in addition in South Africa, it is also supported by social objectives expressed in the preamble, the objects clause and the body of the law.

4.2.6.1 Goals of South African Competition Law

Merger analysis must be carried out with the overall goals of the competition statute in mind. But of the objectives of competition law there are no certitudes. Its concepts are dynamic, coloured by political dispensation, socio-economic preferences and related imperatives.[1273] Competition legislation tends to be broad, providing a legal framework for protection of competition without offering definitive directives as to what concepts should be taken to mean.[1274] So it is with the 1998 Competition Act. That notwithstanding, South African competition agencies and courts must effect merger analysis in a manner true to the intention of those who envisioned the legislation. Meaning therefore that the said intention must with as much clarity as the law may allow, be pointed out.

The preamble to the Act starts with the recognition that the country's history of discrimination resulted in excessive concentrations of ownership and control, inadequate restraints against anticompetitive trade practices and unjust restrictions on full and free participation in the economy. This is followed by a declaration that a competitive environment balancing all stakeholders' interests will fetch better outcomes for all South Africans. Credible competition law and effective structures to administer it are necessary for an efficient functioning economy. To that end, there must be opening up of the economic space to ownership by a greater number of South Africans. These preliminary pronouncements are followed by a list of eight rationales for passing the legislation, spanning across economic efficiency and consumer welfare to social concerns of transfer of economic ownership. Parliament was passing the 1998 Competition Act in order that it

[1272] For a summary of the Act see Visser C "An overview of the Competition Act (Part 1)" 2004 12(1) *Juta's Business Law* 54 hereinafter Visser (2004) 12(1) *Juta's Business Law* and Rutherford (1999) 11 *South African Mercantile Law Journal* 300.
[1273] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 289; Sutherland & Kemp (2017) par 1-35 and Kelly et al. (2017) 4. See chapter 2, par 2.3.
[1274] See chapter 2 par 2.3.3.

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would be implemented to: provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy; 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.

Section 1(2) mandates that the Act be interpreted in a manner that gives effect to the purposes stated in section 2. The latter section makes for pretty plain reading, providing verbatim thus: '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.'

Notably the preamble and section 2 present differing pressures. The law is intended to achieve multifarious ends, of which consumer welfare is just one.[1275] Typically, the overriding goal of competition policy is to remedy market failures and to provide a framework for regulating mergers.[1276] In South Africa's case, however, the country's political history mandates additional rationales. As alluded to above, eight objectives are laid out in the preamble. The bulk need no introduction as they have traditionally formed part of competition legislation.[1277] The rest generally fall outside the jurisdiction of

[1275] Brassey (ed.) (2002) 19; Sutherland & Kemp (2017) par 1-10.
[1276] See chapter 2 par 2.2.2.
[1277] Specifically: provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy; 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; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.

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competition legislation, pursued via trade or industrial policy.[1278] They have specifically been included to not only promote the country's competitiveness in the ever-globalizing world but also to address the inequalities between the white population and other racial groups.[1279] Incorporation of both economic and social objectives gives effect to the aspirations and ideals of society.[1280] The same pertains to section 2. Set out here is the economic purpose of the law - that of promoting and maintaining competition in the Republic. This is then followed by the set of six particular goals or policy purposes.[1281] The umbrella objective of the law at first glance appears to be the maintenance and promotion of competition in the Republic in order to facilitate the realisation of a number of economic and social objectives in section 2(a) to (f).[1282] If competition legislation is effectively applied, the highly concentrated industries can be reformed and anticompetitive practices can be eliminated or at least reduced. The socio-economic goals of ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the economy and promotion of a greater spread of ownership can too be achieved.

The brief for one analysing a merger is as established in the preamble and the purposes set out in section 2. Both the preamble and purposes section must be taken into account in merger analysis. DTI's Proposed Guidelines of 1997 were emphatic that the law would have to cater for promotion of public interest objectives alongside the conventional economic ones.[1283] The concentrated economy intertwined with aspirations of democracy and equity to drive the agenda. Debate called for use of competition policy to facilitate greater ownership and participation by black persons in the economy.[1284] Effective enforcement would also have to ensure access to those who had been denied an equal opportunity to participate. Competition law would have the task of reforming the structure of the political economy. This, it was envisaged, would be achieved via first removing the distorting effects of excessive economic concentration, collusive practices

[1278] Specifically regulate the transfer of economic ownership in keeping with the public interest.
[1279] Smit (2005) *Paper read at the Biennial ESSA Conference* 7-9 September 2005 at 25.
[1280] Brassey (ed.) (2002) 2.
[1281] Visser (2004) 12(1) *Juta's Business Law* at 54; OECD (2003) Competition Law and Policy in South Africa 8 and Reekie 1999 67(2) *South African Journal of Economics* at 285.
[1282] Rutherford (1999) 11 *South African Mercantile Law Journal* 300 at 300.
[1283] See chapter 4 par 4.2.6.
[1284] DTI (1997) Proposed Guidelines for Competition Policy.

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and abuse of economic power by firms in a dominant position and second, by eliminating practices that restrict entry of new businesses into certain industries. These themes were conveyed into key provisions of the Act, in particular the preamble and objects clause, as well as in provisions dealing with mergers.[1285] The preamble itself is a restatement of political motivations. In it are incorporated the ideals for competition law derived from ANC policy positions and the stakeholder's debate.[1286] It rings of equity, justice and distribution, and along with that, efficiency. Past restrictions on free competition are described as "unjust," rather than as "inefficient."[1287]

For Reekie, one of the earliest, most ardent critics of inclusion of non-economic concerns in the Act, the general rubric of "promoting and maintaining competition" implies without further expansion that the goal is simple - it is promotion and maintenance of competition.[1288] According to him the list of six objectives that follow at section 2 is purposeless. The first two are a redundant reiteration of the core goal and the next four have no business in competition legislation in the first place. Reekie does concede, however, that as misplaced and redundant as they are, the list of six are indeed outcomes the drafter expected.[1289] Others such as Oxenham and Smith are of the mind that what we have is a 'principal objective', that of promotion and maintenance of competition. The preamble and section 2 present an approach whose focus is the efficiency benefits of competition.[1290] Chabane is of the view that the fact that of the list of six those that cater to promotion of economic efficiency precede those based on the consideration of public interest should count for something.[1291] The logical deduction from the ranking should result in enforcement where economic efficiency is the overriding principle. For Van Heerden and Neethling, the first two considerations - promotion of efficiency, adaptability and development of the economy, and provision to

[1285] Hodge J, Goga S and Moahloli T "Public Interest Provisions in the South African Competition Act: A Critical Review" in Moodaliyar K & Roberts H (eds.) *The Development of Competition Law and Economics in South Africa* (2013) hereinafter Hodge et al. in Moodaliyar and Roberts (eds.) (2013) 5.
[1286] OECD (2003) Competition Law and Policy in South Africa 8.
[1287] OECD above.
[1288] Reekie 1999 67(2) *South African Journal of Economics* at 259 and 260.
[1289] Reekie above at 258.
[1290] Oxenham J & Smith P "What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives" *(2014) Norton's Inc and RBB Economics* 2. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf (accessed 13/06/2018).
[1291] Chabane (2003).at 2.

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consumers of competitive prices and product choices - are the mainstream objectives of competition policy.[1292] But this cannot be a dogmatic position. As pointed out by Brooks, the Act itself does not give its multiple objectives a particular hierarchical structure.[1293] Had the legislature warranted a hierarchy necessary, nothing would have been easier. We think, in agreement with Reekie and Brooks, that for the sake of coherence of application, agencies should ensure that maintenance and promotion of competition in a market forms the crux of all assessments.[1294] They must too, as established in the previous chapter, pursue the ends of free, fair, open markets and social justice, of course within the confines of the preamble and section 2.

In terms of the theoretical school or framework, South Africa does not fit neatly into any particular one. Theoretical coherence is usually the product of academic endeavour, not a political process like the 1998 Competition Act is.[1295] Still, it is possible to roughly allocate the regime into some framework. Sutherland opines that the Act seems to reflect the structure-conduct-performance paradigm.[1296] The structure-conduct-performance approach is interventionist, directed towards pursuing multiple objectives and with a strong focus on eliminating business practices which create artificial barriers to competition.[1297] An important concern for structure-conduct performance-approaches is ease of entry.[1298] Creamer, on his part, sees the Act as being informed by a qualified version of structure-conduct-performance thinking.[1299] One that views allocative efficiency and ease of entry as most significant but also holds income distribution and decentralisation of aggregate concentration as valid objectives of competition policy. Either way, both writers see either Harvard antitrust or something very close to it as what

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[1292] Van Heerden & Neethling (2008) 1; Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 306 and Brassey (ed.) (2002) 2 and 8.
[1293] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 305.
[1294] Brooks above at 306.
[1295] Creamer NG 1999 (11) *South African Mercantile Law Journal* 342 hereinafter Creamer (1999) 11 *South African Mercantile Law Journal* 342 at 344.
[1296] Sutherland & Kemp pars 1-52 and 53.
[1297] See chapter 2 par 2.4.3.
[1298] Das Nair "Measuring excessive pricing as an abuse of dominance – an assessment of the criteria used in the Harmony Gold/Mittal Steel complaint" 2008 11(3) *South African Journal of Economic and Management Sciences* 279 at 280.
[1299] Creamer (1999) 11 *South African Mercantile Law Journal* 342 at 344.

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the drafters of the law envisioned.[1300] It behoves agencies in their merger analysis to do so too.

Competition policies are built on the normative judgments of legal and enforcement institutions.[1301] The provisions of the 1998 Competition Act are given life in the decisions of the Commission and Tribunal established under the Act and the courts, including especially the Competition Appeals Court, but also the Supreme Court of Appeal and Constitutional Court.[1302] In weighing mergers enforcers are obliged to use an interpretative methodology that gives the Act an essentially South African focus.[1303] Economic, social justice, developmental and transformatory objectives must be taken into account.[1304] The law must always be analysed against the backdrop of the transformation process of establishment of a constitutional democracy.[1305] The belief that the law could contribute to increasing employment, ensure that SMEs compete on equal footing, and promote ownership among historically disadvantaged persons must be honoured.[1306] Free and fair competition should be defined broadly in the sense of a competitive industrial structure and the control of potential abuses and imbalances in the bargaining power between parties.[1307] There is good reason to be wary of size after all. The orientation of large businesses and the ways in which they interact or compete are a central part of a country's development trajectory.[1308]

There are places where it will not do for competition law to simply pursue the traditional functions of antitrust. Times when the "unique characteristics" pull must carry the day.[1309] Some goals are more important than efficiency and achieving a more equitable

[1300] Creamer (1999) 11 *South African Mercantile Law Journal* 342at 344 and Sutherland (2017) par 53.
[1301] See chapter 2 par 2.3.3
[1302] Chapter 4 1998 Competition Act.
[1303] Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 303 and 305.
[1304] Brooks above at 303.
[1305] Brassey (ed.) (2002) 87–88 and Lewis (2013) 42-43. Lewis D in OECD (2003) The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency *Global Forum on Competition* hereinafter Lewis in OECD (2003) The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency available at https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=CCNM/GF/COMP/WD(2003)35&docLanguage=En (accessed 17/12/2019)
[1306] Hazel (2015) 37(2) *Houston Journal of International Law* at 318; .
[1307] Roberts (2004) 21(1) *Development Southern Africa* at 230.
[1308] See chapter 3 par 3.2.3.
[1309] See chapter 3 par 3.3.2.

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distribution of opportunity may be such a goal.[1310] As we have stated elsewhere, a competition law approach that excludes non-economic concerns and is purely focused on welfare and economic efficiency may not be ideal for the developing country.[1311]

4.3 SUBSTANTIVE MERGER ANALYSIS

4.3.1 Introduction

In the twilight days of the 1979 Act merger review seemed to pick up momentum with the Board's decisions exhibiting a hitherto uncommon autonomy.[1312] Evidence of such is the decision in the proposed merger between two blue chip firms with ample political connections - Sasol Ltd and African Explosives and Chemical Industries (AECI) Ltd.[1313] The transaction, which had the formal support of the DTI, would eventually be disapproved.[1314]

This apparent assertiveness was in actual fact not newly found but a build-up from back in the mid-1980s when the Board had been tasked with developing and coordinating the government's deregulation policy.[1315] Not only that, but the 1994 Government had appointed new members to the Board, changing its make-up and instilling new thought into its *modus*.[1316] It is also possible that with all that conversation about a shift towards a more robust law and independent enforcement authority, the Board had began to adjust its outlook in preparation for the impending dispensation.[1317] Whatever the motivation, the Sasol/AECI merger was only a precursor to a merger regime that was to follow. The study of this regime confirms the assertion by Lewis that it is in the context of

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[1310] Fox EM "Equality, Discrimination, and Competition Law: Lessons from and for South Africa and Indonesia" 2000 (41) *Harvard International Law Journal* 579 at 593 quoting from the People's Legislative Assembly of the Republic of Indonesia *Draft Elucidation of the Draft Law of the Republic of Indonesia, Concerning Business Competition* (July 1998) par 5.
[1311] See chapter 3 par 3.2.2.
[1312] Lewis (2013) 22.
[1313] Competition Board of South Africa (1998) *Investigation into the Transaction between SASOL Ltd and AECI Ltd*. Report No. 68. Pretoria: Government Printer and Roberts (2004) 21(1) *Development Southern Africa* at 231-232. For historical background into the basic fuels industry and the intertwining with mining and agriculture industries see Makhaya T and Robert S "The Changing Strategies of Large Corporations in South Africa under Democracy and the Role of Competition Law" (24 February 2014) CCRED Working Paper 2/2014 at 12-14.
[1314] For detail of the factors surrounding this decision see Lewis (2013) 24 and 25.
[1315] Government White Paper on privatisation and deregulation in the Republic of South Africa 22 WPG 87 Government Printer Pretoria. *F*or further examples of the new more independent Board at work on restrictive practices by firms having economic power see Brooks (2001) 34(3) *The Comparative and International Law Journal of Southern Africa* 295 at 300-301.
[1316] Roberts (2004) 21(1) *Development Southern Africa* at 232.
[1317] Lewis (2013) 23.

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merger regulation that one can see clearly how far South Africa's competition law enforcement has come.[1318]

What follows is an expositive analysis of the substance of merger analysis/ assessment under section 12A of the 1998 Competition Act. Here we look into the thought and jurisprudence that have built around the provision and how it works towards, contributes to, and conforms to the goals of the Act. It is after all in the decisions of the Authorities - both the agencies and appeal courts - that competition law and policy are given life.[1319] This exercise becomes more significant in light of the fact that standards of analysis of section 12A are both permissive and abstract, making them open to variant interpretations.[1320] Here we also wish to find out how closely South African merger analysis complies with the design established in the preceding chapter.[1321]

The study limits itself to the process of analysis of a merger that has been presented for approval by the competition authorities. It does not extend to the broader merger regulation of which merger analysis is part. Matters such as notification requirements, exclusions and remedies will not be looked into, save in passing.

4.3.2 Overview of Merger Regulation under Competition Act 1998

Section 12(1)(a) of the 1998 Competition Act describes a merger as any situation where "one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm'. By using 'business of another' the definition is broadened to cover all types of mergers - horizontal, vertical and conglomerate.[1322] Section 12(1) provides that a person achieves control of a firm through means including purchase or lease of shares, interest, or assets of a competitor, supplier or customer and amalgation or combination with that competitor, supplier or customer or any other means. In terms of section 12(2) a person controls a firm if he beneficially owns more than one half of the issued share capital of the

[1318] Lewis (2013) 21 and Kelly et al. (2017) 9.
[1319] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry:1999-2009* at 4; Roberts (2004) 21(1) *Development Southern Africa* at 233; Oxenham J & Smith P "What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives" *(2014) Norton's Inc and RBB Economics* 2. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf (accessed 13/06/2018).
[1320] OECD (2003) Competition Law and Policy in South Africa 14.
[1321] See chapter 3 par 3.3.2.
[1322] Chapter 2.2.3. Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 608.

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firm. This has been interpreted to mean more than half of the issued share capital of the firm.[1323] This is not applicable to firms which hold shares as nominees.[1324] In *Caxton and CTP Publishers and Printers Ltd v Naspers*[1325] the Tribunal took the view that to acquire control means that there has to be a link between economic interest and the ability to control. For the purpose of section 12(2)(a) beneficial ownership is not confined to direct ownership, but may include an interest held indirectly. Additionally, holding preference shares which constitute majority shares of the target firm constitutes control.[1326] Section 12(2)(b) further provides that a person achieves control over a firm if he is entitled to vote a majority of the votes to be cast at a general meeting or has the ability to control the voting of a majority of those votes either directly or indirectly.

The list in section 12(2) is not exhaustive.[1327] The rationale of the section was to clarify or give examples of direct control.[1328] The section is ancillary to section 12(1) and does not operate negatively but will operate positively. This means that even if a transaction does not fall within section 12(2) it can still be construed to constitute a merger.[1329] The forms of control contained in section 12(2) have been declared 'bright lines' which have to be observed.[1330]

Notably, the Act applies a compulsory pre-merger notification scheme.[1331] Transactions at or above specified threshold levels must be notified and authorised before implementation. Section 11(5) 1998 Competition Act classifies mergers as small, intermediate or large.[1332] All intermediate and large mergers must be notified.[1333] Small mergers may be required to be notified in circumstances provided for under section 13(2) and (3). This enables agencies to inspect the greatest

[1323] Sutherland (2015) 8-18.
[1324] Sutherland above.
[1325] 16/FN/MAR04 par 24
[1326] Cape Empowerment Trust Ltd v Sanlam Life Insurance Ltd 05/X/ Jan 06.
[1327] *Ethos Private Equity Fund v Tsebo Outsourcing Group Ltd V Bulmer* 72 30/LM/Jun03par32
[1328] Sutherland (2015) 8-15.
[1329] Sutherland (2015) 8.15
[1330] *Ethos Private Equity FundIV/Tsebo Outsourcing Group (Pty) Ltd* 30 LM/JUN03 par 16.
[1331] Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 604.
[1332] For threshold levels, see section 11 of the Act and Amendment of the Determination of Merger Thresholds as set out in General Notice 216 of 2009 Government Gazette Vol 627 No. 41124 15 September 2017.
[1333] Section 13A(1) 1998 Competition Act.

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possible number of transactions prior to their conclusion and therefore to keep a closer rein on the structure of the market than would otherwise be possible.[1334] In the case of intermediate and large mergers, the notice of filing must be served on organised labour representing the merging parties' employees or the employees themselves where not represented as aforesaid.[1335] Not just that, but the notification must also be served upon the Minister of Trade and Industry who has the right to make representations on public interest grounds where there is a material interest on the part of the government.[1336] These obligations tell of the weight of public interest in the whole scheme of merger regulation.[1337] They also engender transparency, a marked move away from the previous regime.[1338] Strict time lines have to be adhered to once a proposed merger is submitted for review and determination whether to approve such a merger conditionally or without condition or whether to prohibit it.[1339]

The 1998 Competition Act provides a three-part process for merger analysis/assessment.[1340] Three separate but interrelated inquiries are carried out.[1341] There is, however, no explicit hierarchy nor subordination but rather an analytical progression between the tests for ease of application.[1342] First, it must be determined whether a merger is likely to substantially prevent or lessen competition - this is referred to as the 'threshold test'.[1343] The test must be applied to the actual market of the merger, not a hypothetical or idealized one.[1344] In assessing substantive lessening or prevention of competition, the competition authorities are enjoined to consider a non-exhaustive list of eight factors set out in section 12A(2), as discussed in more detail below. If at this step concerns are raised, there must then follow appraisal of any efficiency benefits that could result from the problematic merger and that would offset the

[1334] Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 607.
[1335] Section 13(A)(2) 1998 Competition Act.
[1336] Sections 18 and 53 1998 Competition Act.
[1337] Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 607 and chapter 3 par 3.2.6.
[1338] Roberts (2004) 21(1) *Development Southern Africa* at 234.
[1339] Sections13(5), 14, 14A and 13A(3) 1998 Competition Act.
[1340] *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 12. See also Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 604-605.
[1341] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry:1999-2009* at 15; *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 12; *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01 at 5 and 6.
[1342] Raslan (2016) at 6; *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 46/LM/Jun02.
[1343] Section 12(A)(1); *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01 5, 14.
[1344] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01 14.

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reduction or prevention of competition by the merger.[1345] There must also be assessment whether the merger can or cannot be justified on substantial public interest grounds.[1346] Regardless of the results of the first and second tests, it must finally be considered whether the merger can or cannot be justified on substantial specified public interest grounds.[1347] This phase is as imperative and as significant as the prior two.[1348]

Some see a two- and not a three-stage process, the Act mandating an initial examination of the transaction within a 'traditional consumer welfare standard' followed by further testing of that finding in a broader inquiry for efficiency gains and public interest considerations.[1349] The first phase caters solely for 'pure competition' issues, the second moves to the trade-offs the merger may have to offer.[1350] This two-tier approach, however, is not widely approved. Limiting competition assessment to only the substantial lessening of competition and efficiency concerns has been cited as a "slip of the pen".[1351] Most take it that public interest and the competition consequences of a merger travel together and cannot be divorced from one another.[1352]

The public interest consideration-enquiry is compulsory, regardless of the findings of the preceding analysis.[1353] Section 12A(1A) provides that 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). The essence is that a positive public interest consideration-impact may be ground to save a merger that has been adjudged likely to substantially prevent or lessen competition and that is devoid of any redeeming efficiency gains. In the same vein, a substantial negative impact on the public interest

[1345] Section 12A(1)(a)(i) 1998 Competition Act.
[1346] Section 12A(a)(ii) 1998 Competition Act.
[1347] Section 12A(1)(b) 1998 Competition Act.
[1348] OECD (2003) Competition Law and Policy in South Africa 18.
[1349] Sutherland & Kemp (2017) par 10-4; *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012: par 97; *Medicross Healthcare Group* (*Pty*) *Ltd v Competition Commission* 55/CAC/Sep05 par 19; Raslan 2016 at 4-5.
[1350] *Medicross Healthcare Group* (*Pty*) *Ltd v Competition Commission* 55/CAC/Sep05 pars 21 and 23; *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04 pars 41-44 where the Tribunal apparently thought that only s12A(1)(a) concerned competition issues; *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 pars 299–304. Compare the assumption made by the parties in *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 97.
[1351] Sutherland & Kemp (2017) par 10-8.
[1352] Sutherland & Kemp (2017) par 10-11.
[1353] T*elkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 par 291.

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may be the undoing of a merger that makes the grade in terms of its impact on competition.[1354]

Substantive analysis of a merger is confined to the language and framework of section 12A. The preamble, objectives or any provision in any other statute for that matter, cannot be used to introduce considerations not already expressed or implied in section 12A.[1355] As pointed out by Hodge, it does not matter that several of the public interest considerations of section 12A(3) also appear in the list of objectives of section 2.[1356] That said, the preamble and objectives clause may be taken into account as necessary for developing and fleshing out the provisions of section 12A.[1357] In assessing mergers, assessors must thus limit themselves to section 12A. But for grounding on the bigger picture they do keep an eye on the preamble and objectives clause to anchor the exercise. The effect of this is to introduce a broad interpretation paradigm to section 12A.[1358] This appears to be in conformity with the intention of the drafters that this law be applied to achieve a 'beyond conventional' breadth of ends. Effective implementation is expected to deliver both the economic and social outcomes set out in the preamble and objectives, portions of the statute which succinctly convey what the NEDLAC process came up with. An interpretation that leaves out the objectives and the preamble is bound to fall short of the expectations of NEDLAC.

All things considered, the Authorities have tended to be conservative, taking a standard competition policy approach to merger analysis. What is more, contrary to all expectation, the political economy has not played a role, at least not a perceptible one, in the dynamics of merger analysis.[1359] And neither have the pyramid-like investment structures, much the inspiration for the Act, been an issue in deciding particular cases.[1360] To date no merger adjudged anticompetitive has been approved on grounds of public interest and no

[1354] Raslan 2016 at 6. See generally *Anglo American Holdings Ltd and Kumba Resources Ltd* 46/LM/Jun02 speficially par 138; *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 11A; *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 par 291; *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 11.
[1355] *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings* 45/LM/Jun02 and 46/LM/Jun02 par 35.
[1356] Hodge et al. in Moodaliyar & Roberts (eds.) (2013) 5.
[1357] *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings* 45/LM/Jun02 and 46/LM/Jun02 par 38.
[1358] *Distillers Corporation (South Africa) Ltd v Bulmer (SA) Pty Ltd* Davis JP at 358 par A.
[1359] OECD (2003) Competition Law and Policy in South Africa 18.
[1360] See Table 2: Box 2 OECD (2003) Competition Law and Policy in South Africa 18-19.

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competitive merger has been precluded for its negative impact on public interest. More commonly, pro-competitive mergers are approved notwithstanding their detrimental impact on public interest concerns but with conditions to mitigate such negative impact.[1361]

For all its novelty, the South African merger regime is not entirely unique. Either that, or the Authorities have found means to stay as close as possible to the conventional without losing sight of jurisdictional exigencies. Like pretty much everywhere else, the majority of mergers considered by the Commission and Tribunal pass muster.[1362] Unconditional approvals for the ten year period between 2000 and 2009 stood at 92 per cent, well within international average.[1363] At 2014, with conditional approvals added, the figure was 96 per cent approval and 93 per cent in 2016.[1364] And as is typical elsewhere, the exercise of merger assessment is predictive, counterfactual and inherently speculative.[1365] Of course, any speculation must be set upon an evidential foundation. However, no amount of reliable evidence could remove the predictive element in merger adjudication.[1366] Authorities use current behaviour of the relevant market's participants to predict how they would respond to changes in market structure and the incentives of the merger.[1367] But there are no templates or single answers, even for similar situations, as was pointed out in *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd.*[1368] Parameters of markets do shift and consideration of identical transactions a year apart could produce

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[1361] See chapter 3 par 3.3.5.
[1362] Lewis in OECD (2003) The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency at 6.
[1363] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry*: *1999-2009* at 23 and Brassey (ed.) (2002) 181.
[1364] Figure 5 Number of prohibitions and conditional approvals by the Commission by sector: 2000–2009; Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry*: *1999-2009* at 16 and 24. See also Grimbeek et al. (2013) 81(4) *South African Journal of Economics* at 576. For 2016, see Diagram 11 Mergers notified and decided over the last ten years Competition Commission & Competition Tribunal (2009) *Unleashing more rivalry* available at http://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 18/06/2019).
[1365] Lewis (2013) 99*; Medicross Healthcare Group* (*Pty*) *Ltd v Competition Commission* 55/CAC/Sep05 pars 20-21; *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd* 11/LM/Mar05 par 62 and *Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00.
[1366] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 54; *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd* 20/CAC/Jun02 CAC at 33 and *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd* 06/LM/Jan02 par 24.
[1367] Lewis (2013) 99; *Medicross Healthcare Group* (*Pty*) *Ltd v Competition Commission* 55/CAC/Sep05 par 19.
[1368] 11/LM/Mar05.

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different outcomes.[1369] The past is not always a good yardstick for the future, hence circumspection is advised.[1370]

As pointed out in Chapter 2, the primary concern of competition law is market power - the muscle to control prices, exclude competition or behave to an appreciable extent independently of competitors, customers or suppliers.[1371] There is no easier way to achieve or enhance market power quietly than by acquiring or merging with other firms.[1372] This fact underscores the value of merger analysis and why it must be carried out most assiduously. Following now is a step-by-step analysis of the provisions in section 12A of the Act, each as interpreted in the decisions of the Authorities.

4.3.3 Assessing Substantial Lessening of Competition

A merger lessens or prevents competition if it enables the merged firm, either alone or with others, to increase prices without improving products or to reduce the quality of products without reducing prices, or to restrict innovation.[1373] Without such a merger, prices in the market would be lower and quantities supplied would be higher. What is required is demonstration beyond a test of materiality that the merger will lessen or prevent competition, implied from the use of the word 'substantial' in section 12A(1).[1374] On this account, the CAC refused to find that exclusive distribution agreements reduced intra brand competition substantially because it was not established that distribution costs were significantly higher than they would have been absent the agreements.[1375]

The Authorities further maintain that a transaction that increases the likelihood of merging parties engaging in prohibited practices also prevents or lessens competition. This prophylactic approach facilitates agencies to take pre-emptive action, as opposed to approving a union and then dealing with any prohibited conduct that could follow. In *Sasol*

[1369] *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd 11/LM/Mar05 par 72.*
[1370] *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) above* par 71.
[1371] Legh in Brassey (ed.) (2002) 224.
[1372] Brassey (ed.) (2002) 95. On the contribution of mergers and acquisitions to the current state of high concentration in South Africa's furniture industry see Kaplinsky R and Manning C "Concentration, competition policy and the role of small and medium-sized enterprises in South Africa's industrial development" 1998 35(1) *The Journal of Development Studies* 139 at 147-148.
[1373] *Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) pars 50 and 60.
[1374] Roberts (2017) *CCRED Working Paper 13/2017* at 14; Competition Appeal Court decision in *Competition Commission v South African Breweries Limited and Others* (129/CAC/Apr14) [2015] ZACAC 1; 2015 (3) SA 329 (CAC) par 50.
[1375] *Competition Commission v South African Breweries Limited and Others* 129/CAC/Apr14) pars 48-49.

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Ltd/Sasol Oil Ltd[1376] evidence was produced of contemplated foreclosure post-merger. The comeback of the merging parties was that there exists within the Act separate mechanisms and remedies to deal with market abuse, an argument that the CAC dismissed. Were it sound, the court noted, there would be no purpose in pre-emptive merger regulation as a measure for maintaining competitively structured markets. Add to this the fact that such an approach would oblige consumers and the national economy to endure lengthy and costly periods of anticompetitive conduct before perpetrators are brought to book.[1377] The approach to enforcement is in tandem with the Act. The theoretical framework of the 1998 Competition Act exhibits a clear leaning towards the structure-conduct-performance paradigm. This approach is pre-emptive, with the intention of keeping markets open. Premium is placed on the process of competition and dynamic markets. In any event, as established in Chapter 3, this pro-active prophylactic model of merger analysis is recommended for the developing country, even if only in the initial stages of competition law implementation. South African agencies recognise that.

In determining the likelihood of substantial prevention or lessening of competition, the Authorities are to 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."[1378] These factors include: the actual and potential level of import competition in the market; ease of entry into the market; level and trends of concentration and history of collusion; the degree of countervailing power existent; the dynamic characteristics of the market; nature and extent of vertical integration; whether a failed firm or one that is likely to fail is a party to the merger; whether the merger will result in the removal of an effective competitor; the extent of ownership by a party to the merger in another firm or other firms in related markets; the extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors; and any other mergers engaged in by a party to a merger for such period as may be stipulated by

[1376] 101/LM/Dec04.
[1377] *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 pars 219-221.
[1378] Section 12(A)(2) 1998 Competition Act.

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the Competition Commission.[1379] The last three considerations were added to the Act in 2018 amendments that took effect in July 2019.[1380] At the time of conclusion of this thesis, none of the three had been tested by either the Commission or the Tribunal.

Assessment is commonly framed into a two-step process; first, identification of the market(s) concerned and its structure and second, assessment of the competitive effects arising from the merger within the market identified.[1381] We now consider the question of how South African agencies have determined markets and market structure for purposes of merger analysis.

4.3.3.1 Identification of relevant market and market structure

Mergers do not occur in a vacuum. Demarcation of the relevant market provides the appropriate framework for assessment of merger impact.[1382] Definition of a market helps to establish whether the merging firms are competitors and which other firms also provide sources of effective competitive rivalry, facts necessary to determine the market structure and levels of concentration. Failure to provide clear definitive boundaries is taken seriously as it may taint the reasoning that follows.[1383] A fundamental flaw in market definition can vitiate the entire decision.[1384] As a matter of fact, decisions to approve or preclude generally always hinge on market definition.[1385]

There are times, however, where market definition has been adjudged as not totally indispensable. There is little utility, for instance, in engaging in a drawn out exercise to delineate markets where it is palpably clear that a merger is anticompetitive. Or where it is obvious from the facts that there would be no restriction of competition whichever way the market is defined.[1386] Such as in a scenario where post-merger concentrations are

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[1379] Sections12(A)(1) and (2) 1998 Competition Act.

[1380] Competition Amendment Act 18 of 2018.

[1381] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry:1999-2009* at 25.

[1382] *Momentum Group Ltd v Competition Tribunal* 58/CAC/Dec05 par 16; *Medicross Healthcare Group (Pty) Ltd v Competition Commission* 55/CAC/Sep05 par 25; Mncube L, Dlamini B and Ratshisusu H "On Merger Simulation and Its Potential Role in South African Merger Control" 2010 13(1) *South African Journal of Economic and Management* 62 at 62.

[1383] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry:1999-2009* at 16; *JD Group Ltd/Profurn Ltd JD Group Ltd/Profurn Ltd* 28/CAC/May at 7-8 and par 31.

[1384] *African Media Entertainment Ltd v David Lewis* 68/CAC/Mar07 19/11/2007 pars 31 and 39.

[1385] See chapter 2 par 2.2.4.

[1386] Sutherland & Kemp (2017) pars 10 and 11 and *Vodacom (Pty) Ltd/GSM* Case No 10/LM/Nov99; *Vodacom (Pty) Ltd/Teljoy Holdings Ltd* Case No 13/LM/Nov99 and *Investec Group Ltd/Frame Group Ltd* Case No 86/LM/Aug00.

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insignificantly small.[1387] Scarce resources should not be expended in exercises that have little or no bearing on the outcome of a case.[1388] The Authorities have also been clear that the exercise is not to be equated to a neat corralling.[1389] Some markets are complex while economists are not exactly famous for simplifying complex situations.[1390] In *Primedia Ltd v Competition Commission,*[1391] a matter that involved the market for radio advertising, the Tribunal lamented that the effect of the opponents' economists' submissions was to push market boundaries further into the fog rather than bring them out to clarity. It finally opted to use the views of the firms gleaned from private business records to establish the markets affected.[1392]

The Tribunal has refused to bind itself to a rigid interpretation of relevant markets.[1393] Determination of a relevant product market, after all, is a matter of business reality, of "how a market is perceived by those who strive for profit in them."[1394] In *Massmart Holdings Ltd/Moresport Ltd*[1395] opinions of the merging firms picked from internal communication and records reflected that the one merging party considered the other a key competitor. The Tribunal treated them as such.[1396] The same route was taken in *Primedia Ltd v Competition Commission.*[1397] This plasticity of approach is also evident in ascertaining geographic market. Views of witnesses, strategic internal documents and locality have all been used to ascertain the confines of a relevant geographical market. Handwritten notes of a hospital manager, identifying facilities that patients would be able to turn to in the event of a price increase, were crucial in establishing the relevant geographical market in *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*).[1398] As an alternative to SSNIP, South African agencies directly consider functional interchangeability of the products, and to what extent purchasers are willing to

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[1387] *Ford Motor Company/Land Rover Group Ltd* Case No 82/LM/Jul00 at 2.
[1388] Brooks 2001(13) *South African Mercantile Law Journal* 269 at 277.
[1389] *Primedia Ltd v Competition Commission 39/AM/May06* par 66.
[1390] *FTC v Staples/Office Depot* 1:15-cv-02115 Federal Court**:** District of Columbia. See chapter 2, par 2.2.3.
[1391] 39/AM/May06 par 55.
[1392] 39/AM/May06 par 59 and 65.
[1393] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 par 49.
[1394] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 par 51.
[1395] 62/LM/Jul05.
[1396] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 pars 57-59. *See also Primedia Ltd v Competition Commission* 39/AM/May06 par 59.
[1397] 39/AM/May06 09/05/2008 par 59.
[1398] 122/LM/Dec05 21/02/2006 pars 36 to 38.

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substitute one for the other.[1399] Where data is available through techniques like merger simulation, the price effects of a merger can be directly assessed without requiring any precise delineation of relevant markets.[1400] Qualitative rather than quantitative methods of market definition, including the assessment of practical indicia such as product characteristics, are utilised.[1401]

Taking care to keep the exercise of merger analysis as uncomplicated as practically possible while retaining the integrity of outcomes is recommended for the developing country. The expertise required to support costly forms of econometric analysis seldom available in developing countries. Simple models for market definition are especially encouraged.[1402] By keeping the exercise uncomplicated, South African Authorities heed this wisdom.

The widely used SSNIP Test (Small but Significant Non-transitory Increase in Price) is rarely directly applied by South African Competition Authorities.[1403] When used, agencies have been careful to give it an effect relevant to South Africa. Which is in order, going by DTI's recommendation laid out in the proposed guidelines that a uniquely South African approach to competition policy be employed. For instance, with standard SSNIP, demand-side substitution is of greater significance. South African Authorities, however, give supply-side substitution weight as well.[1404] In *Santam Ltd/Guardian National Insurance Co Ltd,*[1405] though the Tribunal was influenced by the European approach to insurance mergers, adoption was not without question. And in *Harmony Gold Mining Company Ltd & Another and Mittal Steel South Africa Ltd and Another*[1406] the Tribunal

[1399] *JD Group Ltd/Ellerine Holdings Ltd* 98/LM/Jul00 at 12.
[1400] Hawthorne (2012) "Are mobile telecommunications networks always a substitute for fixed telecommunications networks?" Paper submitted for Sixth Annual Conference on Competition Law, Economics and Policy in South Africa at 15 hereinafter Hawthorne (2012).
[1401] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 pars 48 and 49. At par 50 practical indicia was said to include "industry or public recognition of the sub-market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, grades of material, quality of workmanship, distinct prices and specialised vendors. See also *JD Group Ltd/Profurn Ltd* 60/LM/Aug02 par 74 where the Tribunal accepted that particular firms were not competitors of the merging firms because executives of the merging firms did not know much about them. See too *JD Group Ltd/Ellerine Holdings Ltd* 98/LM/Jul00 pars 114-118.
[1402] See chapter 3 par 3.3.2.
[1403] Hawthorne (2012) at 15; Brassey (ed.) (2002) 183. In *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 par 49 the Tribunal referred to this as the traditional test but noted that it could not be applied effectively in dynamic markets where differentiated products are sold. In these situations, markets have to be determined with reference to "practical *indicia*".
[1404] Sutherland & Kemp (2017) par 10-18; Hawthorne (2012).
[1405] 14/LM/Feb00 Par 3.
[1406] 13/CR/FEB04) [2007] ZACT 21 (27 March 2007) at pars 137 and 192.

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warned against “slavish adoption” of international precedents. While jurisdiction specificity is only commendable, there must too be a wariness against what has been referred to by Brassey as “philistinism” - a lack of sophistication in asserting uniqueness to an extent that the law becomes detached from all connection to the theoretical underpinnings of the discipline, winding up an “eccentric curiosity”.[1407]

The exercise of market power on the part of the participants in a relevant market may reduce or induce new entry into the market. The Tribunal has adjudged it important to inquire into this, particularly when the question of entry barriers is examined.[1408] Not surprising given the place ease of access to hitherto closed markets took in the debate around the 1998 Competition Act.

In establishing markets, each case is assessed on its unique facts, as it should. In *JD Group Ltd/Ellerine Holdings Ltd,*[1409] the Tribunal found a national market for furniture chains which, though operated in localised market stores, priced nationally and maintained a national competitive strategy.[1410] In *Santam Ltd/Guardian National Insurance Co Ltd*[1411] the market for short-term insurance was defined as being national since firms relied on a national network of brokers. Private hospitals that charged national prices negotiated with medical funds and competed locally for customers on service quality were found to operate in both national and local markets.[1412]

Markets are broken down into market segments or sub-markets where necessary.[1413] This is sensible because after all, “[f]ish paste and beluga caviar are both commonly spread on crackers and both have some relationship to fish, but this does not make a

[1407] Brassey (ed.) (2002) 181 Brassey.
[1408] In *Santam Ltd/Guardian National Insurance Co Ltd* 14/LM/Feb00 pars 7-9 the court included all firms that could provide clusters of insurance products in the market, to avoid having to find all the permutations of insurance products that could be clustered together. See also *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd* 11/LM/Mar05 pars 103 and 104.
[1409] 98/LM/Jul00 at 16 and 17.
[1410] *JD Group Ltd/Ellerine Holdings Ltd* 98/LM/Jul00 at 18; M*assmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 pars 158-160. At par 158, “The Commission finds the geographic market to be national. The Commission arrives at this conclusion on the basis that the merging parties follow a national pricing policy, as well as the fact that they operate a national set of chains. Store managers have limited discretion in setting prices since prices are set nationally.” But see the somewhat more cautious approach in *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 pars 205-207.
[1411] 14/LM/Feb00.
[1412] *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006.
[1413] See for example in *Multichoice Subscriber Management* (*Pty*) *Ltd/Tiscali* 72/LM/Sep04 par 41 where a distinction was drawn between the provision of premium and other content by internet service providers. See also for other examples *JD Group Ltd/Ellerine Holdings Ltd* 98/LM/Jul00 par 13; *Nestlé* (*SA*) (*Pty*) *Ltd/Pets Products* (*Pty*) *Ltd* 21/LM/Apr01 par 22; *Alpha* (*Pty*) *Ltd/Slagment* (*Pty*) *Ltd* 27/LM/Jun03 par 18 and *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 pars 157-179.

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claim to place them in one market at all plausible."[1414] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group*[1415] presents a remarkable example. The Tribunal delineated different market segments for premium, proprietary and value brands of alcoholic spirits. Four unique features of the South African market for alcoholic beverages were found to have a bearing on consumer behavior enough to segment the market further into certain broad price bands. These features were poverty and the skewed distribution of income; the influence of South Africans' political past on drinking habits; the fact that spirits are mostly consumed in mixed drinks; and the fact that consumption of alcohol in South Africa was less occasion-based than in other countries.[1416] The case brings out clearly an appreciation of local history and circumstance and even more, integration of the same into analysis. This abides by the preamble with its requirement that the country's past be acknowledged as having shaped markets.

The agencies, and more especially the Tribunal, have been accused of following an "intuitive approach" in determining market dimensions - imbuing its decisions with uncertainty.[1417] While there is a lot to be said for predictability, the unique facts of each case must be borne in mind.[1418] As observed by Maphwanya, Muzata and Rob, blind application without regard for unique market dynamics can be misleading.[1419] An agency cannot be faulted for rejecting a customary category-based definition in the alcoholic beverages sector in favour of one cognisant of the peculiarities of South Africa's beverage markets, as did the Tribunal in *Distillers*.[1420] Not being bound to rules that propagate predictability allows an agency to play by ear, which can only be commendable.[1421] In defining markets understanding the actual competitive dynamics, and how these may differ in a country compared to other jurisdictions, is laudable.[1422] Flexibility of approach

[1414] *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group* Ltd 08/LM/Feb02 19/03/2003 par 147.
[1415] 08/LM/Feb02 19/03/2003 par 148.
[1416] Similar segmentation in *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd* 06/LM/Jan02 pars 35-36.
[1417] Brooks 2001(13) *South African Mercantile Law Journal* 269 at 279.
[1418] Sutherland & Kemp (2017) par 10-13.
[1419] Maphwanya R, Muzata T and Robb G "The Comforts And Discomforts Of Using Quantitative Tests And Other Tools In Defining Antitrust Markets With Complex Competitive Dynamics: A Review Of Evidence From A Complaint And Two Mergers" 2012 (CCRED) Working Paper No. 8/2012 at 15.
[1420] *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group* Ltd 08/LM/Feb02 19/03/2003 pars 49–68 and especially par 55. See also *Bromor Foods* (*Pty*) *Ltd/National Brands Ltd* 19/LM/Feb00 par 10.
[1421] See chapter 2 generally and chapter 3 pars 3.2.4 and 3.3.2.
[1422] Box 4 'Market Definition' Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry*:*1999-2009* at 17.

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not only yields fairly accurate results but also enables the Authorities to keep an eye on the overarching goals of the Act.

Once the identity of the relevant market is settled, the next step is to establish the structure of the market. Determination of market shares of all firms in a market, merging ones included, is closely tied to understanding its competitiveness. High market shares are taken to point towards dominance and small post-merger shares are regarded as an indicator that the merger is likely to be benign or in fact pro-competitive.[1423] In *Daun et Cie AG/Kolosus Holdings Ltd,*[1424] a combined post-merger market share of 47.2 per cent was considered significant enough to raise *prima facie* concerns regarding future competitiveness in the affected market. The merged entity's powerful share raised a risk of it behaving monopsonistically *vis-a-vis* its suppliers.[1425] In *Multichoice Subscriber Management (Pty) Ltd/Tiscali,*[1426] the merged parties' combined share came to about 34.4% of the relevant market. The two were the largest firms in the market, each having grown more by acquisition than organically. Already their pricing behaviour suggested that they functioned as a duopoly. The large market share coupled with the high levels of market concentration was enough ground to raise concern and the merger was approves subject to a condition requiring the merged firm to terminate its exclusive distribution arrangements with its retail customers.[1427]

On the other hand, small market shares are looked at more favourably, and even more when the market has a good spread of competitors. In *Fujitsu Siemens Computers* (*Holding*) *BV/Siemens Services Newco* (*Pty*) *Ltd,*[1428] the merging parties would have a combined market share of 6% in one market and 5% in the other. This the Tribunal adjudged to be too low to raise serious competition concern given especially the presence of other companies with bigger market shares that would continue to exert competitive pressure post-merger.[1429] And in *Business Venture Investments* (*Pty*) *Ltd/Sage Group*

[1423] *Business Venture Investments No 976* (*Pty*) *Ltd/Sage Group* (*Pty*) *Ltd* 54/LM/Jun05 [2006] 1 CPLR 130 (CT) par 13.
[1424] 10/LM/Mar03
[1425] *Daun* pars 81-90. A monopsony exists where there is only one buyer of a specified good or service for which there are not good substitutes. For reading on why monopsonists can be harmful and how the law has developed to respond to these harms see Blair & Harrison (2010).
[1426] 72/LM/Sep04 pars 59–60.
[1427] *Multichoice Subscriber Management (Pty) Ltd/Tiscali* 72/LM/Sep04 Pars 60 and 65
[1428] 26/LM/Mar06 [2006] 1 CPLR 135 (CT) pars 27–30.
[1429] *Fujitsu Siemens Computers* (*Holding*) *BV/Siemens Services Newco* (*Pty*) *Ltd* 26/LM/Mar06 [2006] 1 CPLR 135 (CT) par 30.

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(*Pty*) *Ltd*[1430] post-merger market shares of between 1% and 25% in various relevant markets contributed to a finding of no likelihood of substantial lessening or prevention of competition. Yet again, it did help that the market had other competitors with reasonably sized market shares and that would remain in competition with the merged entity.[1431] Presence of other competitors of worth also came in handy in *Liberty Group Ltd/Investec Employee Benefits Ltd*[1432] and in *Edgars Consolidated Stores* (*Pty*) *Ltd/Rapid Dawn 123 Pty Ltd.*[1433]

We see two things: first, the unmistakable jaundiced eye towards size and second, a clear partiality for markets with many competitors. This is the one thread that seems to run through merger analysis by South African Authorities. Size is taken to imply reduced competition. A fragmented market structure and dynamism are preferred. In each of the four cases in the preceding paragraph, even with the small market shares, it did help that the merger markets came with active reliable competitors. As will become evident in due course, size and concentration appear to be the pivot upon which South African merger analysis balances. The agencies adopt an approach the Warren Court would approve of - one in favour of fragmentation.[1434] They appropriately adjust their analysis to cater for the differing pressures presented by the 1998 Competition Act. There are times size has been accommodated for specific ends, for instance innovation, and where there is ease of entry into the market.[1435]

Addressing the high levels of concentration in the economy, both in terms of ownership and market shares, dominated policy debate towards drawing up the 1998 Act. At the center of the contention was the excessive concentrations of private economic power and unequal spread of ownership. The conglomerates in the eye of the storm were objectionable as much for their size as for the market abuse that size made

[1430] 54/LM/Jun05 [2006] 1 CPLR 130 (CT) par 14.
[1431] *Chemical Services Ltd/Chemiphos* 100/LM/Dec04 par 22.
[1432] 32/LM/Jun03 at par 53 the Commission stated, "Although the merger would result in the merged entity being one of the larger players … when compared with its competitors, 18 % … is not a market share which would give rise to concerns. In addition, the market is characterised by a high level of competition and regular entry."
[1433] 21/LM/Mar05 pars 15-19; At par 19 the Commission observes as follows, "However, what is evident from the information supplied is that there remain several large competitors in these markets. Market shares will increase by only 2.67% and 2.90% respectively ... It is thus highly unlikely that the transaction would have a negative effect on competition in the relevant markets."
[1434] See chapter 2 par 2.4.3.
[1435] See chapter 4 pars 4.3.3.3, 4.3.3.6 and 4.3.4.

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possible. The issue of concentration permeated conversation through from the point of the RDP to the floor of the House. For instance, from the GEAR document, a credible competition policy was one which would have among its objectives curtailment of excessive economic power and its abuse.[1436] Going by the sample scrutinized here, it is reasonable to conclude that the approach that the agencies mostly fits the bill well.

For developing countries, as has been pointed out in chapter 3, it is recommended that the understanding of competition for use in merger analysis should be that of rivalry. Dynamism is preferred and should be premised upon securing an environment favourable for vigorous rivalry, the assumption being that such an environment - one with many active players - is most conducive for efficiency.[1437] The approach of South African agencies plays well into not just what is the spirit of the 1998 Competition Act, but also what is recommended for the developing country merger analysis template.

With the market defined and shares ascertained, agencies move to appraise for substantial prevention or lessening of competition and whether post-merger the firms in the market will act competitively or co-operatively, guided by any factors that may be relevant including the eight listed in section 12A(2) of the Act. We now take a closer look at these eight factors:

4.3.3.2 Section 12A(2)(a): Actual and potential level of import competition

Imports can discipline pricing strategies of domestic producers even where market concentration is high. In *Clover Fonterra Ingredients* (*Pty*) *Ltd/Clover SA* (*Pty*) *Ltd,*[1438] with the local industry protected by tariffs, skimmed milk powder imports were found to be an effective constraint on pricing. Given these circumstances, the merger was declared unlikely to lead to higher prices or lessening in competition. And in *Pioneer Foods* (*Pty*) *Ltd/John Moir's a division of Bromor Foods* (*Pty*)[1439] the Tribunal approved a transaction which *prima facie* would have been a classic one to bar, on account of the insignificant price differential between readily available imports and the local products. Import

[1436] See chapter 4 par 4.2.6.
[1437] Fox (1981) 66 *Cornell Law Review* at 1169; see chapter 3 par 3.3.2.
[1438] *Clover Fonterra Ingredients* (*Pty*) *Ltd/Clover SA* (*Pty*) *Ltd* 92/LM/Nov04 pars 59–61.
[1439] 46/LM/Jun04 at 4.

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competition similarly influenced outcomes in a merger in the local zinc market and another in the retail market.[1440]

Where imports do not exert any competitive pressures on local firms, approval becomes less likely or may come with conditions attached. In *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd*[1441] for instance, imports were found not to be an effective constraint on local firms on the basis that they had a low actual market share of 1%. Importers would have to create brands and be substantially cheaper than local produce to successfully enter the market.

The claim that international supplies discipline domestic pricing is nevertheless not taken without question. Agencies engage in thorough review before concluding that competitiveness claims are correct. A merger in a market in which import competition had to contend with, among other hurdles, huge logistical costs and customers notoriously unwilling to hold inventories, was declined.[1442] The argument that directly substitutable imports were available in reliable supply was found untenable in the market for production of white phosphoric acid and polyphosphoric acid where currency fluctuations and high insurance coverage demands made it uncompetitive to import. It did not help that one of the merging parties already held a national market share of approximately 85 per cent. The merger would leave competitors at a disadvantage and was approved subject to divestiture conditions.[1443]

Any competition is welcome competition. The more the players, the better the prognosis for the merger. Presence of competition, this time from imports, will work in favour of a proposed merger because it offers a push back against dominant players while adding to locally available firms, hence more players. The agencies are obligated to interpret the 1998 Competition Act in a manner that gives effect to the objective of promoting and maintaining competition in the Republic. Vibrant markets with alternatives make for a

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[1440] *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 pars 87-90; Imports, accounting for 35% of the total market share was adequate competition to keep the merged entity in check in *Food and Allied Workers Union v Competition Commission.* 17/AM/Mar01 par 19. In *Ceramics Industries Ltd/The Vitro Punched Tile Business of Anglo Operations Ltd* 18/LM/Feb00 3, the Tribunal took into account that a major competitor of the merging firms had grown considerably over the past few years by selling imported tiles. See also *Aveng Ltd/LTA Ltd* 84/LM/Aug00 par 14 and *LNM Holdings NV/Iscor Ltd* 08/LM/Feb04 at 4.

[1441] 46/LM/May05.

[1442] *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 pars 90-92.

[1443] *Chemical Services Ltd/Chemiphos SA* (*Pty*) *Ltd* 100/LM/Dec04 pars 34–44.

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more effective and efficient economy and restrain particular trade practices which undermine a competitive economy. This is required under the preamble of the Act.

4.3.3.3 Section 12A(2)(b): Ease of entry into the market

Possibility of entry into the market by other firms has a profound effect on the ability of a merged firm to exercise market power. The easier it is for new competitors to get on board, the greater the push back. The ease with which new firms can enter markets has been a significant consideration in establishing ability and likelihood of firms, especially those in concentrated markets, to engage in anticompetitive conduct.[1444] A merger in a highly concentrated market could be accepted on account of low barriers to entry. It has been observed by the Tribunal that "It is trite that even if concentration levels are high in a market as long as entry barriers are low, a merger is unlikely to be anticompetitive as any attempt by the merged firm to exercise market power will be countered by new entry, provided that entry is timely, likely and sufficient."[1445] Where there are significant barriers to entering a market, potential competition is unlikely to constrain incumbents.

The decided cases reveal Authorities for whom ease of entry ranks quite highly in establishing the outcomes of merger analysis. Where a transaction involving a dominant firm portended a variety of potentially anticompetitive outcomes, the Tribunal noted that of all of them, the prospect of increased entry barriers and the possibility of market foreclosure were paramount.[1446] In *Massmart Holdings Ltd/Jumbo Cash and Carry* (*Pty*) *Ltd,*[1447] the Tribunal was willing to overlook high market shares in certain of the geographical markets. Available evidence pointed to relative ease of entry, with suppliers being willing to extend credit to new entrants. To add to that, the merged entity would face robust competition from both national chains and from well-established independents. In *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd,*[1448] persuasive evidence on the low entry barriers coupled with the existence of competing co-operatives and numerous wine estates saw the Tribunal approve a merger in the face of high post-

[1444] T*iger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 52-53 and 103-104 and *Bidvest Group Ltd/Paragon Business Communication Ltd* 56/LM/Oct01 pars 61-62.
[1445] *Multichoice Subscriber Management* (*Pty*) *Ltd/Tiscali* 72/LM/Sep04 par 61.
[1446] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 11.
[1447] 39/LM/Jul01 pars 34-35 and 49.
[1448] 08/LM/Feb02 19/03/2003 pars 171,173,191,192 and 198.

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merger shares in the table wine market. In *JD Group Ltd/Ellerines Holdings Ltd*,[1449] the Tribunal considered store leases of five years at a time a sunk cost significant enough to deter new entrance. Not to mention that new entrants were constrained by the requirement of being able to run a large debtors book. These barriers of entry were considered significant enough to support preclusion.[1450]

For South African Authorities, the nature of competitive rivalry appears to be appreciated in dynamic terms, including in the sense of opportunities for new participants and keeping market structures that afford the opportunity for new entry.[1451] This approach is in keeping with the Act. Per the preamble, Parliament was passing the 1998 Competition Act to provide all South Africans equal opportunity to participate fairly in the national economy and to restrain particular trade practices which undermine a competitive economy, of which foreclosure is one. The objectives in section 2 set as an outcome equitability of opportunity to participate in the economy. The tenor of these provisions draw from the lead up to the Act where market access, participation in the economy and diversification of ownership featured very prominently. Markets with high entry barriers, either imposed or natural will thwart these ends and a merger that plays into markets of such nature can expect little sympathy from the Authorities. Ease of entry, being part of the list of eight factors, is not a stand-alone consideration and a combination of easy entry and currently existing competition appears to be the winning ticket.

Entry that will tilt the scales has to be effective, that is; timely, likely and sufficient. Entry will be likely only if it is expected to be profitable.[1452] Entry within two to four years is regarded timely.[1453] In *Telkom SA Ltd/Business Connections Group Ltd,*[1454] judicial notice was taken of public statements made by various mobile operators indicating intention to enter the fixed line market. That notwithstanding, there was little likelihood of entry in a manner both sufficient and quick enough to exert a significant competitive

[1449] *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 pars 25-26.
[1450] See too *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00.
[1451] Roberts S "(Re)Shaping Markets for Inclusive Economic Activity: Competition and Industrial Policies Relating to Food Production in Southern Africa" 2017 Center for Competition, Regulation and Economic Development (CCRED) Development Working Paper 12/2017 at 1.
[1452] *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 par 188.
[1453] *Xstrata South Africa* (*Pty*) *Ltd/Egalite* (*Pty*) *Ltd* 54/LM/Jul04 at 8 and 9.
[1454] 51/LM/Jun06 20/08/2007 par 232.

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constraint on the monopoly of Telkom. Any entrant would have needed to develop an efficient national network and none was near there yet. Ease of entry as a redeeming factor was ruled out in an instance where the last new incidence of a local entrant had been three years earlier and the market power of dominant players made it unlikely for foreign ones to join the market.[1455]

4.3.3.4 Section 12A(2)(c): Level and trends of concentration, and history of collusion

Concentration has to do with the number of firms exerting influence in a market and the relative weight of their influence.[1456] South African Authorities consider it a strong indicator of a market's competitive state.[1457] As remarked by the Tribunal: "In general, relative market shares are utilized by Competition Authorities to assess whether a transaction between rivals would require closer scrutiny. However, certain levels of concentration and changes in concentration as a result of a merger act as thresholds for Competition Authorities to scrutinize mergers more closely."[1458] Concentration ratios can be used to determine concentration levels.[1459] The preferred formula though is the Herfindahl-Hirschmann Index (HHI).[1460] On its own though, it is not enough to constitute the basis for deciding the outcome of a merger investigation. A qualitative enquiry is added on to arrive at a realistic assessment of the impact of the transaction on the relevant market.[1461]

Generally, the Authorities have no time for mergers that may further concentrate already concentrated markets. In *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd,*[1462] the transaction under investigation would not only merge the second and third largest of the top three firms in an already highly concentrated private healthcare

[1455] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 50-53.
[1456] Sutherland & Kemp (2017) par 10-34.
[1457] Sutherland & Kemp (2017) par 10-35.
[1458] *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 par 192.
[1459] *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 23; *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 par 58, where a CR3 was calculated and *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 29, where the Tribunal referred to the CR1, CR2 and CR3.
[1460] *Santam Ltd/Guardian National Insurance Co Ltd* 14/LM/Feb00 pars 13-15; *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006 par 47; *Nestlé* (*SA*) (*Pty*) *Ltd/Pets Products* (*Pty*) *Ltd* 21/LM/Apr01 par 32; *Bidvest Group Ltd/Paragon Business Communication Ltd* 56/LM/Oct01 par 47 and *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 par 34.
[1461] *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 23.
[1462] 11/LM/Mar05 par 184.

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market. It would also give way for co-ordination of the merged entity with the only would-be entrant. Needless to say, the merger was barred.

As far back as the mid-1970s, there was concern over the concentrated nature of markets. That carried on into the pre-1998 debate, this time intertwined with aspirations of democracy and equity. Concentration of economic power and the resultant anticompetitive tendencies were seen as responsible for many economic and social ills, which 'strict antitrust legislation' could cure. Apartheid and other discriminatory laws and practices of the past had bred concentrated ownership in concentrated markets, as captured in the preamble of the Competition Act. Inadequate restraints against anticompetitive trade practices compounded the problem. The preamble calls for a more effective and efficient economy in South Africa and that is not compatible with concentration. Section 2 speaks to promotion and maintenance of competition and to an efficient adaptable economy which, in South Africa, is taken to be in the form of fragmented markets. Weak legislation led to the prevailing status quo of highly concentrated markets and it now falls on the same law to unravel the problem. The agencies take this task seriously.

Under section 12A(2)(c), not only are Authorities to consider level and trends of concentration but also the history of collusion in the market. *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd*[1463] involved a merger in the canning industry, one of those born in the era of price and marketing controls. The price at which canning companies procured their fruit from farmers was set by a Control Board up until 1996, as was the price at which they exported their product. In 1997 the Board was abolished and replaced by a voluntary association, which on the evidence appeared to replicate much of the Board's role. While there was a semblance of annual bargaining between farmers and canners, close scrutiny revealed that the former actually were price takers. Canning firms had continued to see themselves as a national collective competing with international players. While overall the Tribunal found nothing unlawful in the conduct of the industry, it determined that a merger between the two strongest firms could only

[1463] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 54-63.

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serve to entrench this undesirable culture further. Approval was granted subject to conditions to counter possible collusion. Similarly, in *Sasol Limited Engen Limited Petronas International Corporation Limited and Sasol Oil (Pty) Ltd Engen Ltd*[1464] the Tribunal found that a coordinated outcome was likely partly because of the predisposition of the petroleum industry towards coordinated rather than competitive outcomes.[1465]

It is no secret that mergers may be used to facilitate collusion and a pre-emptive approach to merger analysis has been applied to prevent this eventuality. The Tribunal accordingly observed in *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd:*[1466]

> "We are concerned that the transaction is the centerpiece of a strategy designed to facilitate the flow of price and other competition sensitive information thus cementing the domestic duopoly, indeed cartelising a number of segments of the broad domestic paper manufacturing market. The formation and operation of a cartel is the most egregious offence under competition law, it is indeed the very antithesis of competition. . . We are not in the process of trying a cartel. We are adjudicating a merger. We are merely establishing whether the transaction will facilitate successful cartelisation. In order to do this we must first establish whether the structure of the market in question and the character of the products lend themselves to cartel formation."[1467]

Given the historical reality of South African markets that includes price fixing by government, it is important that markets be carefully scrutinised for any remnants of, or switching back to, default mode. On that, the Authorities appear to have acquitted themselves well.

4.3.3.5 Section 12A(2)(d): The degree of countervailing power in the market

In a market, competitive pressure is not only exerted by competitors but by customers as well.[1468] Where effective countervailing power is found to exist, transactions that would otherwise have been precluded are approved, even if conditionally. In a merger in the

[1464] 101/LM/Dec04) [2006] ZACT 15.
[1465] Paelo A, Robb G & Vilakazi T "Study on Barriers to Entry in Liquid Fuel Distribution in South Africa" (2004) *CCRED Working Paper 13/2004* at 12-13.
[1466] 06/LM/Jan02.
[1467] 06/LM/Jan02 par 86-88.
[1468] *Bidvest Group Ltd/Paragon Business Communication Ltd* 56/LM/Oct01 par 63.

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food services market, the Tribunal's concerns were ameliorated by the sheer size of the markets' customers, most of them chain stores that could source supply from abroad if need be.[1469] Likewise in *Liberty Group Ltd/Investec Employee Benefits Ltd*,[1470] the relevant statute gave customers - pension funds and their trustees - the liberty to change providers of administrative functions at any time. The Tribunal found that this provided a strong countervailing power in the hands of customers which diluted market power effectively. The merger, which would create the biggest player in the market, was approved. It did of course help that the relevant market was characterised by a high level of competition and regular entry. Similar findings were made in *Clicks Organisation* (*Pty*) *Ltd/Milton and Associates* (*Pty*) *Ltd*[1471] and in *Clover Fonterra Ingredients (Pty) Ltd/Clover SA (Pty) Ltd*.[1472]

Expectedly, countervailing power is unlikely to save a merger that will result in a very high market share, making the merged firm so powerful that it will be difficult for customers to restrict its bargaining power.[1473] The size and power of large multi-national customers could not save a merger where the post-merger market would be left with only one domestic supplier.[1474] Countervailing power will also not count where it exists but is exercised solely for the customer's benefit with no chance of benefit accruing to the final consumer. The best example is that of the retail chains who, despite their enormous bargaining power to extract discounts and rebates from suppliers, do so only that their chains can be competitive relative to one another. What is in it for the ultimate consumer is the least of their worries.[1475] Powerful firms will not exercise countervailing power if they are able to pass on price increases to their customers or are happy to "share in the monopoly rents".[1476] This focus on the consumer is another hallmark of merger enforcement by South African Authorities.

[1469] *Food and Allied Workers Union v Competition Commission* 17/AM/Mar01 pars 21-22.
[1470] *Liberty Group Ltd/Investec Employee Benefits Ltd* 32/LM/Jun03 pars 42-44.
[1471] *Clicks Organisation* (*Pty*) *Ltd/Milton and Associates* (*Pty*) *Ltd* 24/LM/May03 par 37. See also *Santam Ltd/Guardian National Insurance Co Ltd* 14/LM/Feb00 pars 17-19 and *AC Whitcher* (*Pty*) *Ltd v Competition Commission* 84/CAC/Jan09 03/08/2009 par 33 relating to SMEs.
[1472] *Clover Fonterra Ingredients* (*Pty*) *Ltd/Clover SA* (*Pty*) *Ltd* 92/LM/Nov04 pars 57-59.
[1473] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 65-70, especially 67. The merged firm would be managed and two-thirds owned by one of the largest suppliers of food to the retail chains.
[1474] *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 pars 39-40.
[1475] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 65-70.
[1476] *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 pars 114-115.

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The GEAR document set out prevention of exploitation of consumers as one outcome of "credible competition policy" and the Minister, in clarifying the Government's standpoint on the 2017 Competition Bill, declared that *consumers must have access to a wide range of high quality products and services at lowest possible prices.* Per the preamble, enforcement of the 1998 Competition Act should be directed at providing for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire while section 2 sets out provision of consumers with competitive prices and product choices as an objective of the Act.

Claims of existence of countervailing power are not taken at face value. In *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk,*[1477] the merger parties contended that the particular size and power of their customers in the South African market for refined white sugar deserved consideration. The Tribunal, while accepting this on the face of it to be a credible argument, pointed out evidence that in spite of this concentrated buying power, buyers could not negotiate directly with millers for rebates. A negotiating forum determined a fixed rebate per ton of sugar sold, effectively negating the potency of any countervailing buyer power. The product of the merger transaction would be a firm with market power enough to substantially prevent or lessen competition in the relevant market. One thus sees an appreciation for countervailing power but which will not lead to approval of a merger where a market is concentrated or a player dominant. This is in keeping with the heart of merger analysis in the jurisdiction and with the spirit of the law.

4.3.3.6 Section 12A(2)(e): Dynamic characteristics of the market

The dynamic characteristics of the market, including growth, innovation and product differentiation, are to be considered where relevant. A merger that stifles dynamism will be prohibited. The decision in *Telkom SA Ltd/Business Connections Group Ltd*[1478] presents an illustration. The transaction under assessment would have enabled Telkom, which enjoyed the advantage of first entrant into the highly innovative communications market, to act independently of its rivals. There was already evidence of price manipulation. The final effect would be to force the exit of smaller rivals or limit the

[1477] 83/LM/Jul00 pars 90-95.
[1478] *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 pars 256-270.

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expansion abilities of existing rivals whose outcome would be a static market and higher prices for the consumer. The Tribunal refused to grant approval. A similar merger in a dynamic market may, however, be looked upon more generously. A high market share will not necessarily translate into market power in such a market.[1479]

By and large, mergers that support innovation are treated favourably in the same way that those that stifle innovation stand little chance. The former will be accommodated even if the expected benefits of the innovation are in the longer term. In *Pioneer Hi-Bred International v Competition Commission*[1480] the Tribunal had deemed a five year wait for a merger to yield tangible innovative outcomes too long and declined to grant approval. The CAC went on to reverse this finding noting that absent the restructuring, the two firms were separately not going to achieve the same levels of innovation as they could together. Further to that, the merger would alter the market structure by creating a more competitive adversary for the market leader. Though likely to take long, the benefits of the merger would ultimately reach the consumer.[1481]

South African Authorities are pragmatic enough to appreciate that often, size is necessary for dynamism. Big sometimes is necessary, as underlined in the Minister's speech to the House earlier referred to.[1482] Often, successful innovation requires massive resources. Bigger size may indeed promote dynamic efficiency because a firm is able to finance research and development activities. In any event, very high market shares on the part of first movers are no guarantee that they will always be able to dominate the market once new entrants come in.[1483] Where a dominant firm also dominates innovation, the Authorities will be more cautious as they were in *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd*.[1484] The relevant player's market share stood at 70.8 per cent three years prior to the proposed merger. This same player was the market leader in innovativeness towards drawing new consumers into the alcoholic beverages market. Rather than ease the Tribunal's concern, this fact only exacerbated it. The merger

[1479] See *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007.
[1480] 113/CAC/Dec10 28/05/2012.
[1481] *Pioneer Hi-Bred International v Competition Commission* 113/CAC/Dec10 pars 50–51.
[1482] At chapter 4 par 4.2.6.
[1483] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 par 64.
[1484] 08/LM/Feb02 19/03/2003 pars 166-168 and 200-201.

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was adjudged to be capable of substantially lessening competition in the proprietary spirits market, one of the several markets implicated in the transaction.

As pointed out in the previous chapter, it is recommended that in analysing mergers, developing country competition agencies adopt a flexible balancing approach that gives much weight to long-term dynamic considerations. Doing so will maximise long-term growth of industrial and overall productivity which ultimately yields benefit for the consumer.[1485] This is the approach adopted in *Pioneer Hi-Bred International v Competition Commission.*[1486]

4.3.3.7 Section 12A(2)(f): Nature and extent of vertical integration

Roberts observes that in a market with high vertical integration, entrants at only one level of the supply chain are at an immediate disadvantage. They must rely on integrated rivals for key inputs and/or key markets.[1487] In order to be profitable, newcomers have to enter at different levels simultaneously, significantly increasing entry costs.[1488] Saggers remarks that the goals of promotion of market access to all South Africans and equality of opportunity to participate dictate that Authorities be cautious of actions by incumbents that could raise entry barriers and slow progress towards a more effective and efficient economy.[1489] Vertical mergers, where they involve a dominant firm, increase barriers to entry, foreclose markets and ultimately harm the consumer. At the same time, vertical mergers do unlock much-needed efficiencies and cost savings.[1490] In view of all this, the Act obligates Authorities, where relevant, to take into account the nature and extent of vertical integration in the merger market.

The approach of the South African Competition Authorities has been one "cognisant of, and in general sympathy with, the characteristically permissive approach taken by anti-trust to vertical mergers".[1491] Vertical mergers are considered not *prima facie* harmful unless they come with the prospect of increased entry barriers as well as

[1485] Chapter 3 par 3.3.2.
[1486] 113/CAC/Dec10 28/05/2012.
[1487] Roberts (2017) *CCRED Working Paper 13/2017* at 7.
[1488] Roberts above.
[1489] Saggers (2008) 11(3) *South African Journal of Economic and Management Sciences* 247 at 255.
[1490] See chapter 2 par 2.3.3.
[1491] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd 23/LM/May01.*

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possibility of market foreclosure.[1492] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* ,[1493] hereinafter referred to as SCHS and PD respectively, provides insight into the congruence of thought between the Tribunal and the CAC on the matter of vertical integration. The merger involved a transaction between two firms in a vertical relationship. The acquiring firm, SCHS, is a supplier of candle wax and the target firm, PD, a candle manufacturer. The Tribunal noted that PD stood to benefit from a massive anticompetitive advantage in the downstream market by the mere fact that its parent SCHS had intimate, direct and immediate knowledge of the production capacities and output levels of all of PD's competitors. These were tools that could be put to use to engage in anticompetitive practices including predation, made possible by the deep pockets of the parent company. Entry barriers into candle manufacturing were found to be relatively low though the rates of exit were high, this being blamed on high concentration. The largest participant had a 42 per cent market share and 66 per cent of the market share was shared by the three largest participants. In view of the high level of concentration, and the dominance by SCHS, the Tribunal declined to grant approval. There was a high chance, it found, of substantial lessening and prevention of competition in both the upstream and downstream markets.

On appeal, the CAC approved the merger finding that on the basis of the evidence the transaction was driven by sound business rationale, specifically involving a debt settlement agreement.[1494] There appeared to be no plausible grounds for concluding that SCHS could foreclose the market to the supply of wax, particularly when manufacturers had ready, easy affordable access to imports. Predation would have failed as a strategy given the low barriers to entry in the downstream market.[1495] Though different decisions were arrived at, the same concerns were shared. The Court's overturning of the Tribunal's decision was not for a flaw of ideology but for want of rationality in interpretation of the evidence. For both, concentration, dominance, barriers to entry and ability to foreclose

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[1492] See chapter 2, par 2.3.3 and Saggers (2008) 11(3) *South African Journal of Economic and Management Sciences* 247 at 249. See also *Coleus Packaging* (*Pty*) *Ltd/Rheem Crown Plant a division of Highveld Steel and Vanadium Corporation Ltd* 75/LM/Oct02 at 8.
[1493] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 pars 52-59.
[1494] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01 at 19-20.
[1495] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01 at 14.

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remained fundamental. Not long after this decision the Tribunal prohibited a proposed transaction because it was "likely to substantially prevent or lessen competition in both the upstream and downstream markets" through exclusionary foreclosure and facilitating collusion.[1496] The CAC upheld that decision.[1497]

The conglomerate has been the bane of the South African economy, and was squarely at the center of the push for the new Act. The integrated nature of these financial giants blocked the market structure, effectively kept out newcomers and dampened competition. Nonetheless, it will not do to apply "strict antitrust" to such transactions. Cognisance is duly given to the efficiency enhancing attributes such vertical restructuring comes with. This is in keeping with both the preamble and the objectives sections of the 1998 Competition Act. The former requires that enforcement be directed at achieving an effective, efficient economy where consumers benefit, the latter sets out efficient markets from which consumers benefit from competitive prices and product choices as desirable ends.

4.3.3.8 Section 12A(2)(g): Failing firm arguments

Most competition law systems recognise the "failing firm" doctrine. Typically, it permits approval of takeovers whose possible anticompetitive effects are outweighed by the damage otherwise caused to the market by the exit of a firm and its assets. Prohibition of take-overs of failed firms may disincentivise new firms from entering into markets. The fear of not being able to dispose of a struggling business to incumbents and recover, even if only part of, capital costs may keep potential entrants away. For that reason, the failure, or imminent failure of a merging firm may favour approval of a merger.[1498]

Section 12A(2)(g) requires competition Authorities to consider, if relevant, whether the business or part of the business of a party to the merger has failed or is likely to fail. South Africa's is therefore not a "failing firm defence" as the doctrine is widely assigned.[1499]

[1496] *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd* 06/LM/Jan02 and *Mondi Ltd/Kohler Cores and Tubes a division of Kohler Packaging Ltd* 20/CAC/Jun02 CAC;
[1497] Saggers (2008) 11(3) *South African Journal of Economic and Management Sciences* 247 at 261.
[1498] Sutherland & Kemp (2017) par 10-62 and Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 605.
[1499] Sutherland & Kemp (2017) par 10-62; *Ellerines Holdings Ltd/Relyant Retail Ltd* 56/LM/Aug04 par 54; *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 pars 58. Though see in *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 par 71 where the Tribunal referred to the 'failing firm defence'. For reading on application of the failing firm in SA see Nzero (2013) Chapter 5.

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Under the Act, failure of a firm is but one of eight possible considerations in a list that is open to more; not, as pointed out by Nzero, a rationalisation for a merger already found likely to restrict competition.[1500] Therefore, imminent failure of a firm will not save a merger which raises competition concerns that weigh more than the loss of competition from the departure of the failing firm.[1501] Where loss of competition is low, Authorities can be less exacting in requiring that all the traditional elements of the defence be proven. Were it a defence then this type of flexibility, which allows real balancing of interests, would be lost.[1502] Agencies are able to rank appropriately what is of relevance for South Africa, even if it is not part of the traditional test.[1503] The facts of each case can take precedence over the application of a formula.[1504]

The Tribunal set ground rules for assessment of treatment of the failing firm consideration in *Iscor Ltd/Saldanha Steel* (*Pty*).[1505] To begin with, parties are cautioned against invoking the doctrine if in effect it amounts in substance to another factor or defence already provided for under the Act - specifically the efficiency defence and the public interest criteria.[1506] Beyond that, on a general scale, the criteria commonly applied in other jurisdictions will be applicable, of course adjusted appropriately. It must be proven that the failing firm is incapable of meeting its financial obligations or of reorganising successfully and would leave the market, but for the merger. In *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd*[1507] the Tribunal declined to approve a merger where it emerged that in fact, initiative for the transaction had come from the "supposedly likely to fail"-firm. Prior to that, this same firm had even considered making an offer for a subsidiary of the now acquiring firm. Hardly the behaviour of a firm in dire straits. It must also be shown that there is no less anticompetitive alternative open

[1500] Nzero 2017 (80) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg,* at 611; *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 pars 100–103 and *JD Group Ltd/Profurn* Ltd 60/LM/Aug02 par 108.
[1501] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 pars 104 -106; *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006 par 51.
[1502] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 105-106.
[1503] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* above par 107
[1504] Nzero 2017 (80) *THRHR* 602 at 612.
[1505] 67/LM/Dec01 pars 108-110.
[1506] See chapter 4 pars 4.3.4 and 4.3.5.
[1507] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 75-79.

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to the failing firm other than the proposed merger.[1508] Evidence of the extent of failure or its imminence will be weighed against the evidence of the anticompetitive effects of the merger. The greater the latter the more cogent the proof required that failure is imminent and would be detrimental.

Approval will be granted where it is clear that the acquisition is not about monopolisation, "the standard problem presented by a failing firm defence".[1509] Mergers that carry the promise of innovation will be looked at favourably. As pointed out by the Court of Appeal, "[I]t would not serve the cause of competition policy, which seeks to encourage firms to invest in plant and innovation, to apply the failing firm doctrine so rigidly that we inhibit such schemes, otherwise firms may become afraid to risk their capital."[1510] The failing firm must show that it has made unsuccessful good faith efforts to elicit reasonable alternative offers that would keep its assets in the market and pose a smaller danger to competition than the proposed merger.[1511] Proof that the assets of the failed firm would exit the market if not for the merger, will not be necessary although it will probably increase the likelihood of a failing firm argument succeeding.[1512] Departure of a firm's resources means that they cease to represent an actual or potential constraint on the market, an undesirable outcome given the jurisdiction's priorities.[1513]

A wide sweep approach that looks into the causes of failure had been applied. In *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd*,[1514] SCHS, had triggered PD's failure, filing for liquidation of the firm which had for long been in the doldrums. All the while, the now acquiring firm had chosen to subsidise a captive, though inefficient, customer in its downstream market. What it sought now was approval of full vertical integration which, of course, the Tribunal refused to grant, holding that the less

[1508] *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 pars 209-210; *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 108-110 and *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006 par 11.
[1509] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec0167/LM/Dec01 par 140.
[1510] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* above pars 122-132.
[1511] *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006 pars 67–89; *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 108.
[1512] It was mentioned only in the analysis of the facts in *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 134 but was applied in *Phodoclinics* (*Pty*) *Ltd/Protector Group Medical Services* (*Pty*) *Ltd* (*in liquidation*) 122/LM/Dec05 21/02/2006 pars 90–98. See also *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 65.
[1513]See also *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 87.
[1514] 23/LM/May01 pars 61-66.

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risky alternative for the market was to have SCHS continue with its subsidy programme. Given the choice between the rescuing of a failing firm via full vertical integration and allowing its departure from the market, the Authorities sooner opt for the latter. Not surprising given the overall viewpoint towards vertically integrated structures. It would go against the grain of the Act to open the door to the same structures that so much motivated the enactment of the 1998 Competition Act and which it was thought competition law was the antidote for.

4.3.3.9 Section 12A(2)(h): Removal or creation of a particularly effective competitor

A merger which eliminates the influence of a significant competitor may have a particularly negative impact on competition. The Act therefore requires Authorities to factor into their consideration the question of whether or not a merger will result in the removal or creation of an effective competitor. In *Massmart Holdings Ltd/Moresport Ltd*,[1515] a merger was prohibited on the basis that the merging firms were the major competitors in the retail market for sports and recreational equipment, their rivalry being marked by constant striving to offer the better product to consumers at lower prices. The merger would leave consumers with few credible national general retailers to whom they could turn to for fairly priced alternatives. One may add, contrary to the expectation of both the preamble and the objectives of the Act.

Where there is a dominant firm in a market, one could argue that a merger between smaller firms can create an effective competitor to counter such dominance. As reasonable as this argument sounds, it is one approached with caution. In an already concentrated market, reducing the number of firms and increasing the size of the market's smaller firms, increases the likelihood of non-competitive pricing.[1516] Mere reduction of size disparities on its own will not justify a merger. In *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd,* [1517] the market had two market leaders of broadly similar strength and with distinct competitive strength and strategies. There was a third firm well placed to compete effectively with the two market leaders. The pair's contention

[1515] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 pars 197-200 and 208-209.
[1516] *Ellerines Holdings Ltd/Relyant Retail Ltd* 56/LM/Aug04 par 57.
[1517] 11/LM/Mar05 par 210.

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that a merger was needed to make them more effective competitors to the latter would not wash with the Tribunal who held that a merger that increased concentration was unlikely to lead to greater competition. This same reasoning is applied even where the party likely to exit the market is a small player. Although accretion may appear minimal when a firm enjoying a very large market share merges with another of a relatively small pre-merger market share, this may in fact reflect removal of one of the last hopes of robust competition.[1518]

A merger between firms that fall in the same market but are for some reason incapable of competing effectively, may be approved.[1519] Removal of a competitor may also be countenanced if it is not likely to have deep impact on competition. A merger in the sugar industry was approved because the acquiring firm had a low market share of only 4.4 per cent, imports were limited by quotas and it was unlikely that the regulatory regime of the sugar industry would change in the near future.[1520] Removal of an effective competitor may also be tolerated where some synergies between the merging firms can be realised such as in *Ellerines Holdings Ltd/Relyant Retail Ltd.*[1521] Ellerines dominated the bottom end with very strong brands, Relyant was well represented in the middle market. Relyant boasted of an advanced credit control system much more efficient than that of Ellerines, whose strength lay in its information technology, managerial and financial capacities. A merger between the two was adjudged to present a compelling synergistic-type fit that earned approval. In the same vein, a merger that may lead to the creation of a more effective competitor in a market where innovation is critical will stand a good chance of approval.[1522]

What one hears is a determination to keep markets vibrant, fragmented and competitive. Concentration cannot always be avoided given that it comes with benefits such as economies of scale. However, its incidence must be reduced as far as possible.

[1518] *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 pars 177-209.
[1519] *Iscor Ltd/Saldanha Steel Ltd* 67/LM/Dec01 par 66.
[1520] *Mananga Sugar Packers* (*Pty*) *Ltd/Sunshine Sugar Specialities* (*Pty*) *Ltd* 116/LM/Dec05 [2006] 1 CPLR 151 (CT) pars 28-30.
[1521] *Ellerines Holdings Ltd/Relyant Retail Ltd* 56/LM/Aug04 pars 60-62.
[1522] *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011.

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Reduction of numbers in the market must be accommodated only in special circumstances such as where a synergistic fit can be expected.

4.3.3.10 Section 12A(2)(i): Extent of ownership by a party to the merger in another firm or other firms in related markets

This consideration follows 2018 amendments to the Act which took effect in July 2019.

4.3.3.11 Section 12A(2)(j): Extent to which a party to the merger is related to another firm or other firms in related markets, including through common members or directors

Here I will have exactly two pars.

4.3.3.12 Section 12A(2)(k): Any other mergers engaged in by a party to a merger for such period as may be stipulated by the Competition Commission

Here I will have exactly two pars.

4.3.4 Efficiencies

Even if it appears that a merger is anticompetitive, resultant efficiencies may earn it approval.[1523] Countervailing efficiencies are commonly examined in merger evaluation, either as part of the competition finding as in the US, other times as a defence to an anticompetitive finding as under section 12A(1)(a)(1).[1524] South Africa and Canada are the only two countries that have a statutory efficiency defence. In these two, efficiencies become relevant only once it is found that the merger under consideration substantially prevents or lessens competition.[1525]

Prohibiting an anticompetitive merger may come at the price of foregone efficiency, a price that may be unconscionable especially for smaller economies.[1526] Consideration of efficiencies from mergers is especially pertinent in small economies where production efficiency often demands high market shares.[1527] While there are "safer ways" of

[1523] Section 12A(1)(a)(i) 1998 Competition Act – 'if it appears that the merger is likely to substantially prevent or lessen competition, then determine whether or not the merger is likely to result in any technological, efficiency or other procompetitive 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'; Roberts (2017) *CCRED Working Paper 13/2017* at 15.
[1524] See Sutherland (2008) 125(1) *SALJ* 331 at 334 for contrast with United States and European Union approach. And *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 pars 98-103 especially 103 for a similar comparison with United States' approach.
[1525] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01 par 103.
[1526] Tongaat Hulett Group Ltd/Transvaal Suiker Bpk 83/LM/Jul00 par 102.
[1527] Sutherland (2008) 125(1) *SALJ* 331 at 333.

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obtaining these efficiencies, such as by internal expansion or joint ventures, these may be slow and are not always more beneficial to competition than a merger.

South African agencies, especially the Tribunal, display a healthy scepticism towards claims of efficiency.[1528] Which is not entirely unjustified, given that too often the extravagant efficiencies predicted by merging parties turn out to be "hazy chimeras".[1529] Not just that but assessment of these gains is difficult and often comes down to a matter of pure judgement.[1530] "Pandora's box" is a phrase that has been used with reference to the exercise.[1531] The Tribunal's take expressed in *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk*[1532] is especially enlightening with regard to treatment of efficiency by South African agencies:

> "The objectives of the Act require us 'to promote and maintain competition in the Republic in order . . . to promote the efficiency . . . of the economy'. Competition is, in other words, not deemed neutral with respect to efficiency - the Act seeks to promote competition precisely because it is efficiency enhancing. [T]he Act presumes that a lessening of competition diminishes efficiency. The standard in establishing an efficiency gain that outweighs the efficiency loss generally presumed to flow from a 'bad' merger must accordingly be set very high indeed . . "[1533]

There is a fusing of lessening or prevention of competition with efficiency. Competition is efficiency enhancing and a merger that prevents or lessens competition reduces overall market efficiency. For an anticompetitive merger to pass on grounds of redeeming efficiencies, the efficiencies that are at risk of loss must be pronounced. As remarked in the *Tongaat Hulett Group*-matter:"[T]he economic efficiency sacrificed by permitting an anticompetitive merger must be compensated, or rather 'over-compensated', by pro-efficiency gains expressed in the same terms, in economic welfare terms rather than purely commercial terms."[1534]

[1528] Lewis (2013) 114-115.
[1529] Lewis (2013) 112-113; see chapter 2 par 2.2.2.
[1530] Sutherland (2008) 125(1) *SALJ* 331 at 333 and 335; Lewis (2013) 114.
[1531] *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 par 81. See too par 44 where the challenges in enforcement of section 96 of Canada's Competition Act are discussed.
[1532] 83/LM/Jul00.
[1533] *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 par 99.
[1534] *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* above par 102.

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By adopting an *eiusdem generis* approach the Authorities have come to the conclusion that efficiencies that equate to "technological gains", that is, dynamic efficiencies or pro-competitive efficiencies, are to be favoured over mere pecuniary gains.[1535] The choice of language in section 2(a) is taken to support this approach: "[P]romote the efficiency, *adaptability and development of the economy"* is construed so as to link efficiency to notions of a dynamic nature and productive nature.[1536] Efficiency gains are therefore divided into three main categories in order of decreasing importance: dynamic, production and pecuniary efficiencies. The first constitutes the most beneficial of the three and are most favoured. They are those efficiencies that fetch better product or service quality, precisely what competition seeks to induce.[1537]

On the other end of the spectrum are pecuniary efficiencies such as tax savings or improved bargaining power with suppliers. They do not come at the expense of consumers, or another player. These, though the easiest to put a number to, are not considered real efficiency savings effectively being transfers between entities that do not lead to net gains in efficiency and importantly, any benefit to the consumer.[1538] Consequently, they "are absolutely never considered merger specific efficiency and are never recognised".[1539] In *Sasol Ltd/Sasol Oil Ltd*,[1540] if the parties merged, they would have needed to build less service stations than otherwise thus making capital savings. The question was whether capital savings were cognisable efficiencies at all. In any case, consumers would lose the benefit of competition from more stations. The merger was declined.

[1535] Section 12A(1)(a)(i)1998 Competition Act whether or not the merger is likely to result in any technological, efficiency or other procompetitive 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;

[1536] Empasis added. *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 pars 78-79. Par 78 reads, "Our statute differs from its Canadian counterpart in some important respects. Firstly, our concept of efficiency is used in section 16 in combination with the words "technological or other pro-competitive gain". Adopting an *eiusdem generis* approach and trying to discern a common meaning between these three words, this would suggest that in this context, efficiencies that equate to "technological gains" i.e. dynamic efficiencies or "pro-competitive gains" i.e. those that constitute real economies, not mere pecuniary gains, are to be favoured."

[1537] *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 pars 52-55. Par 55 reads, "We look for the enduring variety of efficiencies." "… what the legislature contemplated was either something more significant or enduring" As opposed to "ordinary efficiencies" e.g. distribution, procurement and overhead economies. Sutherland (2008) 125(1) *SALJ* 2008 331 at 339.

[1538] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 122-130.

[1539] *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd* 11/LM/Mar05 par 239; *Business Venture Investments 790* (*Pty*) *Ltd/Afrox Healthcare Ltd* 105/LM/Dec04 par 28, the mere fact that a firm will receive more for selling assets to a particular other firm because that firm will be prepared to pay a market power premium is irrelevant to competition law.

[1540] *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04.

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Production efficiencies are somewhere along the continuum between innovation and pecuniary efficiencies. They are those efficiencies that enable firms to produce more or better quality output from the same amount of input and are realised through specialisation, rationalisation and greater economies of scale. They are the most commonly claimed but are not generally given much weight by Authorities.[1541]

Authorities have adopted a standard where the consumer is placed centre stage. The stronger the showing of real efficiencies, the less need to show how consumers would benefit directly.[1542] Greater evidence of a pass-through to consumers will need to be demonstrated for the other types of efficiencies. Productive efficiencies were up for consideration in *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd*[1543]. The merging parties argued that the merger would lead to more efficient outcomes as a result of the firms being able to integrate their factories' production lines. A factory with only one production line at a time incurred a lot of wastage and the merger would enable the two firms to use to specialise in particular fruit thus reducing production time. While conceding that there was merit in the parties' arguments, the Tribunal ruled that proof of improvement of the merged firm's margins on its own would not do. Proof would still be needed that the efficiency gains or part thereof would be passed on to consumers in the form of lower prices.

We think that consideration of merger efficiencies that prioritises dynamic efficiency and focuses on the consumer is spot on and in tandem with the ends of South African competition law. Pecuniary efficiencies offer no returns for the consumer, dynamic ones fetch better product or service quality. Pursuit of efficiency, mainly the type that would benefit the owner, pushed markets in the direction of dominant players in the first place. Firms needed to trade profitably and production and pecuniary efficiencies were prioritised. It is necessary now that these two be placed on the back burner and assessment tilted towards dynamic efficiency in the hope of evening things out. An efficient, competitive economic environment, balancing the interests of owners and

[1541] *Medicross Healthcare Group* (*Pty*) *Ltd/Prime Cure Holdings* (*Pty*) *Ltd* 11/LM/Mar05 par 238.
[1542] *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd89/LM/Oct00 par 8.*
[1543] 46/LM/May05 pars 112-126.

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consumers and focused on development will benefit all South Africans and provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire. So states the preamble of the Act. Not to mention that developing country agencies are encouraged to be guided by dynamic efficiency, the most likely of the three to be in line with an overall development agenda.[1544]

The onus of proving justifiability of a merger on the basis of countervailing efficiency rests on the parties to the merger.[1545] Efficiencies must be quantitatively and qualitatively verifiable.[1546] For markets dominated by innovation, the CAC has nevertheless found that "verification of the existence of such efficiencies, rather than their precise quantification, should be emphasised".[1547] This reveals a partiality for innovation. Efficiencies will have to be timely if they are to rescue a merger. They must be achieved within a relatively short period of time to prevent a proposed merger from causing harm to consumers.[1548] Concessions are made for dynamic efficiencies that tend to be realisable over relatively longer periods.[1549] In addition to offsetting the effects of a lessening of competition the parties need to show that efficiencies are attributable to the merger and that without it, they would not occur. The standard is a high one.[1550] It accordingly will be explored whether there are realistic, and less restrictive, alternative ways in which the same gain can be achieved.[1551]

4.3.5 Public interest considerations

The rife expectation that incorporation of purely public interest concerns into merger analysis would complicate what should be a simple economic exercise, may have been overestimated. For one, as observed by Lewis, the time and energy spent in efficiency

[1544] See chapter 3 par 3.3.2.

[1545] "It is for the Commission to establish a lessening of competition; it is for the parties to establish that the efficiencies sacrificed by an merger are countervailed by efficiency gains."-*Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 par 100; and "We have previously held that merging parties bear the onus of proving the efficiency defence." - *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 par 113. See also *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 par 51; *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 par 315 and *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 par 545.

[1546] *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 par 63; *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 par 315.

[1547] *Pioneer Hi-Bred International v Competition Commission* 113/CAC/NOV11 par 37.

[1548] *Pioneer Hi-Bred International v Competition Commission* 81/AM/Dec10 09/12/2011 pars 325 and 329.

[1549] *Pioneer Hi-Bred International v Competition Commission* 113/CAC/Dec10 28/05/2012 par 50.

[1550] In *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 pars 30-32, where it was argued that the merged firm would be able to provide financial services to the unbanked and the Tribunal rejected the argument on the basis that the merger was not necessary to allow the parties to do so. See too *Trident Steel* (*Pty*) *Ltd/Dorbyl Ltd* 89/LM/Oct00 pars 76-77 and 92.

[1551] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 10/CAC/Aug01.

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assessment supersedes that spent on public interest concerns.[1552] What is more, public interest considerations, though still a conversation piece, is no longer the flavour of the season. There seem to be bigger fish to fry in the current South African competition law discourse.[1553] However, the June 2021 decision by the Commission to prohibit a merger whereby ECP Africa Fund IV LLC & ECP Africa Fund IV A LLC (collectively, "ECP Africa Fund") sought to acquire Burger King (South Africa) RF (Pty) Ltd ("Burger King SA") and Grand Foods Meat Plant (Pty) Ltd ("Grand Foods")[1554] on the sole basis of public interest concerns, specifically, that as a result of the merger the ownership levels in the target firm by historically disadvantaged persons ('HDPs') would decrease from 68 per cent to 0 per cent raises the question whether public interest considerations may in due course increase in prominence to be at par with competition concerns.

On the whole, however, in enforcement one sees an almost conscious effort to, as far as possible, confine merger analysis within the conventional straight and narrow while still making room for public interest considerations in due deference to the spirit of the Act. Until June 2021, accommodation of public interest considerations had never resulted in the prohibition of a merger.[1555] To date, no problematic merger from a competition perspective has been rescued by dint only of public interest grounds. The imposition of conditions to mitigate or remedy injury potentially caused by mergers to the public interest has been the preferred way out.[1556] In 2014, of the mergers approved, only 10% were conditionally approved, and of these conditions, only 40% were public interest related.[1557] In 2018, conditional approvals were at 13 per cent, with public interest taking less prominence.[1558] Employment topped the list, followed by the ability of small businesses,

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[1552] Lewis (2013) 137.
[1553] One example is the criminalization of anticompetitive conduct and the constitutional issues this raises. See for instance Prins & Koornhof (2014) 18 *Law Democracy and Development* 136 and Munyai PS "The Interface between Competition and Constitutional Law: Integrating Constitutional Norms in South African Competition Law Proceedings" 2013 25 (3) *South African Mercantile Law Journal* 323 3.
[1554] See Tribunal Press Release at https://www.comptrib.co.za/info-library/case-press-releases/tribunal-releases-public-version-of-conditions-imposed-on-sale-of-burger-king-sa (accessed 22 October 2021).
[1555] Hazel (2015) 37(2) *Houston Journal of International Law* at 325-326; Burger-Smidt & Goolabjith *Without Prejudice*, May 2015 at 29. Competition Commission Press Release 1 June, 2021 Commission prohibits Acquisition between ECP Africa Fund, Burger King South Africa and Grand Foods available at http://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf (accessed 10/11/2021).
[1556] *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 at 34.
[1557] Figure 2: Tribunal decisions LM (1999-2014) at 17 and Figure 3: Tribunal LM Conditional approval (1999-2014) at 18 Raslan 2016.
[1558] Diagram 11 Mergers notified and decided over the last ten years Competition Commission & Competition Tribunal (2009) *Unleashing more rivalry* available at http://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 18/06/2019).

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or firms controlled or owned by historically disadvantaged persons, impact on a particular industrial sector or region and finally ability of national industries to compete in international markets.[1559]

Section 12A(3) constitutes a closed list.[1560] The list will not be expanded to cater for anything beyond what is provided for. Regardless of how worthy the concern may be, say for example giving the unbanked access to financial services or provision of affordable HIV/AIDS drugs.[1561] Even in regard to the listed considerations, Competition Authorities exhibit a lot of caution, considering their jurisdiction to be residual and secondary to that granted to other bodies by statutory and regulatory instruments.[1562] Industrial policy should not be conducted by Competition Authorities but by the state.[1563] The effect of the delisting of a blue chip firm on the South African economy was found to not be a public interest issue as envisaged in section 12A(3)(a) of the Act. Such fell to be considered by the securities and sector regulators who had already approved the transaction.[1564] Authorities caution themselves against pursuing the public interest consideration-mandate in an over-zealous manner, given the high level of abstraction and generality of their discretion.[1565] They move with considerable caution when they use public interest as a basis for intervention, particularly when competition is not impaired.[1566]

Within the confines of the listed public interest considerations, however, there is greater elasticity of interpretation. The tendency is to construe the five public interest considerations broadly, leaning for support on the overall tone of section 12A and section 2 of the Act. Section 12A(2) is open ended and section 12A(3) open grained. The example

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[1559] Figure 4: No. of public interest consideration conditional approvals by the Tribunal Raslan (2016) *CLES Research Paper Series* 3/2016 at 18. For the period 2010 to 2019 see Diagram 11 Mergers notified and decided over the last ten years Competition Commission & Competition Tribunal (2009) *Unleashing more rivalry* at 39. Available at http://www.compcom.co.za/wp-content/uploads/2020/01/Competition-Commission-20-year_V9.pdf (accessed 18/06/2019).
[1560] *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 par 30.
[1561] *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 at 30-32 and *Glaxo Wellcome plc/Smithkline Beecham plc* 58/AM/May00 par 20. Though see *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 pars 76-77, where the Tribunal took into account that the merger in question was in the candle and candle wax markets and that it was the poorest of consumers that used candles. In view of that, the public interest would have been considerable to justify a merger regarded as . The merger was nonetheless not approved because the positive impact on public interest did not outweigh the consequences.
[1562] *Shell South Africa* (*Pty*) *Ltd/Tepco Petroleum* (*Pty*) *Ltd* 66/LM/Oct01 par 58; *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 pars 232-238.
[1563] *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/10/2012 pars 12-15.
[1564] *DB Investments SA/De Beers Consolidated Mines Ltd* 20/LM/Mar01 par 41.
[1565] *Shell South Africa* (*Pty*) *Ltd/Tepco Petroleum* (*Pty*) *Ltd* 66/LM/Oct01 par 58.
[1566] *Shell South Africa* (*Pty*) *Ltd/Tepco Petroleum* (*Pty*) *Ltd* above pars 57-58. Competition Authorities do not have the power to tell parties whom they should sell to see *Vodafone Group plc/Venfin Ltd* 110 and 111/LM/Nov05 par 15 to 18. See also *Walmart Inc/Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) par 35.

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given of the latter is that the phrase "effect on a particular industrial sector or region" in section 12(A)3(a) opens up an enormous range of issues "without doing any violence to the language".[1567] The preamble and section 2 of the Act are the lens through which public interest considerations are viewed. The statements ". . . balancing the interests of workers, owners and consumers" and regulating ". . . the transfer of economic ownership in keeping with the public interest" in the preamble were found to be relevant in deciding *Metropolitan Holdings Ltd/Momentum Group Ltd*[1568] where loss of employment was an issue. The South African legislature imposed ambitious goals upon the Competition Authorities created in terms of the Act. Effect must be given to this ambition. To this end, a wide perspective that extends beyond a standard consumer welfare approach and incorporates a uniquely South African element is advised. [1569]

The burden is on those who oppose a merger to show that a listed public interest consideration has been substantially and negatively affected, not on the parties supporting the merger to affirmatively show that the transaction is in the public interest.[1570] A causal link must be shown between a merger and the public interest harm. Authorities will not otherwise intervene, however weighty the concerns.[1571] Retrenchments that are not a consequence of a merger are not merger specific, coincidence in timing notwithstanding. The most they could be are instances of unfair retrenchment.[1572] *BB Investment Company (Pty) Ltd and Adcock Ingram*[1573] illustrates this point. The merger in question raised no competition concerns. However, it was indicated that Adcock was embarking on a restructuring exercise, which would result in the loss of fifty-one jobs. The Commission was satisfied a rational and fair process in identifying the redundant positions had been followed and the retrenchments were in order. Post-merger the merged entity intended effect further retrenchments and the Commission recommended to the Tribunal

[1567] *Industrial Development Corporation of South Africa Ltd v Anglo-American Holdings* 45/LM/Jun02 and 46/LM/Jun02 of 23/10/2002 pars 34-38 on the broad scope of section 12A(3) CA1998. See especially how widely this provision was applied in *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011.
[1568] [2010] 2 CPLR 337 (CT) pars 73-76.
[1569] *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 98.
[1570] *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) Case No: 41/LM/Jul10 pars 68-69.
[1571] *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 par 51 "The union would first need to show that retrenchments were merger specific. Only then would the burden of justification shift to the merging parties. The difficulty for the union is that they have not been able to cross this first hurdle. Massmart has given plausible reasons for the retrenchments that are not merger specific."
[1572] *Walmart Inc/Massmart Holdings Ltd* above pars 32–33, 54. See also *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 par 138 to 139 as handled by Appeal Court.
[1573] LM002Apr14

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that the merger be approved subject to a condition that the number of retrenchments at Adcock be limited to only the fifty-one originally meant to be retrenched, with a moratorium on all other retrenchments for a period of three years. The Tribunal approved the merger subject to the condition the mergerd parties not retrench any employees for one year from the date of the approval of the transaction. The subsequent planned retrenchments were not merger specific.

Should the opponents of a merger discharge their duty, it is *prima facie* presumed that public interest justifies prohibiting the merger or imposing conditions.[1574] The evidential burden thereafter shifts to the merging parties to rebut that presumption using equally weighty countervailing public interest grounds or interests that are "public in nature".[1575] Notably public interest in this context is extended beyond the factors listed in section 12A(3) to include any gains that have a public dimension.[1576]

Public interest arguments are evaluated and balanced against the competition and efficiency conclusions. The term "justified" in section 12A(3) is taken to mean that the public interest conclusions are to be justified in relation to the prior competition conclusion.[1577] The public interest inquiry is not at all a separate and distinctive analysis but one applied with close regard to the conclusion of the prior test.[1578] The finding reached on competition grounds can be overturned, but only where justified on the basis of clearly identified, substantial public interest grounds backed by strong evidence and convincing reasoning.[1579] This standard, though a high one, is not applied in an inflexible fashion.[1580] In *Nasionale Pers Ltd/Education Investment Corporation Ltd*[1581] the Tribunal

[1574] *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) Case No: 41/LM/Jul10 pars 68-69.
[1575] Par 68 *Metropolitan Holdings Ltd v Momentum Group Ltd (41/LM/Jul10) [2010] ZACT 87 (9 December 2010)* **"**In *Harmony/Goldfields* we held that the merging parties are not required to affirmatively justify a merger on public interest grounds. What we did not decide in that case is whether once a substantial public interest ground has been raised whether the merging parties face an evidential burden of justification. In this case we have decided that they do. Once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it".
[1576] Par 71 *Metropolitan Holdings Ltd v Momentum Group Ltd (41/LM/Jul10) [2010] ZACT 87 (9 December 2010)* **"**. . .. This is because the Act refers to a public interest which must be distinguished from a private interest. Thus although a firm may be able to demonstrate that employment loss is rationally connected to an efficiency claim this would on its own not be sufficient if the efficiency gain is a private one. Thus even if the merging parties make a good efficiency argument for job losses, this efficiency gain must, if the job losses are substantial, be justified on a ground that is public in nature to countervail the public interest in preserving jobs".
[1577] *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 par 36. See *Harmony Gold Mining Company Limited and Gold Fields Limited* CT Case No. 93/LM/Nov04.
[1578] *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) par 68; *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04 par 76 and *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04.
[1579] *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) 110/CAC/Jul11 09/03/2012 Par 256.
[1580] *Minister of Economic Development v Competition Tribunal* (*Walmart/Massmart merger*) pars 113-114.
[1581] 45/LM/Apr00

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approved the merger subject to a divestiture requirement to protect the access of prospective students to education and thus giving effect to the purpose of section 12A(3)(a) of the Competition Act.

The concessionary nature of the circumstances under which the public interest consideration provisions came to be included in the Act explain the balancing act that their application in merger analysis by the Authorities is. The DTI proposed guidelines which formed the basis for NEDLAC negotiations called for an approach to competition policy that would pursue orthodox efficiency objectives, while taking into account broader social and industrial policy concerns. The DTI envisaged law that could achieve competition in markets and greater economic efficiency within a developmental context conscious to the need to correct structural imbalances and past economic injustices.[1582] This latter part is where public interest considerations come in but couched within the economic considerations that are traditional to competition law.

The first listed public interest consideration is the effect of the merger on a particular industrial sector or region.[1583] Use of the word 'sector"' instead of 'market' is taken as a licence to accommodate a wide range of issues, including geographical areas.[1584] The particular importance of the education sector and the damage wrought on it by the country's past were considered in *Nasionale Pers Ltd/Education Investment Corporation Ltd.*[1585] Careful attention was therefore paid to protect the ends of access of prospective students to education. Similarly, the fact that a merger was within the critical information and communication technology sector in a season of deregulation and rapid technological innovation was considered in *Telkom SA Ltd/Business Connections Group Ltd.*[1586] Public policy at the time intended, largely through deregulation, to promote an efficient Information and Communcations Sector that would play an important role in underpinning a competitive economy. In *PSG Investment Bank Holdings Ltd/Real Africa Durolink*

[1582] Par 4.2.1
[1583] Section 12A(3)(a) 1998 Competition Act.
[1584] *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 pars 141-144.
[1585] *Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00. See par 47.
[1586] *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 pars 298,301-302,304.

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Holdings Ltd, the systemic harm caused by the exit of a bank from the market influenced the ultimate decision. [1587]

The impact of mergers on employment has enjoyed much greater attention and enforcement than the other public interest considerations. So much so that the Authorities have been found to impose conditions to protect employment even when a merger raises no competition concerns.[1588] The Authorities are of the mind that "because of the powerful link between direct employment loss and a restructuring initiative like a merger, it is undoubtedly in this area that the legislature intended a role for the Competition Authorities".[1589] And they are right as is abundantly evident in the journey towards the new Act, especially at the NEDLAC negotiations.[1590] The provision is applied in the context of section 2(c) of the Act, which states that one of the purposes of the Act is to promote employment and advance the social and economic welfare of South Africans.[1591]

The usual solution has been to impose conditions to minimise job losses attributable to mergers.[1592] Such have included moratoriums on any merger-related retrenchments,[1593] imposition of caps on the number of job losses allowable[1594] and novel remedies such as compelling creation of training funds and schemes to support those who have lost their jobs.[1595] Lewis points out that employment as an issue weighs most heavily in situations of extreme, economic deprivation.[1596] Greater weight is allocated to employment losses suffered by relatively immobile unskilled workers, not skilled employees who may more easily find alternative employment.[1597]

[1587] *PSG Investment Bank Holdings Ltd/Real Africa Durolink Holdings Ltd* 31/LM/May 01 at 2.
[1588] Avidon & Azzarito *Without Prejudice* February 2012 at 11; Staples et al. (2013) 25 *South African Mercantile Law Journal* 94.
[1589] *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 par 126.
[1590] Par 4.2.6
[1591] *Telkom SA Ltd/TPI Investments* (*Pty*) *Ltd* 81/LM/Aug00 par 39.
[1592] *Cherry Creek Trading 14* (*Pty*) *Ltd/Northwest Star* (*Pty*) *Ltd* 52/LM/Jul04 pars 17-22; *Multichoice Subscriber Management* (*Pty*) *Ltd/Tiscali* 72/LM/Sep04 par 82; *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) par 117 and *Multichoice Subscriber Mgmt. (Pty) Ltd./Tiscali (Pty) Ltd.*, 2005 ZACT 23 (CT) par 82.
[1593] *Metropolitan Holdings Ltd. v Momentum Grp. Ltd.,* 2010 ZACT 87 (CT) par 79.
[1594] *Multichoice Subscriber Management* (*Pty*) *Ltd/Tiscali* 72/LM/Sep04.
[1595] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05; *Lonmin plc/Southern Platinum Corp* 41/LM/May05 and *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT).
[1596] Lewis (2013) 129. *Ashton Canning Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT).
[1597] Hazel (2015) 37(2) *Houston Journal of International Law* at 321; Lewis (2013) 129; *Harmony Gold Mining Co/Gold Fields Ltd* 93/LM/Nov04 especially par 81; *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co* (*Pty*) *Ltd* 46/LM/May05 pars 141–143, 151; *Investec Group Ltd/Fedsure Investments Ltd* 19/LM/Mar01 6; *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR 337 (CT) par 113 where management were excluded from protective conditions.

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Metropolitan Holdings Ltd/Momentum Group Ltd[1598] outlines the approach once intervenors have proven a negative impact on employment. The fact that a merger may save or create jobs will count in its favour.[1599] A merger that saves a failing firm may also save jobs in that firm.[1600] However, it will have to be shown that it is indeed the merger that saves the jobs.[1601]

Contrary to common perception, employment related interventions are not always successful. Not where on the facts, employment losses could be addressed by other means.[1602] In *Edgars Consolidated Stores* (*Pty*) *Ltd/Rapid Dawn,*[1603] the union sought a condition to cap Edcon's purchases of imports, which, it was argued, would narrow the manufacturing industry and in due course result in job losses. The court declined the application because such a condition could deny consumers the benefits of lower prices passed on from cheaper procurement. Not to mention that imposing demand of that nature on a single company would advantage its competitors who would continue to be free to import without restraint. Likewise, in *Pepkor Ltd/Manrotrade Four* (*Pty*) *Ltd*[1604] the Tribunal refused to oblige the firm to purchase from South African suppliers, ostensibly to protect employment.

Competition Authorities are loath to strike down mergers on the basis that jobs will be lost, preferring a longer-term view of the employment question.[1605] Prohibition of retrenchments altogether may turn out to be self-defeating in some circumstances, such as where a firm is failing. They are also careful to limit their concern to the merger's impact on actual employment, not extending to operational requirements in the retrenchment process.[1606] Employment concerns may have been key in motivating inclusion of public

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[1598] *Metropolitan Holdings Ltd. v Momentum Grp. Ltd.,* 2010 ZACT 87 (CT) par 70-90.
[1599] *Inzuzo Furniture Manufacturers* (*Pty*) *Ltd/PG Bison Holdings* (*Pty*) *Ltd* 12/LM/Feb04 10. But see *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 30–32, where it was argued that the merged firm would be able to provide franchising opportunities and thereby increase employment. The Tribunal did not accept that the merger was necessary to allow any of the firms to provide franchises
[1600] *Anglo American plc, Billiton plc/Silicon Smelters* (*Pty*) *Ltd and Samancor Ltd* 40/LM/Mar00; See also *Lonmin plc/Southern Platinum Corp* 41/LM/May05 par 13.
[1601] So that where even if a failing firm were to exit the market parts of its business would be bought as going concerns and some staff retained, such retention cannot be credited to the merger *JD Group Ltd/Profurn* Ltd 60/LM/Aug02 pars 174–177.
[1602] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 76; *Food and Allied Workers Union v Competition Commission* 17/AM/Mar01 pars 23.
[1603] *Edgars Consolidated Stores* (*Pty*) *Ltd/Rapid Dawn 123* (*Pty*) *Ltd* 21/LM/Mar05.
[1604] *Pepkor Ltd/Manrotrade Four* (*Pty*) *Ltd* 06/LM/Jan06 pars 27-29.
[1605] *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 par 128; *Unilever plc v Competition Commission* 55/LM/Sep01 par 128.
[1606] Lewis (2013) 127*; Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 pars 232-238; *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 par 124-125; *Metropolitan Holdings Ltd/Momentum Group Ltd* [2010] 2 CPLR

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interest concerns into the 1998 Competition Act and the Authorities take due cognisance of that. But while there is an evident deference to this concern, what we see is a tempered, balanced application. By no means is claiming loss of employment as an objection to a merger a walk in the park. Intervenors still have hurdles to cross.

The effects of a merger on 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 is the third public interest consideration.[1607] Like employment, this consideration has played a prominent role in the public interest consideration gamut.[1608] The ability of historically disadvantaged individuals, to become competitive, sometimes referred to as a Black Economic Empowerment (BEE)-clause, often travels together with concern for small and medium size enterprises.[1609] Given the country's legacy of Big Business domination, constrained competition and unequal distribution of income and wealth, the small business sector was considered an important force towards equity and real transformation in the economy.[1610]

Hazel indicates that the consideration and promotion of BEE is generally invoked where parties argue that the anticompetitive effects of their proposed merger are mitigated by its promotion of BEE. That a merger is an important boost to black economic empowerment may earn it a favourable evaluation.[1611] The ability of a small banks to grow and to become competitive, coupled with the fact that smaller banks have black economic empowerment components, tilted the scales in favour of approval in *PSG Investment Bank Holdings Ltd/Real Africa Durolink Holdings Ltd*.[1612] The broader the potential empowerment a transaction portends, the better its chances of approval on this ground.[1613] Special attention will be paid to mergers in markets that seem to have high

337 (CT) pars 109–111; *Walmart Inc/Massmart Holdings Ltd* 73/LM/Dec10 29/06/2011 par 68 and *Minister of Economic Development v Competition Tribunal* 110/CAC/Jul11 09/03/2012 par 136.
[1607] Section12(A)(3)(c) 1998 Competition Act.
[1608] Hazel (2015) 37(2) *Houston Journal of International Law* at 320.
[1609] Raslan 2016 at 20. SMMEs are defined as per the National Small Business Act No. 102 of 1996 (as amended in 2003).
[1610] Chabane (2003) at 8.
[1611] Hazel (2015) 37(2) *Houston Journal of International Law* at 323.
[1612] 31/LM/May 01.
[1613] *Lonmin plc/Eastern Platinum Ltd* 45/LM/Jun04 pars 4 to 9.

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incidence of thriving SMMEs.[1614] Conditions are however imposed to ensure that BEE gains do not come at the expense of consumers.[1615]

Authorities are watchful for attempts to have mergers with a negative impact on competition passed under the guise of BEE concerns.[1616] The priority remains competitive markets.[1617] While widespread participation in the economy by all South Africans is indispensable, Authorities will in delivering it, confine themselves to a framework of laid down rules and established jurisprudence.[1618] BEE concerns will for instance not be used to require a party to sell not to a chosen acquirer but to a person or class of persons of the Tribunal's preference.[1619] Obligations that go beyond executive policy laid out in a BEE Charter will not be imposed, enacted legislation that deals unambiguously with the issues will be deferred to.[1620]

The fourth public interest consideration is the effect of the merger on the ability of national industries to compete in international markets.[1621] What is protected is the ability to compete and not the ability to become competitive as in the case of SMMEs, reflecting an obligation to protect national champions already existing in the market.[1622] As with the other public interest considerations, Authorities defer to public policy where it is stated. In the *Iscor Limited and Saldanha Steel (Pty) Limited merger*,[1623] DTI arguments centred on the acquiring firm being able to expand its productive capacity in order to better compete with much larger firms in the international market. Though hesitant on such arguments the Tribunal nevertheless approved the transaction noting that this was not a subject they ought to make a pronouncement on. Authorities are, however, not quick to accept

[1614] *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 pars 73-75.
[1615] *Business Venture Investments 790* (*Pty*) *Ltd/Afrox Healthcare Ltd* 105/LM/Dec04 par 84.
[1616] *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 pars 548-597.
[1617] *Engen Petroleum Ltd/Zenex Oil* (*Pty*) *Ltd* 26/LM/Dec99 at 5. Although black empowerment was raised as a public interest consideration, the Tribunal was of the opinion that, because the merger did not affect competition, it does not have to address the issue.
[1618] *Mybico v Lewis* 59/CAC/200606/02 par 17.
[1619] *Shell South Africa* (*Pty*) *Ltd/Tepco Petroleum* (*Pty*) *Ltd* 66/LM/Oc01 par 58; *Vodafone Group plc/Venfin Ltd* 110 and 111/LM/Nov05 par 15.
[1620] *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 pars 167-170, *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 pars 232-238.
[1621] Section 12A(3)(d) 1998 Competition Act. In *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 par 24 the Tribunal considered that the merger was taking place in the ICT sector which was pivotal to the competitiveness of South Africa and in *Distillers Corporation* (*SA*) *Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 par 171, where this was rejected as an efficiency argument. See also *Schumann Sasol* (*South Africa*) (*Pty*) *Ltd/Price's Daelite* (*Pty*) *Ltd* 23/LM/May01 par 74 and *Nampak Ltd/Malbak Ltd* 29/LM/May02 par 65.
[1622] Raslan 2016 at 21 and T*elkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007 pars 294-304.
[1623] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec01.

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wholesale the argument that domination of a local market by a merged firm is necessary for international success.[1624]

The fifth and final public interest consideration is 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. at section 12A(3)(e) of the Act. The defining public interest consideration in *Simba (Pty) Limited and Pioneer Group Limited*[1625] *was the establishment of a greater spread of ownership, specifically among workers and historically disadvantaged individuals.* The acquirer, PepsiCo, is one of the world's largest food and drink companies and the target firm, Pioneer, is a South African-based conglomerate specialising in producing and distributing branded food and beverage products. The merged entity agreed to the implementation of a broad-based black ownership plan involving Pepsi Co issuing R1.6 billion of its ordinary shares to a broad-based black trust belonging to Pioneer Food's South African employees. Additionally, the merged entity agreed to maintain all sale and distribution agreements with historically disadvantaged individuals and firms for a minimum period of 2 years.

To be sure, antitrust law has often received support because of its value in advancing objectives more accurately labeled political than economic.[1626] Now that the considerations are explicitly provided for, both in the preamble and the objects of the Act, the Authorities have found themselves needing to find ways of accommodating them yet without straying too far from the economic so that the Act becomes a piece of social legislation. We dare say, they have acquitted themselves well. Never have competition concerns been put on the back-burner for public interest considerations and deference to policy as well as to other regulators have been the hallmark of enforcement. There is, however, an increasing move towards public interest concerns acquiring the same status as competition concerns.

[1624] *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 pars 115-116.
[1625] Case No. LM108Sep19
[1626] See chapter 2 par 2.3.3

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4.3.6 Scoring South African Merger analysis

The drafters of the 1998 Competition Act envisioned that competition law, and merger regulation as a component of it, would support economic development. The agencies rate themselves quite well on this account. They claim to not only have protected markets from anticompetitive mergers but also to have actively sought out means to strengthen competition by imposing remedies that lower both concentration and barriers to entry.[1627] Our investigation of the seminal cases appears to bear this out.

Overall, South Africa's merger analysis is implemented in ways cognizant of the country's historical context and its broader socio-economic goals.[1628] In weighing mergers, Authorities use an interpretative methodology that gives the interpretation and application of the Act an essentially South African focus. Economic, social justice, developmental and transformatory objectives are taken into account. The law is analysed against the backdrop of the transformation process of establishment of a constitutional democracy. The belief that the law could contribute to increasing employment, ensure that SMEs compete on equal footing, and promote ownership among historically disadvantaged persons is honoured. As observed by Lewis consideration of these concerns lends legitimacy to merger regulation.[1629]

Enforcement has generally pivoted on market concentration, dominance and oligopolies in the relatively small economy. A common point of departure has been that mergers calculated to benefit already large competitors are axiomatically bad for small competitors. Mergers where market shares are larger, barriers to entry higher and concerns over co-ordinated effects rife, have stood little chance.[1630] Authorities appear prepared to do everything possible to protect jobs, but this has not necessarily meant an easy pass to unions and other intervenors. As a matter of fact, the record indicates that in South Africa, public interest concerns are unlikely to trounce economic efficiency in a merger evaluation.[1631] Conventional measures of competition, such as

[1627] Competition Commission & Competition Tribunal (2009) *Ten years of enforcement by the South African competition Authorities: Unleashing rivalry*:*1999-2009* at 13 and 25.
[1628] OECD (2003) Competition Law and Policy in South Africa 1.
[1629] Lewis D. Preface and Acknowledgments in Lewis D (ed.) *Building New Competition Law Regimes: Selected Essays* (2013) viii.
[1630] See chapter 4 par 4.3.3 above as confirmed by Grimbeek et al. (2013) 81(4) *South African Journal of Economics* at 575.
[1631] Theron N "The Economics of Competition Policy: Merger Analysis in South Africa" 2001 69(4) *South African Journal of Economics* 614 at 682 and Grimbeek et al. (2013) 81(4) *South African Journal of Economics* 566.

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combined market share, potential coordinated effects, potential import competition, market dynamics and growth, a history of collusion and barriers to entry have been the dominant determinants for approval.[1632] Public interest has so far trumped competition considerations only once in the "Burger King" merger case,[1633] but the approach adopted has generally been both in line with the original motivation and sound practice.[1634]

Unconditional approval is more likely when there are low barriers to entry into the market, when other countervailing market power exists and when there is evidence that either the industry or the market is growing or is otherwise very dynamic. Mergers are more likely to be either conditionally approved or prohibited when post-merger market shares are larger, there is concern over coordinated effects, and public interest considerations are raised.[1635] For all types of mergers, increased market shares are associated with an increase in the probability that a merger is not approved.[1636] There is a careful balancing between strict and broad interpretations of competition law.[1637] In terms of adherence to the spirit of the law, the goals for which the provisions were laid down, the agencies appear to have got it right. Grimbeek points to statistics which suggest that the agencies follow both the letter and the intent of the 1998 Competition Act.[1638] So too with regard to the ideal merger analysis design of the previous chapter. It would appear that Fox's analysis was accurate.[1639]

Could we be accused of looking at South Africa with rose tinted glasses? It may appear so but that is not our intention. Is there a dark side to South African merger analysis? Naturally, of course. As is with every system. But our brief as clarified from the get go was to see whether South African merger analysis adheres to the stated goals of the Competition Act. That and if the merger analysis is aligned to that recommended for the

[1632] Grimbeek et al. (2013) 81(4) *South African Journal of Economics* 575.
[1633] Competition Commission Press Release 1 June, 2021 Commission prohibits Acquisition between ECP Africa Fund, Burger King South Africa and Grand Foods available at http://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf (accessed 10/11/2021).
[1634] Hodge et al. in Moodaliyar & Roberts (eds.) (2013) 9-10.
[1635] Hodge et al. above.
[1636] Grimbeek et al. (2013) 81(4) *South African Journal of Economics* 561 at 573.
[1637] Barzeva K and Grimbeek S "The Effectiveness of Merger Control in South Africa: Selected Case Studies" 2016 (33) *Competition Commission South Africa Working Paper* 01.
[1638] Grimbeek et al. (2013) 81(4) *South African Journal of Economics* 563.
[1639] See Par 3.3.3..

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developing country the answer we have found to both questions is yes. We have no doubt that, as with any system, there are cracks. But for now, we leave those aside for a different study.

4.4 CONCLUSION

Similarities in the character of national markets and the shared space of global markets permit a degree of homogeneity in national competition laws. Particular national circumstances are nevertheless, greatly influential and determine the understanding of the notion of competition and the extent to which, if any, non-competition objectives will be taken into account.

South Africa's political and economic history has directly influenced its competition law regime. For much of the 20th Century, the country's economic policy was shaped by high dependence on extractive industries and isolation from many world markets. Markets were highly concentrated and dominated by conglomerates, this being a historical outcome of heavy reliance on the mining economy. Small mining enterprises needed to amalgamate into bigger outfits to benefit from economies of scale and operate profitably. Mining firms used export earnings to diversify into the manufacturing market, including the markets for key inputs for their activities. This formed the origins of the power and organisational structures of mining conglomerates in the economy.

In order to safeguard the economy from the risk of over-reliance on mining, the government implemented policies to encourage farming and local manufacturing. Monopoly concessions were granted to these industries. The state engaged in trade both as producer and regulator. Apartheid policies that protected the South African economy from external competition increased concentration of markets and exchange controls forced firms to invest locally. Firms used corporate restructuring to grow domestically.

The market regulation laws of early 20th Century were rudimentary, minimalist and compartmentalised. There was reluctance to interfere in markets by regulating private conduct between market players. Though basic, the laws were intended to secure

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efficient operation of markets and therefore constituted the competition law of the time.

The first step towards conventional competition law was through the Board of Trade and Industries Act of 1923. The Act gave the Board of Trade and Industry the responsibility of enquiring into and advising the government on competition policy, monopoly situations and restrictive practices. Enforcement was administrative in nature and investigation commenced only on the Minister's directive. Final decision making rested with the Minister, which enabled enforcement in tandem with economic policy. The measure of illegality under the Act and all legislation that followed it was public interest. The Act however did not define public interest. Existing sector specific legislations operated alongside the Act.

The Board of Trade and Industries Act of 1944 repealed the 1923 Act and consolidated all the laws relating to the Board. Its role remained consultative and final power continued to vest in the Minister. The Undue Restraint of Trade Act of 1949 replaced the 1944 Act but the power to inquire into anticompetitive practices continued to vest in the Board on the direction of the Minister. This enabled close management of enforcement in order to ensure consonance with prevailing economic policy.

The Regulation of Monopolistic Conditions Act passed in 1955 was more progressive than the preceding laws though it did not contain prohibitions against any market arrangement or conduct. Enforcement remained through an administrative machinery in which the Minister had the final discretion. Conduct was measured against the standard of public interest which was not defined. The Act did not deal with mergers and dominance directly and is criticized as having had no meaningful impact. Though activities of the State were not expressly excluded, the Minister was not likely to instruct investigation into acts of a state machinery he was part of.

The apparent shortcomings of the 1955 Act can be explained as a direct outcome of the chosen approach to enforcement. At the time, the overarching policy was focused on creation and support of a self-reliant economy which required some level of

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tolerance for size, especially in the critical mining sector. A light enforcement of merger regulation was necessary. A Commission of Inquiry was established in 1975 to investigate and report on the efficacy of the 1955 Act, the impact of economic concentration on South African markets and the legislation necessary for controlling economic concentration. The Commission presented its report in 1978 recommending that a law be passed to facilitate effective workable competition.

The Maintenance and Promotion of Competition Act was passed in 1979 in response to the Commission's recommendations. The law did not vilify concentration and supported a case-by-case analysis. It favoured restricting state interference in markets to only when absolutely necessary and recommended that state enterprises be subject to the same control as firms in the private sector. The Act also introduced merger review powers. Only mergers that were contrary to public interest, meaning those with a serious impact on competition and the economy generally, were proscribed. The merger test was open-ended, variable and elastic. It took into account economic, social and political considerations and catered for the peculiarities and business realities of relevant markets. Pre-notification of transactions was not required by law. Big firms were still looked on favourably as enablers of economic growth. Most merger hearings were conducted in secrecy and decisions were subject to ministerial approval.

The Maintenance and Promotion of Competition Act of 1979 was in many ways similar to the preceding competition laws. A difference from previous laws was the requirement that the conduct in question have the effect of restricting competition directly or indirectly. At times, only economic considerations mattered, other times the analysis extended to social and political considerations.

By the close of the 1980s, years of economic decline and apartheid policies had created a society with highly unequal distribution of wealth and income and immense socio-economic imbalances. On coming to power in 1994, the African National Congress committed to creating an economy characterized by growth, employment and equity. The priority was addressing the high levels of concentration in terms of

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ownership and market shares. Competition policy was considered a central feature of the democratisation process. The current Competition Act was passed in 1998. Unlike the laws that preceded it, the ends of equity and redistribution were factored in alongside the conventional concerns of promotion of competition and economic efficiency.

The dominant concerns that precipitated passing of the 1998 law reveal its spirit. Concentration of economic power was held responsible for economic and social ills such as stifling the development of smaller firms, especially those owned by black people. The objectives of the intended law were stated as curtailment of excessive economic power and its abuse, prevention of exploitation of consumers, safeguarding the participation of small and medium-sized enterprises in the economy and protecting the interests of workers. A uniquely South African approach that would retain orthodox efficiency objectives while at the same time taking into account broader social and industrial policy concerns, was preferred.

The 1998 Competition Act is fashioned to achieve diverse ends, of which consumer welfare is one. Objectives that traditionally form part of competition legislation and those that generally are pursued through trade or industrial policy are part of the Act. The preamble recognises the history of discrimination and excessive concentrations of ownership and control, and of weak restraints against anticompetitive practices. It requires opening up of the economy to ownership by a greater number of South Africans. Section 2 supports social objectives of public interest in addition to economic objectives. In analysing a merger, public interest objectives must be considered alongside the conventional economic ones.

Section 2 does not give a hierarchical structure to the various objectives it sets out and there is different thought on the primary purpose of the Act. Oxenham and Smith are of the mind that the principal objective of the Act is promotion and maintenance of competition. Consideration of public interest factors should be relevant but economic efficiency should take precedence. Van Heerden and Neethling consider that the mainstream objectives of the Act remain promotion of efficiency and

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consumer welfare. The argument of Reekie and Brooks that agencies should ensure that maintenance and promotion of competition forms the crux of all assessments but must too pursue the outcomes of fair, open markets and social justice, seems to be more correct.

In weighing mergers, enforcers are required to use an interpretative methodology that gives the Act an essentially South African focus. Economic, social justice, developmental and transformatory objectives should be taken into account and free and fair competition should be defined broadly in the sense of a competitive industrial structure. Mergers are divided into small, intermediate or large mergers. Intermediate and large mergers must be notified and the notice of filing served on either organised labour representing the employees of the merging parties or the employees themselves. The Minister of Trade and Industry must also be notified and is entitled to make representations on public interest grounds on behalf of the government. This obligation underscores the importance of public interest considerations in merger enforcement.

Substantive analysis of mergers is confined to the language and framework of section 12A of the 1998 Competition Act but the preamble and objectives clause may be applied to provide perspective and clarity to the provisions of section 12A. The standards of merger analysis in section 12A are open and abstract, making them amenable to a broad interpretation to achieve both economic and social outcomes in conformity with the intention of the legislature.

Authorities have tended to be conservative and have generally taken a standard competition policy approach. The political economy has not played a conspicuous role in the dynamics of merger analysis as would have been expected. No merger has been approved or precluded purely on grounds of public interest. The majority of merger applications are approved and conditions have been used to mitigate negative impact on public interest concerns.

The Act provides a three-part process for merger analysis. The parts are each separate and without an explicit hierarchy. Transactions are first assessed to

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establish likelihood of substantially preventing or lessening of competition, referred to as the "threshold test". At the second test, possible efficiency benefits of the merger are considered where there is a finding of a likelihood of prevention or lessening of competition. An assessment of whether the merger can or cannot be justified on substantial public interest grounds is conducted alongside. Regardless of the findings of the first two tests, consideration of whether the merger can or cannot be justified on substantial specified public interest grounds will follow.

There are those who divide analysis into two instead of three tiers, the first stage consisting of scrutiny for pure competition issues using the traditional consumer welfare standard, and the second a broader inquiry for efficiency gains and public interest considerations that may provide a trade-off for an anticompetitive merger. This approach is not widely approved.

A merger prevents or lessens competition if it enables the merged firm to, alone or with others, exercise market power or increases the likelihood of merging parties to engage in prohibited practices. A pro-active approach leaning towards the structure-conduct-performance paradigm is applied to make possible taking of pre-emptive action in order to maintain competitively structured markets. This approach is recommended for developing countries, even if only in the initial stages of implementation of competition law.

Assessment of substantial prevention or lessening of competition is framed in a two-step process. Authorities first identify the market concerned and its structure, and follow with assessment of the competitive effects of the merger within that market. Market definition is not totally indispensable and may be dispensed with where it is obviously evident that a merger is anticompetitive. Identification of the relevant market is kept as uncomplicated as practically possible. The agencies regard market definition a matter of business reality and each case is assessed on its unique facts. For example, a national market was found for furniture chains which, though

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operating in localised market stores, were priced nationally and maintained a national competitive strategy.[1640]

Markets are broken down into segments or sub-markets where necessary. Definition is given an effect relevant to South Africa which gives regard to the intention by the drafters of the Competition Act that it be applied to give a uniquely South African effect. In considering a merger in the alcoholic beverages market, the Tribunal divided the relevant market further into broad bands, taking into account unique features of the South African market which were found to have a bearing on consumer behavior.[1641]

Determination of market structure follows identification of the relevant market and takes into account shares of all firms in the established market. Large market shares are taken to point towards dominance and raise *prima facie* concerns. Agencies are partial to markets with many competitors in an approach similar to that of the Warren Court.[1642] Small post-merger shares are taken as an indicator that the merger is likely to be benign or pro-competitive. This approach facilitates addressing the high levels of concentration in the economy in the spirit of the Act and is also suitable for the developing country where it is recommended that the understanding of "competition" for use in merger analysis be that of rivalry. Firms of bigger size may be accommodated for specific ends such as innovation and where barriers to entry are low.

Appraisal for substantial prevention or lessening of competition and whether post-merger the firms in the market will act competitively or co-operatively, is guided by any factors that may be relevant to the merger, including the eight listed in section 12A(2) of the Act. The first is the actual and potential level of import competition in the identified market. Ready competition from imports will work in favour of approval. Where actual or potential imports do not exert any competitive pressures on local firms, approval is less likely or may be conditional. An in-depth review is carried out

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[1640] *Group Ltd/Ellerine Holdings Ltd,* 98/LM/Jul00 at 16 and 17.
[1641] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group* 08/LM/Feb02 19/03/2003 par 148.
[1642] Par 2.4.3.

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to establish that indeed international supplies discipline domestic pricing in the relevant market. A proposed merger in a market in which import competition was found to face significant multiple obstacles was declined.[1643]

Ease of entry into the relevant market ranks highly in influencing the outcome of merger analysis. Competitive rivalry is appreciated in dynamic terms, including in the sense of opportunities for new participants to enter markets. Effective entry is only that which is timely, likely and sufficient. Where there is ease of entry into the relevant market, a merger is considered unlikely to be anticompetitive even in the face of high levels of concentration. Per the preamble to the 1998 Act, Parliament intended that the law be applied in a manner that would provide to all South Africans an equal opportunity to participate fairly in the national economy as well as to pre-empt market conduct that undermine a competitive economy, of which foreclosure is one.

The third consideration in section 12A(2) is the level and trends of concentration and history of collusion in the identified market. The preferred formula for the purpose is the Herfindahl-Hirschmann Index (HHI) to which a qualitative enquiry is added. Concentration is considered a strong indicator of a market's competitive state. Mergers that may further concentrate already concentrated markets are not approved. The approach coincides with the intention of the drafters of the Act who saw concentration of economic power and high degrees of monopolisation in the economy as responsible for many economic and social ills.

The history of collusion in the market is considered and a pre-emptive approach to analysis applied to prevent eventuality of collusion. A merger in the canning industry, was approved subject to conditions to counter possible collusion on account of the finding that in a carryover from the era of price and marketing controls, the canning firms continued to see themselves as a national collective competing with international players.[1644] A merger in the petroleum industry was declined on the

[1643] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05.
[1644] Tiger Brands Ltd above.

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finding that co-ordinated outcomes were likely partly because of the industry's predisposition of towards coordination rather than competition.[1645]

Effective countervailing power by customers is the fourth consideration. Where found to exist, the transaction under review will be approved unless the result is a very high market share or where the countervailing power is exercised solely for the customer's benefit and does not reach the final consumer. This approach abides by the preamble and section 2 of the Act's requirements that enforcement be directed at providing markets in which consumers have access to competitively priced goods and services of quality and variety.

The dynamic characteristics of the market including growth, innovation and product differentiation is the fifth consideration. A merger that stifles dynamism will be prohibited. The Tribunal refused to grant approval in a decision in the highly innovative communications market where the transaction would enable the first entrant to act independently of its rivals with the expected final effect of forcing exit of smaller rivals or limiting the expansion abilities of existing rivals.[1646] Mergers that support innovation are looked on favourably even if the expected benefits of the innovation are in the longer term. A careful balance will be drawn to avoid enabling a dominant firm to also dominate innovation. It is recommended that mergers analysis in developing countries support dynamism in markets.

The nature and extent of vertical integration is the sixth factor at section 12A(2). Vertical mergers are considered not *prima facie* harmful unless they raise the prospect of increased entry barriers and possible market foreclosure. A vertical merger where a dominant firm also dominates innovation may not be approved. Authorities apply a flexible balancing approach that gives much weight to long-term dynamic considerations. Cognisance is given to the efficiency enhancing attributes of conglomerate mergers, in keeping with both the preamble and the objectives of the 1998 Competition Act.

[1645] *Petronas International Corporation Limited and Sasol Oil (Pty) Ltd Engen Ltd* 101/LM/Dec04) [2006] ZACT 15.
[1646] *Telkom SA Ltd/Business Connections Group Ltd* 51/LM/Jun06 20/08/2007.

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Failing firm arguments are considered where relevant. South Africa does not apply the traditional failing firm defence. Failure of a firm is one of eight possible factors in the list in section 12(A)(2), not a rationalisation for a merger already found to be anticompetitive. Imminent failure of a firm will not save a merger which raises competition concerns that weigh more than the loss from departure of a failing firm. The doctrine is not available if in effect it amounts in substance to the efficiency defence and the public interest criteria. Each case is assessed on its merits and the facts of each case take precedence over the application of a formula. A merger involving a failing firm will be approved where it is ascertained that the transaction is not aimed at monopolisation. A wide sweep approach that looks into the causes of failure is applied.

Whether a merger will result in the removal or creation of an effective competitor is the final factor in the section 12A(2) list. A merger in the retail market for sports and recreational equipment was barred on the basis that the firms involved were the major competitors in their market and if approved the merger would leave consumers with few credible options for fairly priced alternatives.[1647] The preamble and the objectives of the Act require enforcement that safeguards choice and low prices for consumers. A merger between firms that fall in the same market but are incapable of competing effectively, may be approved. Removal of a competitor will be accommodated if not likely to have deep impact on competition or where some synergies between the merging firms can be realised.

Consideration of merger efficiencies is conducted either as part of the inquiry into the competitiveness of the merger, or as a defence to a finding that the merger has an anticompetitive effect. South Africa applies the second approach and efficiencies become relevant only where a merger is found to substantially prevent or lessen competition. The efficiencies at risk of loss must be pronounced for approval on efficiency grounds. Efficiency gains are divided into dynamic, production and pecuniary efficiencies, in order of preference. Developing country agencies are

[1647] *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05.

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encouraged to be guided by dynamic efficiency, the most likely of the three to be in line with an overall development agenda.

Claims of expected efficiencies are not taken at face value. The efficiencies that are at risk of loss must be proven to be timely, quantitatively, qualitatively verifiable and attributable to the merger. The anticompetitive effect of the merger should be over-compensated by its pro-efficiency gains which must be in terms of economic welfare, not purely commercial benefits. Integration of merging parties' factory production lines while it would lead to more efficient outcomes and improvement of the merged firm's margins was found adequate to support approval of a merger adjudged likely to substantially lessen competition.[1648]

South Africa's merger analysis remains conventional while making room for public interest considerations in due deference to the spirit of the Act. Public interest considerations have to date not led to prohibition or approval of a merger. The preferred solution has been imposition of conditions to mitigate or remedy harm caused by an otherwise innocuous merger to the public interest. Public interest arguments are appraised and balanced against the competition and efficiency findings which acknowledges the concessionary nature of their inclusion in the law. The Agencies treat their jurisdiction as residual and secondary to that of statutory and regulatory bodies with responsibility over state industrial policy.

In weighing mergers, Authorities are obliged to use an interpretative methodology that gives the Act an essentially South African focus. Economic, social justice, developmental and transformatory objectives have been taken into account. The law is analysed against the backdrop of the transformation process of establishment of a constitutional democracy. The belief that the law could contribute to increasing employment, ensure that SMEs compete on equal footing, and the promotion of ownership among historically disadvantaged persons is honoured.

A closed list in section 12A(3) contains the four relevant public interest concerns and the provision will not be expanded further, regardless the moral worthiness of the

[1648] *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05.

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concerns involved. The four listed considerations are however construed broadly which pays respect to the tone of sections 2 and 12A of the Act that call for a wide perspective extending beyond a standard consumer welfare approach and incorporation of uniquely South African elements.

The burden of showing that a listed public interest consideration will be substantially negatively affected by a proposed merger is on those who oppose the merger. A causal link must be shown between the merger and the public interest harm. If the duty is discharged, a *prima facie* presumption arises that public interest considerations warrant prohibition of the transaction or at least conditional approval. The merging parties may rebut that presumption with equally weighty countervailing public interest grounds or gains of a public nature.

The first public interest factor in section 12(A)(3) is the effect of a merger on a particular industrial sector or region. Use of the word “sector” as opposed to “market” is construed as licence to be open to a wider range than markets, for instance to consider the effect of a merger on a geographical area.

The second factor is the impact of mergers on employment, which has generally received greater attention and enforcement than the others. The justification given is that the Act establishes one of its objectives as being the promotion of employment and advancement of the social and economic welfare of South Africans, and employment is to be taken as one of the key areas in which the legislature intended a role for the competition agencies. Conditions are imposed to minimise job losses attributable to mergers, prioritising job losses by relatively immobile unskilled workers. The agencies intervene only where it is established that employment losses cannot be addressed by other means.

Effects of a merger on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons to become competitive, sometimes referred to as Black Economic Empowerment (BEE), is the third public interest consideration. It is considered together with concern for small and medium size enterprises and is typically invoked where parties argue that the anticompetitive effects of their

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proposed merger are mitigated by its promotion of BEE. A merger that carries a broad potential for empowerment is likely to have higher chances of approval on this ground. The priority remains competitive markets and the Authorities will not accommodate attempts to have anti-competitive mergers passed under the guise of BEE concerns. Where there exists legislation that deals with the issues of BEE brought before the agencies, the legislation will be deferred to.

The final public interest consideration is the effect of a merger on the ability of national industries to compete in international markets. Protection is offered for the ability to compete and not the ability to become competitive. The provision is used to protect national champions already in the market. Authorities defer to public policy where it is stated.

The drafters of the 1998 Competition Act envisioned that competition law, and merger regulation as a component thereof, would support economic development. Enforcement has generally pivoted on market concentration, dominance and oligopolies. Public interest concerns remain relevant but are unlikely to trounce economic efficiency in a merger evaluation. The approach adopted has generally been both in line with the letter and intent of the Act as well as sound practice recommended for developing jurisdictions. Merger assessment is implemented in ways cognizant of the country's historical context and its broader socio-economic goals. By global standards, the country is considered reasonably successful in its competition enforcement initiatives.

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CHAPTER 5

MERGER ANALYSIS UNDER KENYAN COMPETITION LAW

5.1 Introduction

5.2 Historical development

5.3 Substantive merger analysis

5.4 Conclusion

5.1 INTRODUCTION

> My view is that government agencies' activities or policies should be aimed at addressing the biggest challenge[s] facing the government or the population at that particular time. In other words, just like an aircraft, agencies should fly at the altitude and speed, depending on the turbulence of the airspace they are overflying; otherwise, they will stall.[1649]
>
> Francis W Kariuki Director - General Competition Authority of Kenya
>
> The success we enjoy is the result of being a purpose-driven, insight-led, customer-obsessed business with a robust strategy that we execute with great precision. This strategy has served us well, and is the reason close to 30 million subscribers have chosen to be on our network. . . However, our size should not be used as an argument to punish our success.[1650]
>
> Bob Collymore - Chief Executive Officer Safaricom Ltd

In terms of commitment to Kenya's jurisdictional idiosyncrasy, the Competition Authority of Kenya (hereafter CAK) could not be accused of vacillation. The Director General's statement of 2014 quoted above, is still very much the beacon for the country's

[1649] Fox Interview with Kariuki *Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico* New York University School of Law on September 16, 2015. Available https://www.concurrences.com/en/conferences/antitrust-in-emerging-and-developing-economies-africa-brazil-china-india-mexico-82990 (accessed 3/12/19.

[1650] Kamau "Collymore: Declare dominance, but don't punish success" 9 September 2018 *Daily Nation* available at https://www.nation.co.ke/oped/opinion/Declare-dominance--but-don-t-punish-success/440808-4750178-ahoxtp/index.html (accessed 24/11/2019). See also Kamau "Safaricom fights dominance claim as Collymore makes comeback" 7 August 2018 *Daily Standard* available at https://www.standardmedia.co.ke/article/2001290936/safaricom-fights-dominance-report-as-collymore-returns (accessed 19/11/2019) and Miriri "Safaricom CEO defends company's dominance as he returns to work" 6 August 2018 *Reuters* available at https://af.reuters.com/article/investingNews/idAFKBN1KR0TT-OZABS (accessed 12/11/2019).

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competition agency. The Authority considers itself as a facilitator in the Government's pursuit of efficient markets for sustainable growth and development.[1651] Its strategic plan, prioritisation of activities and performance indicators all speak to and are aligned with the national economic agenda as articulated in Vision 2030, the Country's economic blue print.[1652] To the Authority and rightly so, Kenya's competition law enforcement must be contextualized.[1653] Focus must be on the immediate challenges of removing skewed distribution of wealth, power and opportunity; reducing severe poverty; and creating robust inclusive development.[1654] The overarching approach must be one that augments government effort in building a pro-business environment.[1655] Enforcement to these ends is a delicate balancing act of urging efficiency while being careful to not allow efficiency to facilitate raising of barriers to entry and conduct harmful to the market.[1656]

The question of what value efficiency and innovativeness should be accorded in the enforcement matrix has been behind occasional contention between the agency and not surprisingly, the biggest and most profitable company in the country - Safaricom PLC.[1657]

[1651] The mission statement of the Authority is 'To enhance competition and consumer welfare in the Kenyan economy by regulating market structure and conduct in order to ensure efficient markets for sustainable growth and development'. Available at https://www.cak.go.ke/ (accessed 10/10/2019). Statements in annual reports of the Authority affirm its role as one of facilitator to Government policy. Examples include the following: The Authority operates cognisant "of the fact that enforcement of the competition policy and law is a key driver to the current government's transformation agenda." Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* vi. See also 13, 16 and 17; The Authority works towards realization of Vision 2030, by among other things dismantling the regulatory obstacles in different sectors. Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2016/2017* 20; and The Authority seeks to 'augment' government efforts to improve the business environment in Kenya, Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2017/2018 23*.

[1652] 'Vision 2030 popular version' available at https://vision2030.go.ke/publication/kenya-vision-2030-popular-version/ (accessed 2/10/2019). Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* 3; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* 14;Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 13; Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* 15, 16 and19; Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2016/2017* 20 and Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report & Financial Statements for the Financial Year 2017/2018* 23.

[1653] See chapter 2 par 2.4 on trends in American antritrust in consonance with prevailing economic policy and par 2.5 on on competition law enforcement and government economic policy at par 2.5. See also chapter 3 par 3.3 on developing countries and importance of aligning enforcement with jurisdictional context.

[1654] Fox Interview with Kariuki *Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico* New York University School of Law on September 16, 2015. Available https://www.concurrences.com/en/conferences/antitrust-in-emerging-and-developing-economies-africa-brazil-china-india-mexico-82990 (accessed 3/12/19; Speech by David Ong'olo, given at the Competition Authority of Kenya 5th Annual Symposium Nairobi Kenya 28 September 2018 "The Role of Competition Law and Policy in Inclusive Growth and Development" par 2 available at https://www.cak.go.ke/sites/default/files/2019-05/Chairman%27s%20Speech%20at%20the%20Authority%27s%20Annual%20Symposium%20September%2028%2C%202018.pdf (accessed 13/11/2020

[1655] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report & Financial Statements for the Financial Year 2017/2018* 23.

[1656] Fox Interview with Kariuki *Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico* New York University School of Law September 16, 2015. Available https://www.concurrences.com/en/conferences/antitrust-in-emerging-and-developing-economies-africa-brazil-china-india-mexico-82990 (accessed 3/12/19.

[1657] Wafula "Safaricom remains top East Africa company with Sh74.7 billion profit" 20 April 2020 Business Daily available at https://www.nation.co.ke/business/Safaricom-remains-top-East-Africa-company-profitability/996-5538620-nxpylu/index.html (accessed 23 April 2020 and Sunday "Safaricom lines ring in Sh31.5b in six months" 3 November 2018 Daily Standard available at https://www.standardmedia.co.ke/article/2001301348/safaricom-juggernaut-clocks-sh31-5b-profit (accessed 13/11/2019).

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This firm has found itself in the crosshairs of the CAK regarding some of its market practices.[1658] The telecommunications giant straddles the mobile communications market, controlling 64.8 per cent of the mobile subscriptions market and 98.8 per cent of mobile money business at December 2019.[1659] A study of the state of competition in Kenya's telecommunications market commissioned by the Communications Authority of Kenya and published in January 2018 confirmed what was already in the public domain - that indeed Safaricom is dominant in a manner that is likely to jeopardise the market.[1660] Several curative recommendations, including imposing controls on certain products, requiring sharing of infrastructure with competitors under a regulated pricing regime, and mobile money interoperability, were proposed.[1661] It was while appearing before a Committee of the National Assembly on Communication, Information and Innovation in August 2018, that the firm's Chief Executive Officer, Bob Collymore, tendered the age-old dominant firm's defence in the words quoted above. Basically, that the findings of dominance and proposed remedies were nothing more than penalisation of hard work, efficiency and constant innovation.[1662] Where some would see contextualization and reducing skewed inequality in power and opportunity, Safaricom saw villification of the result of a single firm's superior skill, foresight and industry.

Unlike South Africa, Kenya never had a watershed moment in which competition law was thrust to special prominence and an uncommon weight of expectation placed on it. Conversely, the Country's current law came with the wave that brought competition law

[1658] In 2013 the Authority carried out investigations into complaints lodged by Airtel Networks Kenya Limited and other competitors against Safaricom Limited's restrictive agreements with its mobile money transfer agents. The outcome was that the Authority and Safaricom entered into a settlement agreement whose terms included that all restrictive clauses in the agreement between Safaricom and its mobile money agents be expunged and the agents be at liberty to transact the mobilr money transfer businss of any other mobile money transfer service providers. Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* 24-25. See also Kenya Data Network (KDN) Vs. Safaricom Ltd at Annex 3 Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013*.

[1659] Figure 3: Market Shares in Mobile Subscriptions per Operator 10 and Table 2: Mobile Money Transfer Services 11 Communications Authority of Kenya *Second Quarter Sector Statistics Report for the Financial Year 2019/2020 (October-December) 2019*. See also D'Souza et al. "Safaricom dominant: Fact or fiction?" Sterling Capital Limited Topical Note 2018(5) available at http://www.sterlingib.com/images/products/5bfe29adc869b.pdf (accessed 18/11/2019).

[1660] Boisot A 2018 *Kenya Telecoms Market Report* Mason Analysys 2018. See also as reported in the press Kamau "Safaricom fights dominance claim as Collymore makes comeback" 7 August 2018 available at https://www.standardmedia.co.ke/article/2001290936/safaricom-fights-dominance-claim-as-collymore-makes-comeback (accessed 12/12/2019 and Kiruga "Airtel vs. Safaricom" 26 November 2018 available at http://www.theafricareport.com/East-Horn-Africa/kenya-airtel-vs-safaricom.html (accessed 12/12/2019).

[1661] Boisot A 2018 *Kenya Telecoms Market Report* Mason Analysys 2018.

[1662] See chapter 2 pars 2.1 and 2.2.2.2. Essentially that the successful competitor, having been urged to compete, must not be turned upon when he wins from dictum of Cardozo J. in *United States v. Aluminum Co. of America* (ALCOA)148 F.2d 416 (2d Cir. 1945).

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to hitherto hinterlands sometime in the 1990s.[1663] Like many a developing country, Kenya found itself nudged in the direction of a free economy and a modern competition law framework to go with that.[1664] While the advent of the Competition Act No. 12 of 2010 was somewhat less dramatic than that of its South African counterpart, the expectation was different though not any less weighy. The legislation was a critical part of a toolkit to support an economic turnabout. The country had, after a long drawn-out experience, made a turn around from an era of inefficiently run government monopolies ensconced in highly regulated markets, to a liberalised market economy supportive of private enterprise. The task of the Competition Act was to proactively facilitate as well as reinforce the shift.

The CAK's target is enforcement that is pro-competition and pro-innovation, focused on protecting the process, not the players.[1665] But often the Authority's merger analysis and the outcomes thereof speak a somewhat different language. There is a deliberate picking out of causes to value and prioritise. Vision 2030 takes a place of prominence in enforcement and with that an inevitable slant towards approving arrangements that could produce more efficient business outfits. "More efficient", often a euphemism for bigger firms, are reputed to contribute well to the rapid economic growth needed for take-off, exactly what Kenya needs. Mergers are allowed to proceed based upon efficiency arguments and the regulation pendulum habitually swings in the direction of non-intervention.[1666] The consequence is that on one end, Kenya's merger regime bears a resemblance to that of the United States in its Chicago Days. At the same time, the merger analysis pays due homage to unique developing country exigencies by laying an emphatic emphasis on public interest considerations. Saving employment, ensuring sustainability of small players, rescuing failing firms and retaining stability of sectors are

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[1663] Chapter 3 par 3.2.1.

[1664] A review of competition policy in Kenya by the UNCTAD in 2005 concluded with policy options for consideration recommending that the current Act be replaced and the commission responsible for competition and price control be transformed into an autonomous competition authority. United Nations Conference on Trade and Development "Voluntary Peer Review on Competition Policy: Kenya" 2005 hereinafter UNCTAD (2005). See further below at par 5.2.3.

[1665] Speech by David Ong'olo, given at the Competition Authority of Kenya 5th Annual Symposium Nairobi Kenya 28 September 2018 "The Role of Competition Law and Policy in Inclusive Growth and Development" par 17 availabel at https://www.cak.go.ke/sites/default/files/2019-05/Chairman%27s%20Speech%20at%20the%20Authority%27s%20Annual%20Symposium%20September%2028%2C%202018.pdf (accessed 13/11/2020.

[1666] Chapter 2 par 2.4.5.

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all taken seriously. The consequence is a merger analysis with one foot in the US, and the other in South Africa. Remarkably, out of what some would consider a muddle, emerges a scheme very directly and particularly relevant for the Kenyan economy.

In Kenya's enforcement, one sees an agency seeking to give effect to policy in a manner that fits its context and yet obtains the gains that come with integration into today's world of interconnected markets.[1667] That said, gaps, incoherence and complexities do exist and we will point them out in this chapter. What lessons can be picked from a side by side comparison with the South African experience will be taken out, and apt conclusions and recommendations made.

Unfortunately, there is not much available by way of writings, record, precedents or jurisprudence on Kenya's merger regime. Neither from decisions of the Competition Authority nor of the Tribunal established to hear appeals. The Authority does not publish the detail of its merger decisions and is not obliged to do so by law.[1668] What is more, there is no requirement in the Act to conduct merger hearings in public and none are so conducted. Meaning that, even whatever could be gleaned from such inquiries, is lost. On its part, the Tribunal has determined four matters to completion since it was sworn in on 7 July 2017.[1669] Of these two, only one arose from a merger decision of the Authority.[1670] Notably, one of the concerns raised by the appellants was the lack of information on the reasoning of the Authority in conditionally approving their merger.[1671] What was issued to them was the Notice of Determination, without the accompanying reasons for the decision. There is equally little in the form of scholarly work or texts on Kenya's competition law.

The dearth of information poses a big challenge to the researcher who is left to work with what little information is available in the Annual Reports of the Authority. In these are

[1667] See chapter 3 par 3.2.2.
[1668] The only obligation on the CAK with regard to the record of its merger decisions is to issue a notice of the determination to the parties involved in the proposed merger and by notice in the Gazette, required at section 46(6)(a) 2010 Competition Act. Written reasons only issue in the event of prohibition or conditional approval or upon a request by any party to the merger or upon request by any of the parties to a merger at section 46(6)(b) 2010 Competition Act.
[1669] *East Africa Tea Trade Association v Competition Authority of Kenya* CT/001 of 2017; *Telkom kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020 and *Majid Al Futtaim Hypermarkets Limited v Competition Authority of Kenya & another CT 006/2020*; *The Standard Group Plc v Competition Authority of Kenya* CT 008/2021
[1670] *Telkom kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[1671] Pars 21 and 22 *Telkom kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020

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highlighted notable merger transactions determined during the course of the year. The rest of the decisions for that year are relegated to an annex with a one sentence summary of circumstances and the Authority's finding for each. Recently in mid-2018, the Authority began to publish its merger determinations on its website.[1672] Even then, these reports do not run into more than three pages on average, providing only the nature of the application and a bare overview of what the Authority decided. The Consolidated Guidelines on the Substantive Assessment of Mergers provide the other source of information on merger enforcement.[1673] Thankfully, these are quite detailed, going as far as occasionally providing hypothetical scenarios of situations in merger analysis. They do not, though, have the force of law and are not binding.

At the end of the day, one cannot fail to notice that the most obstinate obstacle to effective implementation or competition law in Kenya has been absence of a competition culture in the country.[1674] There remains a widespread lack of appreciation of the workings and benefits of this law in spite of concerted efforts by the agency.[1675] This may well be a historical anachronism, a carryover from the era of government controls and state owned monopolies.[1676] We think, however, that there is more and with it, an early lesson from South African competition law enforcement. The confidential nature of merger decision-making adds little to the cause of cultivating a competition culture. Ranking mergers a priority at the take-off stage of competition law and drawing the public in through deliberate publicity, paid dividends for SA, including those that would have come from

[1672] Available at https://cak.go.ke/information-center/CAK-latest-determinations (accessed 19/01/20.

[1673] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013). The reports are required under section 83 2010 Competition Act and are to be prepared before thirtieth September each year and submitted to the Minister for submission to parliament. The reports provide information regarding the activities and plans of the Authority during the year to which they relate.

[1674] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* 32 and 33; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* 1 and Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 41.

[1675] CUTS No. 3/2015 at 5 and 6 considers one of the immediate actions necessary of effective operationalization of the Act is development of programmes which will facilite the creation of a competition culture and also to motivate stakeholders to assume their role in promoting a robust competition regime. For the detail of the advocacy initiatives of the Authority, see Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* 34; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* v; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 18 and Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* 16 and 32.

[1676] Fox Interview with Kariuki *Antitrust in Emerging and Developing Economies: Africa, Brazil, China, India, Mexico* New York University School of Law on September 16, 2015. Available https://www.concurrences.com/en/conferences/antitrust-in-emerging-and-developing-economies-africa-brazil-china-india-mexico-82990 (accessed 3/12/19.

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pursuing plain advocacy.[1677] Maybe, if there was publication of merger decisions; and maybe if hearings in the process of merger adjudication was made open to the public, the problem of lack of a competition culture in Kenya would less of a challenge than it is today.

Every school child in Kenya knows the Kiswahili proverb, "*Njia mbili zilimshinda fisi*". Rendered in English, of course with some nuance lost in translation, this is a warning to heed the risks of attempting to walk two disparate paths. The story is told of a hyena that was torn asunder trying to attend two village feasts, both at the same time. Competition enforcement in Kenya has two commitments, each of which is indispensable for the country and must be heeded to. There is the end of free markets and robust growth on the one hand and inclusive development and distribution related outcomes on the other. The Authority will have to find a way of not splitting apart in the concurrent pursuit of both.

5.2 HISTORICAL DEVELOPMENT

5.2.1 Introduction

At independence from Britain in 1963, Kenya's gross national income (GNI) per capita stood at about $100 with a Gross Domestic Product (GDP) of $ 926.589 million.[1678] As at 2019 GNI had risen to $1,620 and the GDP to $ 87.908 billion respectively.[1679] In a like manner, the country's population of 8.6 million people had grown six-fold to an estimated 47.6 million in 2019.[1680] As pronounced as these progressions, is the change in the mechanism for regulation of market conduct - from price control to modern competition legislation.

[1677] Lewis in Sokol et al. (eds.) (2013) 229. See also chapter 1 par 1.2. Lewis posits that mergers are a particularly effective platform for entrenching nascent competition agencies given that their analysis tends to be relatively uncomplicated. Accordingly, mergers can help a budding competition agency increase visibility and build a competition culture. Lewis (2012) 76-78.

[1678] World Bank data available at http://data.worldbank.org/indicator/NY.GNP.PCAP.CD?locations=KE (accessed 18/12/2019) and http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KE (accessed 18/12/ 2019.

[1679] World Bank data Available at http://data.worldbank.org/indicator/NY.GDP.PCAP.CD (accessed 18/1/2020.

[1680] Kenya National Bureau of Statistics '2019 Kenya Population and Housing Census' https://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county (accessed 6/1/2020. For ealier population trends see Kenya National Bureau of Statistics 'The 2009 Kenya Population and Housing Census - Counting Our People for the Implementation of Vision 2030' (2010) 2 available at file:///C:/Users/tbc/Downloads/Volume%201C-Population%20Distribution%20by%20Age,%20Sex%20and%20Administrative%20Units%20(2).pdf (accessed 1/11/2019) and National Council for Population and Development "The State of Kenya Population 2017" June 2018 10 available at https://ncpd.digispurenterprises.com/wp-content/uploads/2021/02/STATE-OF-KENYA-POPULATION-JUNE-2018.pdf (accessed 3/12/2019).

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For most of the 20th century, the country embraced a policy of tolerating and even supporting restrictive trade practices by state owned enterprises.[1681] Economic policies protected the agriculture industry while across the board legislative controls supported often inefficient firms in an effort to indigenise the economy. Ever deteriorating economic performance in the 1980s and 1990s increasingly rendered this approach untenable. Conditions of government divestment imposed by international lenders and incontestable evidence that competition, and not protectionism, was superior as a means of promoting economic growth were instrumental in forcing legislative reform.

Competition law in Kenya has been housed in three statutes. The Price Control Ordinance of 1956 later renamed the Price Control Act of 1956; the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 and currently, the Competition Act 12 of 2010. For the Price Control Act of 1956 the underlying philosophy was protection of consumers against price increases. The Restrictive Trade Practices, Monopolies and Price Control Act of 1988 moved up a notch to the protection of the process of competition but retained price control elements.[1682] The Competition Act of 2010 is prototypical contemporary competition legislation with no room for price control.

The process of reform of Kenya's competition law has tracked alongside the evolution of the economy, from a protected one to today's comparatively liberal regime. What follows is a chronological analysis of these three statutes within the context of the attendant economic environment. Consideration of the origins and circumstances of Kenya's competition law will lead us, like it did with South Africa's, to an inquiry into the motivation behind the present Act and therefore the ideals that merger regulation should be inclined towards.

5.2.2 Government Controlled Economy and the Price Control Act

Kenya's colonial experience transformed the country fundamentally, reorganising the economy from pre-colonial subsistence farming to a private enterprise capitalist economy.[1683] Agriculture was at the centre of this economic system. Land was alienated

[1681] See par 5.2.2 below.
[1682] See par 5.2.3 below.
[1683] UNCTAD (2005) 3. For a study of Kenya's pre-colonial economy see Ochieng WR "Kenya's Internal and International Trade in the 19th Century" in Ochieng WR and Maxon RM (eds.) *An Economic History of Kenya* (1992).

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to settlers to engage in agricultural production and the African population supplied cheap, often forced, labour.[1684] Beyond agriculture, the degree of trade and industrialisation in the economy remained rudimentary. The British did not initiate major manufacturing works regarding Kenya as a source of raw materials and a market for finished goods manufactured in Britain.[1685] In this critical way Kenya's 20th century economy is different from that of South Africa whose early manufacturing sector was not only advanced but also a focal point for the economy.[1686] Much of the profits of industries in the Colony were repatriated, as were savings and salaries of the expatriate community.[1687] The internal market for manufactured goods was small since the larger African population were not consumers of manufactured products. Supplies to support agriculture such as farm machinery and manufactured goods were imported, especially from the United Kingdom.[1688] There would be little need for regulation of competition in such a setting and so there was none.

The earliest legislative regulation of market conduct came in the form of the Price Control Ordinance passed on 16th October 1956.[1689] Price controls operated at both the production and retail levels depending on the commodity, mainly maize, wheat, and milk, which were considered essential foodstuffs.[1690] The underlying purpose of this law was to protect consumers, mainly settlers, against price increases by regulating prices of basic commodities. Imposing price controls on manufactured goods was intended to keep monopolistic pricing practices at bay.[1691] The Minister in charge of finance appointed price

[1684] Maxon RM "The Establishment of the Colonial Economy" in Ochieng WR and Maxon RM (eds.) *An Economic History of Kenya* (1992) hereinafter Maxon in Ochieng & Maxon (eds.) (1992) 64 and 66 and Leys C *Underdevelopment in Kenya: The Political Economy of Neo-Colonialism* (1975) hereinafter Leys (1975) 30. See generally also Maxon WR in Ochieng & Maxon (eds.) (1992) and Zeleza T "The Colonial Legal System in Kenya" in Ochieng WR and Maxon RM (eds.) *An Economic History of Kenya* (1992).
[1685] Maxon in Ochieng & Maxon (eds.) (1992) 70. For a long time, the only extractive industry in Kenya was the extraction of Soda Ash from Lake Magadi in 1911. See generally Maxon in Ochieng & Maxon (eds.) (1992) and Ogonda RT "The Colonial Industrial Policies and the Process of Industrialiation in Kenya" in Ochieng WR and Maxon RM (eds.) *An Economic History of Kenya(1992*).
[1686] Chapter 4 par 4.2, particularly 4.2.2. Kenya played the classic role of country at the periphery of the capitalist systeme, exporting primary commodities and importing manufactures. Leys (1975) 28.
[1687] UNCTAD (2005) 3.
[1688] Leys (1975) 28 and UNCTAD (2005) 4.
[1689] Act Number 1 of 1956.
[1690] Nzuma JM "The Political Economy of Food Price Policy in Kenya" in *Food Price Policy* in Pinstrup-Andersen P A*n Era of Market Instability: A Political Economy Analysis* (2015) hereinafter Nzuma in Pinstrup-Andersen (ed.) (2015) 201 and Swamy G *Kenya: Structural Adjustment in the 1980s* (1994) hereinafter Swamy (1994) 33.
[1691] Preamble Price Control Ordinance 1956. See also Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 3 and Mudida R, Ndiritu SW & Ross TW "Kenya's New Competition Policy Regime" 2015 38(3) *World Competition* 437 hereinafter Mudida et al.(2015) *World Competition*, at 437. Price control also had a consumer protection purpose, especially protection of consumers of lower economic capacity. For instance, controls on staple foods were

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controllers and inspectors to oversee different provinces in the Colony.[1692] The colonial regime went on to create bodies to safeguard and deliver benefits to the farming settler economy. These included state agencies to control and sometimes subsidise national economic activities. Institutions such as the maize, wheat and pyrethrum boards as well as producers' organisations were established to interact with the government in the interest of their members.[1693] Most would outlive the colonial era and a number exist to this day.[1694]

Kenya attained independence in 1963. Though the new Government aligned itself with African nationalistic economic policies, it did not take the strict path of "African Socialism" or a variant of it, opting instead for a mixed economy that would retain the already existing private sector while remaining open to foreign investment.[1695] But it soon became evident that the country's economy was heavily foreign-owned.[1696] The newly acquired political power was not backed by commensurate economic clout. Economic power was resident in large transnational corporations which controlled various sectors of the economy. To deal with this, the government pursued a policy of state intervention, both to increase its hold over the national economy and to replace foreign capital and personnel.[1697] Given the virtual absence of indigenous entrepreneurs, "Kenyanisation" of the economy was left almost entirely to the state. Control over key industrial corporations was established by turning them into quasi-government bodies known as parastatals. The corollary was

targeted at protecting lower income groups. CUTS 2002 Promoting Competitiveness & Efficiency in Kenya: The Role of Competition Policy & Law hereinafter CUTS (2002) 24. See also Nzuma in Pinstrup-Andersen (2015) 201.

[1692] As authorised by section 3 of the Price Control Ordinance 1956.

[1693] Virtually all important commodities had state boards, which regulated their production and marketing. These included the Sisal Board of Kenya, Kenya Sugar Authority, Coffee Board of Kenya, Tea Board of Kenya, Pyrethrum Board of Kenya, Kenya Dairy Board, the Cotton Board of Kenya, the Dairy Board, and the Kenya Meat Commission. Smallholder production and marketing was organized under cooperatives to assist in the procurement of production inputs and in the marketing of produce. A majority of these cooperatives were affiliated to the Kenya National Farmers Union. A number of state-run farmer organizations were also set up to support the production and marketing of most commodities. These included Kenya Tea Development Authority for tea, Kenya Co-operative Creameries for milk, National Cereal and Produce Board for cereals, National Irrigation Board for irrigated crops and Horticultural Crops Development Authority for horticulture. For further reading on these bodies see Nzuma in Pinstrup-Andersen (ed.) (2015) 200.

[1694] Prominent examples include the National Cereals and Produce Board, a state corporation formed by the amalgamation of The Maize and Produce Board and The Wheat Board on 1st July 1979. It currently operates under the National Cereals and Produce Board Act 1985 to streamline the management, handling and marketing of all grains.

[1695] See Swamy G "Kenya: Patchy, Intermittent Commitment" in Husain I and Faruqee R (eds.) *Adjustment in Africa: Lessons from Country Case Studies* (1996)193-196 hereinafter Swamy in Husain & Faruqee (eds.) (1996) 196-200 for a summary of the indicators of the Kenyan Economy between 1963 and 1980.

[1696] Leys (1975) 259. The colonial economy which was adopted intact at independence had been structured to yield high incomes for the small white minority. The pattern of government spending, fiscal and tax system and investment policy all reinforced this economic structure.

[1697] Swamy in Husain & Faruqee (eds.) (1996) 198. 'Kenyanisation' of industry was to be achieved through public sector ownership in both traditional activities such as utilities and transport but also in distribution and farming.

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emergence of a large state sector in the form of state-owned industrial enterprises.[1698] State intervention in markets was accepted as an extension of the independence struggle and these efforts received overwhelming support..[1699]

In the meantime, the country embarked on a process of rapid industrialisation and further indigenisation of the economy through the policy of import substitution, a strategy that emphasised the replacement of imports with domestically produced goods, rather than the production of goods for export, to encourage the development of the domestic industry.[1700] This was the recommended policy path at the time for the economies of newly independent states whose prospects for breaking into global markets for manufactured products were considered remote, if at all possible.[1701] It involved setting up domestic industries to produce substitutes for previously imported consumer goods and establishing policy measures to protect these industries from competition. To effect this protection, the Government introduced importation quotas for certain types of goods and passed other laws to support the initiative.[1702] State intervention in the economy increased in the 1970s, as a pragmatic response to the conduct of private enterprises that, it was taken, would inhibit free operation of competitive market structures.[1703]

The prominent form of intervention was price control and related consumer subsidies. There was still no need for dedicated competition legislation and the Price Control Ordinance, now renamed an Act, retained relevance at both production and retail levels.[1704] Controls on staple foods were imposed to protect lower income groups, while

[1698] Swamy in Husain & Faruqee (eds.) (1996) 198 and UNCTAD (2005) 4-6.
[1699] UNCTAD (2005) 5.
[1700] Import substitution industrialisation was recommended for former colonies and other dependent nationsin Africa, Latin Ameris and Asia. It was assumed that while such countries specialised earlier in producing raw materials for export while importing almost all their manufactured goods, import substitution would re-orient their economies towards greater local production of manufactured goods. For a reading of the policy of import substitution in Kenya, how it was effected and the long term effects see Nyong'o PA "The Possibilities and Historical Limitations of Import-Substitution Industrialisation in Kenya" in Coughlin P and Ikiara GK (eds.) *Industrialization in Kenya:.In Search of a Strategy* (1988) 9. Nyong'o argues that that this policy bred monopolies and actually stymied the development of industries.
[1701] UNCTAD (2005) 6.
[1702] For instance, the Trade Licensing Act 1968 which regulated issuance of trading licences for certain trades and businesses and the Imports, Exports and Essential Supplies Act 1958 that legalised the control of importation and exportation of certain goods identified as essential supplies.
[1703] CUTS (2002) 24. The import strategy programme was informed by the need to create homegrown corporations to compete with transnational corporations. The majority of local enterprises were therefore allowed to retain monopoly status in the quest to build them through economies of scale. See CUTS 2015 The State of Play of Competition Policy and Law Reforms: The Case of Kenya hereinafter CUTS (2015), 25.
[1704] Colonial laws in Kenya that were not repealed were renamed from Ordinances to Acts of Parliament.

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those on manufacturers protected against monopolistic pricing practices.[1705] Government's hold over the economy was further reinforced through a regulatory framework for controls on interest rates, foreign exchange, imports and exports.[1706] Some of these measures were introduced as a response to a succession of economic shocks including a capital flight in the 1970s and a boom-and-bust cycle in coffee and tea prices between 1976 and 1979.[1707]

The decline of the East African Community in the mid-1970s and ultimate break-up in 1977 derailed the country's industrialization programme, bringing with it as it did, the loss of the large captive East African market.[1708] Kenya's industries found themselves with a very small domestic market and products which could not yet compete in the export markets.[1709] The only way out of imminent economic decline was to open up domestic markets to imports while making Kenya's products competitive enough for export beyond the region.

Import competition was allowed into the domestic market on a quota basis starting from the end of 1970s.[1710] At the same time, the country was implementing an outward oriented industrial development strategy as part of a World Bank policy operation.[1711] At the heart

[1705] CUTS (2002) 24. Nzuma in Pinstrup-Andersen (ed.) (2015) 201.

[1706] For instance, through the Exchange Control Act of 1950, Chapter 113, Laws of Kenya

[1707] UNCTAD (2005) 6 and Swamy in Husain & Faruqee (eds.) (1996) 199 where Swamy notes that macroeconomic indicators which were poor were a result of severe external terms of trade.

[1708] In 1967, the permanent Tripartite Commission for East African Co-operation was formed under the name 'East African Community (EAC)'. This regional body comprised the East African countries of Kenya, Uganda and Tanzania. The idea was to forge economic integration in the region with prospects of establishing a political union in the long run. But, this process was never concluded. The EAC collapsed ten years later in 1977 due to a confluence of factors. For a summary of the rise and fall of the Community and contributing factors see Mshomba RE *Economic Integration in Africa: The East African Community in Comparative Perspective* (2017) 49.

[1709] It is instructive that from the beginning probably the most important problem threatening the existence of the old EAC was the industrial dominance of Kenya in the region, leading to growing deficits of Tanzania and Uganda in their trade with Kenya. The persistence of trade imbalances among the three partner states was one of the main reasons for the collapse of the old EAC. Busse M and Shams R "Trade Effects of the East African Community" 2005 (6) *Estey Centre Journal of International Law and Trade Policy* No 1 at 62 and Holmquist et al. (1994) 37(1) *African Studies Review* (1994) 69 at 96 identifies lost markets for Kenya as an outcome of the demise of the East African Community.

[1710] The government gradually exposed domestic firms to competition by allowing competing imports selectively. Items were progressively removed from the list of banned items and price controlled items removed from price-controlled list progressively. CUTS (2015) at 25. See also Mudida et al. (2015) 38 *World Competition* at 437 and Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 3.

[1711] Import competition was part of the Fourth Development Plan which ran from 1979 to 1983 and which was broken into the three areas of agricultural development, Industrialisaiton and Trade Policies. It set growth targets for each. On the whole, the development strategy and government policy as set forth in the Plan can be characterized as relying more on market forces and on improvingthe functioning of markets than on direct intervention. Trade policy, for example stressed on reduction of protection, especially licensing and quantitative restrictions on imports. Public enterprises were expected to demonstrate increasing efficiency and government participation in private enterprises would be limited in due course. Very specifically, the stated intention was to reduce or eliminate the monopoly power of state agricultural boards. World Bank (1979) 'Kenya; Economic Memorandum Progress Under the Third Development Plan 1979-83' at 974-78 available at http://documents.worldbank.org/curated/en/329631468273048630/Kenya-

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of this program was promotion of manufactured exports while reducing protection of the manufacturing sector.[1712] It involved a phased replacement of quantitative restrictions on imports with equivalent tariffs and in due course, lowering of those tariffs.[1713] This attempt at liberalisation did not go far and was halted in mid-1982. There was at the time little political will to push through with comprehensive reform. Stated policies, including those in line with the World Bank recommendations, were undermined by lethargic implementation that was at times contrary these policies.[1714] Economic progress from that point on was painfully slow. By and by, manufacturing for exports dropped. So much so that, the share of exports in GDP declined from 45 per cent in the mid-1960s to an average 30 per cent between 1980 and 1985.[1715] Gross investment in manufacturing declined to less than half of its 1978 level.[1716] In the absence of robust markets, contemporary competition law was not a priority and the Price Control Act of 1956 continued to hold fort.

A second push to liberalise the trade regime came through a Sessional Paper 1 of 1986 in which government made a strong case for export-promotion over import-substitution.[1717] This time around, the effort was met with more success. Some progress was made in eliminating quantitative restrictions and reducing tariffs. In response exports rose on average by 10 per cent per annum between 1986 and 1991.[1718] Nonetheless, the problem of absent political will persisted and targets for the International Monetary Fund's

Economic-memorandu (accessed 12/1/2020. These plans were not entirely successful on a large part due to mismanagement. Swamy in Husain & Faruqee (eds.) (1996)193-196 and Swamy (1994) 31. For a reading of the period between 1979 the mid 1980s in Kenya's economy, see Swamy in Husain and Faruqee (eds.) (1996) and Bhatt VV, Nankani G & Saito K "A Financial Policy Framework for Accelerated Socio-economic Development in Kenya" (1978) Domestic Finance Studies No 70 available at - http://documents.worldbank.org/curated/en/869251468276901073/pdf/SDF70000A0fina0titutional0framework.pdf (accessed 11/01/2020.

[1712] World Bank (1979) 'Kenya; Economic Memorandum Progress Under the Third Development Plan 1979-83' at 39-41 available at http://documents.worldbank.org/curated/en/329631468273048630/Kenya-Economic-memorandu (accessed 12/1/2020. The major thrust of industrial policy was to bring about a transition from import substitution to emphasis on penetration of export markets. Reduction of protection and increased industrial efficiency would be combined with strengthening of the Kenyan External Trade Authority, iimplementation of an export credit guarantee scheme, establishment of export houses, strengthening and extending the role of the Kenya National Trading Company asand rationalising the existing export incentive scheme.

[1713] World Bank above.

[1714] Swamy in Husain & Faruqee (eds.) (1996) 193 and CUTS (2002) 18.

[1715] Swamy (1994) 9.

[1716] Swamy above.

[1717] Republic of Kenya (1986) Economic management for renewed growth Sessional Paper No.1 of 1986 Nairobi: Government Printer. In contrast to import substitution, export promotion strategy aims to provide producers with incentives to export their goods through various economic and governmental policies. Its also aims to increase the capability of producing goods and services that are able to compete in the world market, to use advanced technology, and to provide foreign exchange needed to import capital goods. Abou-Stait (2005) *Economic Research Working Paper No 76* at 1.

[1718] CUTS (2002)19.

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lending conditions were often not met.[1719] Growing financial indiscipline made trade and financial sector reform difficult.[1720] Political mismanagement and centralisation of power that triggered growing political tensions combined with accelerating inflation, policy uncertainties and deteriorating infrastructure contributed to a drastic drop in foreign direct investment.[1721] Expenditure pressed against revenues, creating an escalating fiscal crisis amidst slow growth and declining standards of living.[1722]

Mismanagement of the crucial agriculture sector added to the woes facing the country.[1723] A key government socio-economic objective had been to increase agricultural production. To this end, a number of public and quasi-public institutions were established or revived, either to operate as monopolies or regulator bodies in agricultural markets.[1724] Thanks to a grim combination of mismanagement, poor rural infrastructure and low world commodity prices, the sector continued to plummet.[1725]

Contributing to the overall dire economic plight were the parastatals. The problem of these state-owned enterprises was already cause for concern as far back as 1982. A government report of that year had declared them "inefficient due to government pressure to carry out non-commercial functions and to employ an excess labour force; protected from competition and beleaguered by declining standards of management and financial control."[1726] A Structural Adjustment Programme was recommended to deal with this

[1719] For a detailed reading see Swamy (1994) and O'Brien FS and Ryan TCI "Aid and Reform in Africa: Kenya Case Study" World Bank Research Project on 'Aid and Reform in Africa' (1999). Kenya received structural adjustment lending from the World Bank and the IMF to facilitate the liberalisation process. It was expected that the reforms would be implemented to restore macroeconomic stability with greater reliance on market forces, enhanced private sector participation in the development process and political reforms. The first phase of these reforms between 1980-84 was to be focused on trade reforms, grain marketing, interest rates, energy and family planning. However, little was achieved, attributable to lack of adequate government commitment to the reform process. The latter dissatisfied the donors and the reform process characterized by stop-go pattern in adjustment lending. In the second phase, 1985-91, government commitment was described as patchy and it saw the donors suspend their support in 1991 to pressurize for political reforms and government commitment. The third phase started with the resumption of aid in 1993, characterized by comprehensive reforms. However, the donors dissatisfied with the pace, suspended aid again in July 1997.
[1720] Swamy in Husain & Faruqee (1996) 195.
[1721] Holmquist et al. (1994) 37(1) *African Studies Review* 69 at 91-92.
[1722] Holmquist et al. (1994) 37(1) *African Studies Review* 69 at 91-95. See also CUTS (2002) 22.
[1723] Swamy in Husain & Faruqee (1996) 201. As examples, aid financed fertilizers were allocated in non-transparent ways and retail prices of food commodities were still controlled primarily in urban areas conferring an undifferentiated subsidy on urban consumers. Government services to the crucial dairy sector started failing in the mid-1980s due to corruption and mismanagement in the cooperative sector. D'Alessandro SP, Caballero J, Lichte J & Simpkin S "Kenya Agricultural Sector Risk Assessment" November 2015 World Bank Group Report Number 97887 42.
[1724] For instance, The National Cereals and Produce Board (NCPB) revamped under the National Cereals and Produce Board Act 1985 passed in 1985.
[1725] CUTS (2002) 13.
[1726] Republic of Kenya Working Party on Government Expenditures (1982) Report and Recommendations Nairobi: Government Printer; CUTS (2002) 15. See also Table 3.10: History of State Corporations from 1960 to present in CUTS (2002) 30 and Republic of Kenya (2013) "Presidential Taskforce on Parastatal Reforms Report" Nairobi: Government Press 31-32. While Gross Domestic Product overall grew by 5 per cent between 1986 and 1990, value add in the parastatal sector grew at only 0.5 per cent with negative

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situation.[1727] The plan, which came with the promise of donor support, was to progressively reduce the role of government in the economy by phasing out public sector monopolies and privatising commercial state enterprises.[1728] Reduction of government's direct involvement and intervention in the economy and greater reliance on market forces was predicted to have the ability to revive economic growth through more efficient utilisation of resources.[1729] Subsequently, a policy of deregulation of the market was adopted. Public sector monopoly in markets for foreign exchange, credit, and agricultural commodities would be phased out, and commercial state enterprises privatised.[1730] Not entirely surprisingly, by 1987 nary a single enterprise had been divested and a fresh programme of reform and privatisation was announced in 1991. Of the 240 enterprises, 207 were earmarked to be divested, and the remaining 33 would be retained by government as "strategic".[1731] This time around, the programme did move along, albeit in fits and lurches. Some progress was made.[1732]

With the government beginning to cede its grip on the economy to the private sector, the Price Control Act of 1956 was going to need replacement. It was now incumbent to set up a mechanism to protect consumers from possible exploitation and guard the market from unfair practices. The proposal for development of a competition policy had been mooted back in 1982 in a report which had gone as far as outlining the type of legislation and institutions needed for enforcement.[1733] By the time the 1980s were drawing to a

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growth in the parastatals in the manufacturing and mining sectors. Swamy in Husain & Faruqee (eds.) 223 and Table 5.6 Performance indicators of the parastatal sector 1986-91 at 224.

[1727] World Bank (1992) 'Kenya - Parastatal Reform and Privatization Technical Assistance Project' available at http://documents.worldbank.org/curated/en/271261468046825215/Main-report (accessed 3/2/2020.

[1728] World Bank (1992) above. Expected key outcomes included privatisation of at least 20 public enterprises of the 207 earmarked for eventual divestiture; liquidation of a number of uneconomic public enterprises; improvement of the efficiency; profitability, and accountability of the remaining public enterprised by phasing out subsidies, establishing an improved corporate governance system, and dealing with excess indebtedness; adoption and implementation of restructuring plans for 5 of the largest public enterprises including cessation of uneconomic activities and partial privatization; and a more efficient,experienced, and sophisticated stock exchange. The project's broader effect was intended is to contribute to the shift in economic activity from the public to the private sector through improvements in the enabling and competitive environment, and rationalization of public service regulation. See also CUTS (2002) 15.

[1729] World Bank (1992) above. UNCTAD (2005) 7.

[1730] Government of Kenya (1996) Economic reforms for 1996-1998 Nairobi: Government Printer; Government of Kenya Sessional Paper no.2: Industrial transformation to the year 2020 Nairobi: Government Printer and Kelly "No privatization no AID, World Bank warns Kenya" 3 November 2000 *The East African*.

[1731] UNCTAD (2005) 7 and CUTS (2002) 15. Government of Kenya (1992) Policy on public enterprise reform and privatisation. Nairobi: Government Printer.

[1732] Swamy in Husain & Faruqee (1996) at 196. For the areas of progress see Bennell P "Privatization in Sub-Saharan Africa: Progress and prospects during the 1990s" 1997 (25) *World Development* 1785.

[1733] Republic of Kenya (1982) Working Party on Government Expenditure Report and Recommendations Nairobi: Government Printer pars 87-91 at 24-27.

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close the Government was fully committed to relying less on instruments of direct control and increasingly on competitive elements in the economy.[1734] To further that intention, the Government presented a bill for debate and possible enactment by Parliament in 1988. From these efforts, the Restrictive Trade Practices, Monopolies and Price Control Act was passed at the end of 1988, coming into operation on 1st February 1989.[1735] But rather inconsistently, and in the face of a claimed commitment to deregulate and liberalise markets, price control was retained. There was an assurance from the Government that the retention was only a temporary measure.[1736] As would happen, this promise came to naught and price control remained part of the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 until its repeal in 2010. That said, control of prices on manufactured goods did reduce steadily from 1986 till abolition in 1994, although controls on consumer prices of staples continued for longer.[1737]

5.2.3 Progressing to a Free Market Economy and the Restrictive Trade Practices, Monopolies and Price Control Act

The Restrictive Trade Practices, Monopolies and Price Control Act 1988 was passed to "encourage competition in the economy by prohibiting restrictive trade practices [and] controlling monopolies, concentrations of economic power and prices."[1738] In keeping with the new dispensation, its mandate extended to anticompetitive conduct by whomever perpetuated. Government agencies, state enterprises and professional associations were all subject to the Act, unless exempted by an Act of Parliament.[1739]

[1734] Republic of Kenya (1986) Economic management for renewed growth Sessional Paper No.1 of 1986 Nairobi: Government Printer par 2.53 at 24 and Republic of Kenya Budget Speech 1988 Nairobi: Government Printer 4.

[1735] Chapter 504 Laws of Kenya. The Act was Gazetted on 23rd December 1988 after receiving the Presidential Assent on 19th December 1988 and became effective on 1st February, 1989.

[1736] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 5. See also UNCTAD (2005) 9 Box 1 Chronology of economic developments in Kenya.

[1737] Changes to the manufacturing sector in 1994 to liberalize the Kenyan market and make it more competitive and give Kenyan products a chance to compete in external markets included abolition of price controls and introduction of an essential goods production support programme. Ngui D, Chege J and Kimuyu P "Kenya's Industrial Development Policies, Performance, and Prospects" in Newman C, Page J, Rand J, Shimeles, Söderbom M and Tarp T *Manufacturing Transformation: Comparative Studies of Industrial Development in Africa and Emerging Asia* (2016) 74-76.

[1738] The preamble of the Act which read: 'An Act of Parliament to encourage competition in the economy by prohibiting restrictive trade practices, controlling monopolies, concentrations of economic power and prices and for connected purposes'.

[1739] Section 73 Restrictive Trade Monopolies and Price Control Act 1988 provided that the Act applied to every body corporate in which the Government holds shares carrying on any trade and such could be investigated by the Commissioner and prosecution brought in respect of an offence against any provision of the Act. Section 5, however, exempted trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges by an Act of Parliament or by an agency of the Government and practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government.

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A Monopolies and Prices Department was established under the control of a Commissioner who in turn was under the control of the Minister responsible for the Treasury.[1740] The Act was however silent on how, and by whom, this Commissioner would be appointed and all through the life of the Act, vacancies in the office were filled through the general civil service procedure, placing the holder under the supervision of the Permanent Secretary in the relevant Ministry.[1741] Though this Commissioner was responsible for the efficient administration and enforcement of competition law, ultimate control lay with the Minister in a manner similar to South Africa's 1979 Maintenance and Promotion of Competition Act.[1742] While the Minister was expected to seek the technical advice of the Commissioner in his decisions, the Act did not make this mandatory. He could, and did on occasion, disregard the Commissioner's advice or proceed without consulting.[1743] The public face of competition law was not the Commissioner but the Minister who was responsible for all public communication.[1744] Executive intrusion was not unheard off. In an incident in 2001, the Minister, on the recommendation of the Commissioner, had approved the takeover of a Kenyan firm by a multinational company, a decision that caused disquiet among local players. Soon after, no one less than the President weighed in, issuing a decree that foreigners should not be allowed to control local companies.[1745] It was left to the Minister and the Commissioner to see how best to deal with the fall out. With an environment such as this, it is difficult to say that the Monopolies and Price Control Department's decision-making was always free of political influence and based on sound competition principles.[1746] Especially since in due course,

[1740] Section 3(1) Restrictive Trade Monopolies and Price Control Act 1988. Section 3(2) provided that the Commissioner was 'subject to the control of the Minister . . .' Throughout the tenure of the Act, this remained the Ministry of Finance and Planning.
[1741] Section 3(1) Restrictive Trade Monopolies and Price Control Act 1988 simply stating 'There shall be appointed a . . . Commissioner. . .' See UNCTAD (2005) 24 on the Office of the Commissioner of Monopolies and Prices.
[1742] Chapter 4 par 4.2.5.
[1743] UNCTAD (2005) 19. Sections 18, 24 and 30 RTPA 1988 bestowed on the Minister Powers to overrule the Commissioner to restrictive practices, unwarranted concentration of power and mergers. In all three sections, the Act uses the word 'may' with regard to issuing of orders recommended by the Commissioner under sections 17, 23 and 28 respectively.
[1744] CUTS (2002) 38. The overall responsibility for competition policy in Kenya rested in the hands of the Minister for Finance. Section (3)(2) Restrictive Trade Monopolies and Price Control Act 1988 subjected the Commissioner for Monopolies and Prices to the control of the Minister. The Commissioner obtained compliance with his professional prescriptions for the market through Ministerial orders. Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 10.
[1745] Mureithi "Okemo, Kijirah in dilemma: Presidential order has put the duo on the spot" 4 September 2001 The Financial Standard.
[1746] UNCTAD (2005) 19.

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it became evident that there was little political will to push through the economic reforms that had precipitated the Act, let alone seriously effect the competition law.[1747]

Appeals from Ministerial orders lay to the Restrictive Trade Practices Tribunal (RTPT) whose members were appointed by the Minister.[1748] Orders of price regulation and cost determination could not, however, be appealed against, only Parliament could annul them.[1749] Throughout its tenure, the Tribunal heard one appeal and was for all intents "a practically redundant body".[1750] The UNCTAD Peer Review of 2005 attributed this dormancy partially to the generally low output of the Competition agency, lack of awareness of the existence of the Tribunal by the business community and the apparent lack of independence.[1751] We think of all these findings, the most impactful was the apparent want of independence. Given that members of the Tribunal were appointees of the Minister and administratively fell under his supervision, there was good reason to doubt that the institution could be absolutely impartial in adjudicating its appointing authority's pronouncements. Would be appellants would have deemed it imprudent to present appeals. Final appeal from orders and decisions of the Tribunal lay to the High Court.[1752]

The Restrictive Trade Practices, Monopolies and Price Control Act covered the three main competition law areas of restrictive trade practices, control of monopolies and concentration of economic power and regulation of Mergers and Takeovers. Provisions on control of prices occupied Part IV of the Act. With regard to restrictive practices, the Act supported settlement as the preferred first line of enforcement. Only when it failed would orders be prepared for the Minister to issue.[1753] On receipt of a complaint, the Commissioner would inform the alleged contraveners of the charge and invite their

[1747] CUTS (2002) 38.
[1748] Sections 20(1) Restrictive Trade Monopolies and Price Control Act 1988 with regard to restrictive practices, 25(1) for unwarranted concentrations of power and 32(1) for decisions on mergers. The Restrictive Trade Practices Tribunal established under section 64 Restrictive Trade Monopolies and Price Control Act 1988 was made up of a chairman and not less than two and not more than four other members, all appointed by the Minister and subject to removal by the Minister if found unfit to perform the duties of the office.
[1749]Section 38 Restrictive Trade Monopolies and Price Control Act 1988. Sections 35 to 37 were on price fixing. All order made under these sections these would be laid before the National Assembly. If no resolution otherwise was passed within twenty days the order would pass.
[1750] UNCTAD (2005) 27.
[1751] UNCTAD (2005) 27. The Tribunal had no secretariat or premises budget and did not work on a full-time basis. CUTS (2002) 35
[1752]Sections 20(2), 25(2) and 32(2) Restrictive Trade Monopolies and Price Control Act 1988 for restrictive practices, unwarranted concentrations of power and mergers respectively.
[1753] Sections 13 to 17 Restrictive Trade Monopolies and Price Control Act 1988.

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comments on the evidence.[1754] If he took the view that the weight of the evidence supported the allegations, he would request the offending party to discontinue the practice and compensate for its effects.[1755] If the offender failed to respond to the request, the Commissioner would invite them to negotiate a consent agreement undertaking to desist from the harmful conduct and any consent reached would be gazetted.[1756] Only two such consent agreements were ever published in the Gazette.[1757] If a person failed to appear for agreeing to a consent order or failed to comply with a consent agreement, the Commissioner could recommend to the Minister to make an order to regulate the practices in question.[1758] But this could occur only after a hearing conducted by the Commissioner at which the offending party would be represented.[1759] The Minister made four such orders through the twenty one year period that the Act was in force.[1760] Otherwise, most restrictive trade practices cases were finalised without issuing a formal published decision.[1761]

While now there was a law to prevent market abuse, there apparently was little intention to give it effect. For restrictive trade practices, the provided procedure appears to have

[1754] Section 15(1)(a) Restrictive Trade Monopolies and Price Control Act 1988 (1) The Commissioner could take a number of steps with respect to a person alleged to be engaged or have been engaged in restrictive trade practices including at section 15(1)(a) Restrictive Trade Monopolies and Price Control Act inform the person in writing that allegations have been made and that specific evidence has been presented to substantiate the allegations, and invite the person to comment on the allegations and the evidence and to indicate what remedies (if any) the person would propose in order to bring his trade practices into conformity with this Act.

[1755] Section 15(1)(b) Restrictive Trade Monopolies and Price Control Act 1988. The minister may 'inform the person that in his opinion the weight of the evidence supports allegations that have been made concerning the occurrence of a restrictive trade practice, and request the person to take specific steps to discontinue such practices and, in addition, compensate for the past effects of such practices by taking positive steps to assist one or more existing or potential suppliers, competitors or customers to participate actively in producing or trading in the goods or services to which the allegations relate'.

[1756] Sections 15(3) and (4) Restrictive Trade Monopolies and Price Control Act 1988 'If the person alleged to have committed a restrictive trade practice does not respond to the Commissioner's communication by the indicated date, or the Commissioner deems the person's response not to remove the grounds for the allegation, or the person fails to implement measures to which he has agreed in his response, the Commissioner shall invite the person to negotiate a consent agreement satisfactory to the Commissioner, stipulating that the person will desist from specified practices and will take specified measures to compensate for the past effect of such practices. (4) The Commissioner shall cause a consent agreement entered into under subsection (3) to be published in the Gazette as early as practicable and he shall send copies of the agreement to any person who complains to him of the trade practices in question, and a1so to any other persons whom he deems to be affected by the agreement.

[1757] CUTS (2002) 38.

[1758] Sections 16 and 17 Restrictive Trade Monopolies and Price Control Act 1988. At section 16 (1) 'If a person considered by the Commissioner to be committing or to have committed a restrictive trade practice under this Act fails to take steps satisfactory to the Commissioner under section 15 or, having signed a consent agreement under subsection (3) of section 15, fails to abide by the terms of the agreement or commits restrictive trade practices not covered by the agreement, the Commissioner shall inform the person that he proposes to recommend that the Minister make an order regulating the practices in question, and that a hearing on the desirability and contents of such an order will be held on a specified date. (2) Any person whose trade practices are the subject of a proposed order. and any person who has complained in writing to the Commissioner in respect of those trade practices, shall be given reasonable advance notice of the holding of a hearing on that order and shall be invited either to attend in person or to send a duly appointed representative. At section 17 'Upon concluding his investigation under section 16, including the holding of a hearing as specified in that section, the Commissioner shall present his report together with recommendations for action to the Minister.'

[1759] Section 16(1) Restrictive Trade Monopolies and Price Control Act 1988 as above.

[1760] CUTS (2002) 38.

[1761] CUTS (2002) 39 and Table 4: Illustrative Recent RTP Cases Handled by the Commission at 26.

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been contrived to activate decisive action only as a last resort in a manner similar to that of the South African Regulation of Monopolistic Conditions Act of 1955. Under that Act, following a finding of conduct of a market player to be anticompetitive, the Competition Board initiated negotiation with the persons concerned towards an arrangement to remove the conduct.[1762] As evidence of the overall lethargy, the practice of refusal or discrimination in supply was never acted upon yet it was rampant, particularly in times of shortage of staples.[1763] With Kenya, like with South Africa, this was a case of the law fitting the season evidenced in the absence of political will to enforce. The prevailing opinion was that the economy was best served by government intervention and regulation.

The Minister was under a duty to keep the structure of production and distribution in markets under review to determine where there were concentrations of economic power whose detriment on the economy outweighed any efficiency benefits.[1764] The ability of the Monopolies and Prices Department to identify unwarranted concentrations was, however, limited by the absence of data that would enable the determination of concentration indices. A Census of Industrial Production had been done back in 1982 but was never published.[1765] Even without this information, there was no doubt in anyone's mind that Kenya's markets were highly concentrated. Markets such as those for cement and beer as well as banking, suffered from high degrees of concentration and were marked by the attendant anticompetitive practices.[1766] While the Minister was empowered to discourage unwarranted concentration and market dominance through the issue of divestiture orders, no such orders were ever issued throughout the tenure of the Act.[1767] Yet another sign of either new wine in old wineskins or blatant refusal to enforce. The reality, however, is that divestment is rare in most countries as it is drastic.

[1762] Chapter 4 par 4.2.4.
[1763] CUTS (2002) 26.
[1764] Section 23 Restrictive Trade Monopolies and Price Control Act 1988.
[1765] CUTS (2002) 13.
[1766] See Ellis K & Singh R "Assessing the Economic Impact of Competition" Overseas Development Institute Report (2010) hereinafter Ellis & Singh (2010) at 35 for the state of the cement market, at 46 for state of the beer market and at 15 for the sugar industry.
[1767] Section 24 Restrictive Trade Monopolies and Price Control Act 1988 and Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 9-10.

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Mergers and takeovers between two or more independent enterprises were prohibited unless authorised by the Minister.[1768] The definition of "merger" was restricted to transactions between two or more concerns dealing in the same or similar products, that is, horizontal mergers.[1769] Section 30 of the Act stipulated a trade-off approach to analysis via which any reduction on competition would be acceptable if adequately counterbalanced by a benefit to the country. In evaluating an application, the Commissioner was required to have due regard to criteria entailing three considerations comprising both competition and public interest concerns. First was the question of whether the merger will be advantageous to Kenya to the extent that the participants produce goods and services entering into international trade and whether it will yield a substantially more efficient unit able to compete more effectively with imports, expand exports and increase employment. Second was whether the merger or takeover will be disadvantageous to the extent that it reduces competition in the domestic market and increases the ability of the applicants to manipulate domestic prices. Third, whether the merger or takeover will be disadvantageous to the extent that it encourages capital-intensive production technology in lieu of labour-intensive technology.[1770] The Commissioner would make a recommendation to the Minister who was at liberty to either approve unconditionally, approve subject to remedial conditions, or to reject the merger application.[1771]

Compulsory merger notification provided the Department with steady work.[1772] From the end of the 1990s, the number of mergers and acquisitions increased as the poor state of the economy compelled firms to combine resources for survival.[1773] Virtually all applications were approved. The Commission considered its function as the application

[1768] Section 27 Restrictive Trade Monopolies and Price Control Act 1988. Section 28 Any person may apply to the Minister, through the Commissioner, for an order authorizing a merger or takeover.
[1769] Section 27(1) Restrictive Trade Monopolies and Price Control Act 1988.
[1770] Section 30 Restrictive Trade Monopolies and Price Control Act (1988).
[1771] Section 31 Restrictive Trade Monopolies and Price Control Act 1988. An example of a conditional approval is the takeover of Agip Kenya Limited by Kenya Shell Limited and BP Kenya Limited towards the end of the year 2000, approved on condition that Kenya Shell and BP Kenya would, as soon as possible but not later than twelve months following the takeover, dispose of the Nairobi and Mombasa Terminal depots, including facilities wholly owned and operated by Agip Kenya Limited prior to acquisition.
[1772] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 9, 12-13; UNCTAD (2005) 39 Box 12 Cases considered by the Monopolies and Prices Commission from 1989 to 2004 and CUTS (2002) 39-40.
[1773] CUTS (2002) 40.

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of competition policy in a manner contributing towards achievement of public, political and governmental objectives.[1774] A takeover that the Commissioner found would lead to an increase in employment and enhanced exports was approved on account of "the government's commitment to creation and sustenance of employment".[1775] Yet another merger was approved mainly because it was expected to increase job opportunities, boost export potential and equip Kenyan firms to compete with imports. [1776]

The Restrictive Trade Practices, Monopolies and Price Control Act of 1988 was a marked leap from the Price Control Act of 1956 and better equipped to regulate markets and market conduct. But the legislation did not have the desired impact. Precious few matters were heard. Probably, the law came into an environment so steeped in, and accommodating of, inefficient business models, that it stood little chance of having a bigger impact. Admittedly, the existence of the Act, reduction in subsidisation of parastatals and minimal increase in the size and role of the private sector did enhance competition in the economy.[1777] By and large, however, monopolisation and concentration increased.[1778] By the year 2000, importation of petroleum was controlled by eight firms, four of which combined controlled 80 per cent of the market.[1779] The top four banks combined controlled 65 per cent of the annual credit and assets for the sector.[1780] Major industrial groups had close relations with each other either through direct equity holdings or cross directorships, fomenting further concentration and collusion.[1781] Non-interventionist enforcement and high levels of protection no doubt contributed to this scenario, exacerbated further by the small size of the domestic market.[1782]

[1774] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 13.
[1775] Njoroge above at 14, 16-17 referring to The Proposed Take over of the Assets of Trufoods Limited and Kabazi Canners Limited by Premier Food Industries Limited 2002.
[1776] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 24 referring to the Merger between Spinknit Dairy Ltd. and Brookside Dairy Ltd 2010.
[1777] CUTS (2002) 41.
[1778] Singh et al. (2010) v. records that, "Kenya suffers a relatively high degree of concentration in its cement and beer industries and Cement industries." The beer industry at the time was a monopoly virtually with a dominant firm with 90% market share. Mobile telephony also highly concentrated. CUTS (2002) 44 Annex 2 gives an indication of the nature of competition in the Kenyan economy in 1992 and 2000.
[1779] Singh et al. (2010) v.
[1780] Singh et al. (2010) above.
[1781] Singh et al. (2010) above.
[1782] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 13 and CUTS (2002) 44.

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To respond to the ensuing economic challenges and build a globally competitive and prosperous economy, the government crafted a raft of economic and structural reforms elaborated in the Economic Recovery Strategy (ERS) of 2003.[1783] These were policy interventions to pull the economy out of recession toward equitable economic recovery. The strategy was anchored on four key pillars: restoration of economic growth within the context of a stable macroeconomic environment; rehabilitation and expansion of infrastructure; equity and poverty reduction and improved governance.[1784] At the centre of this policy was the disengagement of government from commercial activities.[1785] By the expiry of the ERS in 2007 the economy had picked up, growing significantly from virtual stagnation in 2002 to 6.3 per cent in the first quarter of 2007.[1786] A robust efficiency focused strategy to pick up from where the ERS stopped was needed, hence the drawing up of Vision 2030 in 2007 and its launch in 2008.

Kenya Vision 2030 aims to transform the country into a "newly industrializing middle-income country providing a high quality life to all its citizens by the year 2030".[1787] The Vision is based on three pillars - economic, social and political.[1788] The economic pillar aims to improve the prosperity of all Kenyans through an economic development programme aimed at achieving an average GDP growth rate of 10% per annum beginning

[1783] Government of Kenya Kenya: Economic recovery strategy for wealth and employment creation 2003-2007 (2003) Available at http://siteresources.worldbank.org/KENYAEXTN/Resources/ERS.pdf (accessed 1/2/2019); and Government of Kenya: Ministry of state for Planning, National Development and Vision 2030 Sessional paper No 10 of 2012 On Kenya Vision 2030 (2012) 2. See also Republic of Kenya Ministry of Planning and National Development Annual Progress Report 2003/2004 July 2005 Available at https://www.imf.org/external/pubs/ft/scr/2007/cr07158.pdf (accessed 12/2/2020 (accessed 1/2/2020.

[1784] The programme included redefining goal of government vis-à-vis that of private sector, facilitation of the private sector, and maintenance of macro-economic stability. For a summary of the key components of the Economic Recovery Strategy for Wealth and Employment Creation See Annexes 2-2 and 2 -3 in Food and Agriculture Organisation (FAO) (2004) Kenya Support to NEPAD–CAADP Implementation Volume I: National Medium–Term Investment Programme (NMTIP).

[1785] UNCTAD (2005). There were increasing calls for redefining the role of the state as a facilitator for private sector growth and investment. The strategy identified key policy actions to spur the economy which included maintaining an environment of macro economic stability, strengthening of institutions of governance, rehabilitation and expansion of physical infrastructure and investment in human capital of the poor. The key theme of the strategy was to strengthen policy and regulatory functions of the state and transfer productive and service delivery activities to the private sector and farmer organizations. Annexes 2-2 and 2-3 FAO (2004) Kenya Support to NEPAD–CAADP Implementation Volume I: National Medium–Term Investment Programme (NMTIP).

[1786] Government of Kenya: Ministry of state for Planning, National Development and Vision 2030 Sessional paper No 10 of 2012 On Kenya Vision 2030 (2012) 1-2.

[1787] Government of Kenya (2007) Kenya Vision 2030: The popular version 1. Available here https://vision2030.go.ke/publication/kenya-vision-2030-popular-version/ (accessed 13/2/2020.

[1788] The goal of the Economic Pillar is to maintain a sustained economic growth of 10% p.a. over the next 25 years. The Social Pillar aims at a just and cohesive society enjoying equitable social development in a clean and secure environment and the Political Pillar for a democratic political system that is issue-based, people-centered, result-oriented, and accountable to the public. The Political Pillar is at chapter 6, the Economic Pillar at chapter 4 and the Social Pillar at Chapter 5. For a thematic overview of these three pillars, see Table 1 at 2 Thematic Overview of Kenya Vision 2030 Government of Kenya (2007) above.

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in 2012 through to 2030.[1789] As a foundation, the Vision places the highest premium on a stable macroeconomic environment to win confidence among investors and ordinary Kenyans.[1790] Special focus is given to agriculture to make it an innovative, efficient, commercially-oriented sector.[1791] On the manufacturing front, the country aims to become the provider of choice for basic manufactured goods in the region through "improved efficiency and competitiveness at firm level, producing consumer goods that compete with imports in key local industries and raising market share in the regional market."[1792] These objectives have a direct bearing on merger analysis by the CAK as we see in due course.[1793]

With the shift from direct management of the economy to increased reliance on market dynamics, Kenya needed to redesign its legislative strategies across the board, to fit into the long-term objective of sustained economic growth.[1794] Increasing liberalisation and private sector growth came with the need for a sound competition policy which could draw out and reinforce the benefits of privatisation and regulatory reform. There was need to align the competition regime with the level of market liberalization and globalisation.[1795] The Restrictive Trade Practices, Monopolies and Price Control Act of 1988 was wanting on several fronts and was thought not the best tool for that task. It was outdated and failed to provide a comprehensive and effective framework for competition policy in Kenya.[1796] What was needed was a legislative regime that encourage rivalry to increase efficiency. One that would encourage investment by entrepreneurs and removal of barriers to entry.[1797]

[1789] Government of Kenya (2007) above at 1 and 6. The Vision commits to macro-economic stability and establishes six key sectors to act as key growth drivers; tourism, agriculture, wholesale and retail sector, manufacturing, business process offshoring and financial services. Government of Kenya (2007) 10.
[1790] Government of Kenya (200& above at 6 stating that a stable macroeconomic environment ". . . is the only way in which confidence among investors and ordinary Kenyanscan be maintained. A stable economic environment also works in favour of the poor who stand to lose the most in periods of high inflation. All the projects proposed under Vision 2030 will, therefore, be subjected to the parameters set under the macro-economic stability framework,as reviewed on acontinuous basis by the Ministry of Finance and the Central Bank of Kenya"
[1791] Government of Kenya (2007) above at 13.
[1792] Government of Kenya (2007) above at 14.
[1793] Chapter 5 par 5.3.3.
[1794] CUTS (2002) 10.
[1795] CUTS (2015) at 27 and Njehu FK CUTS (2010) Competition Law in Kenya: A Snapshot Briefing Paper CUTS ARC 4.
[1796] UNCTAD (2005) 61. Box 5 Shortcomings of the Restrictive Trade Ptactices, Monopolies and Price Control Act CUTS (2015) 26.
[1797] CUTS (2002) 42 states that, "The central objective of Kenya's competition policy and law must be the promotion of long-term growth of productivity. The objective is dynamic rather than static efficiency and requires, among other things, high rates of investment. This necessitates the encouragement of investment by entrepreneurs, and the removal of entry barriers. The country requires a competition policy regime that would entail sufficient rivalry to reduce inefficiency in the corporate use of resources at the

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A UNCTAD Peer Review condensed well the shortcomings of the Restrictive Trade Practices, Monopolies and Price Control Act.[1798] The Monopolies and Prices Department was to all extents and purposes a Ministry extension particularly handicapped in tackling competition infractions where powerful vested interests, including those of government, were involved.[1799] There was no scope for the Department to engage in advocacy even in the face of virtual absence of a competition culture.[1800] Some of the sector regulators, of which there was a multitude, had parallel jurisdiction over competition matters and on occasion made erroneous decisions in which the Department could not intervene.[1801] The exemption in section 5 of the Act was too wide and had the potential to lessen competition in the economy.[1802] The level of fines that could be levied was extremely low.[1803] Only horizontal mergers were subjected to regulation yet their review was neither transparent nor subject to published time frames.[1804] The section 30 criteria for analysis of merger applications needed revision to bring it in line with the tenets of dynamic efficiency.[1805]

microeconomic level, but not so much competition that it deters the propensity to invest." Singh & Dhumale "Competition Policy, Development and Developing Countries" 1999 South Centre T.R.A.D.E. Working Papers 14 No 50 observe that it is important for developing country competition laws to emphasise dynamic rather than static efficiency as the main purpose in order to achieve fast long term economic growth. They also highlight the critical significance of maintaining the private sector's propensity toinvest at high levels and hence the need for a steady growth of profits.

[1798] UNCTAD (2005) 59-61. These are also set out in CUTS (2015) 26 at Box 5 'Shortcomings of the Restrictive Trade Practices, Monopolies and Price Control Act'. They include that the minister was not time bound in regard to issuance of an authorisation or rejection order; the enforcement process for restrictive practices was convoluted; the Minister was not obligated to publish or state reasons for his rejection of a merger application or approval of mergers with conditions; the penalty for breach prohibitions would attract a minimal fine or imprisonment not exceeding three years; and there were no provisions for advocacy and awareness creation.

[1799] CUTS (2002) 44 and Ellis & Singh (2010) 19.

[1800] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 38 and CUTS (2015) 26.

[1801] For instance a proposed merger between the Nation and Capital Groups in the media industry which was probibited on technical regulatory grounds yet it did not raise any competition concerns. See Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 41 and CUTS (2002) 44. Examples of other sector regulators at the time include the Tourism Regulatory Authority, Capital Markets Authority, Central Bank of Kenya, Insurance Regulatory Authority, Kenya Civial Aviation Authority and National Environment Management Authority.

[1802] Section 5 Restrictive Trade Monopolies and Price Control Act 1988 exempted government action and provided as follows, 'The following trade practices are exempted from the provisions of this Act (a) trade practices which are directly and necessarily associated with the exercise of exclusive or preferential trading privileges conferred on any person by an Act of Parliament or by an agency of the Government acting in accordance with authority conferred on it by an Act of Parliament; (b) trade practices which are directly and necessarily associated with the licensing of participants in certain trades and professions by agencies of the Government acting in accordance with authority conferred on them by an Act of Parliament. Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 38 is of the same opinion as UNCTAD.

[1803] UNCTAD (2005) 28. For instance for collusive tendering and collusive bidding at section 11(4) and 12(2)(2) Restrictive Trade Monopolies and Price Control Act 1988, the penalty was a fine of one hundred thousand shillings or imprisonment for a term not exceeding three years or to both. At section 27(3) consummating a merger without approval would attract imprisonment for a term not exceeding three years or a fine not exceeding two hundred thousand shillings or to both. In comparison, the present Act provides for a penalty of imprisonment for five years or a penalty of ten million shillings or both at sections 23(3), 29(8), 42(5) and 47(4) among others. See also CUTS (2015) 26.

[1804] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 41 and Mudida et al. (2015) 38 *World Competition* at 440.

[1805] CUTS (2002) 43.

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UNCTAD recommended that the Act be replaced with a modern law based on the UNCTAD model law but taking into account the particular circumstances of the country.[1806]

Five years after the Government had appointed a Task Force to review the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 and consider a possible complete overhaul, Parliament passed the Competition Act 12 of 2010 thereby repealing the Restrictive Trade Practices, Monopolies and Price Control Act.[1807] UNCTAD's proposals were incorporated virtually to the letter.[1808] The law received Presidential Assent on 30th December 2010 coming into effect on 1st August, 2011.[1809] With that, Kenya joined the league of countries that could boast of contemporary competition legislation.

5.2.4 Free markets and the Competition Act

In contrast to pervasive controls and the accompanying inefficiencies and rent-seeking, Kenya's economic status at the close of the first decade of the 20th century was something of a revolution.[1810] There was fresh competition legislation to go with this new era. The 2010 Competition Act created enforcement institutions with the wherewithal to promote and safeguard competition and adequately address the weaknesses of the erstwhile law. This coupled with prevailing political and business goodwill bode well for competition law enforcement.

The 2010 Competition Act is in all ways a modern competition statute, borrowing extensively from legislation and experience of other jurisdictions, and displaying a strong orientation toward the promotion of economic efficiency.[1811] Somewhat differently from the norm, the Act is a composite one containing competition law and consumer protection provisions enforceable by one national competition agency. Internationally, Australia and

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[1806] UNCTAD (2005) 62. UNCTAD provides a model competition law template with substantive possible elements for a competition legislation. The Model Law is made up of two parts: Part 1 is a permanent guide and is not subject to revision whereas Part 2 is revised regularly. Available at https://unctad.org/en/Docs/tdrbpconf7d8_en.pdf (accessed 3/2/2020.

[1807] Task Force to Review Competition Law *The Kenya Gazette* Gazette Notice No. 3692 of 20 May 2005 Nairobi: Government Printer available https://gazettes.africa/archive/ke/2005/ke-government-gazette-dated-2005-05-20-no-35.pdf (accessed 31/09/2020)..

[1808] UNCTAD (2005) 61-73.

[1809] Act Number 10 of 2010 Cap 504. Date of assent:30th December 2010. Effective 1 August 2011.

[1810] UNCTAD (2005) 7.

[1811] Mudida et al. (2015) 38 *World Competition* 437 at 444.

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Ireland have similar hybrid legislation.[1812] Older African jurisdictions such as Zimbabwe and South Africa have legislation dedicated to competition law only.[1813] Later entrants, especially those that UNCTAD lent a hand, have hybrid legislation similar Kenya's.[1814] The merits or otherwise of that choice are beyond the scope of this thesis. Suffice it to state for now that combining consumer protection and competition law in one legislative framework does raise significant concerns, some of which Kenyan law makers pointed out in debate over the Bill.[1815]

The 2010 Competition Act covers the archetypal set of anticompetitive conduct, and creates two institutions for enforcement - a Competition Authority and Competition Tribunal. The Authority is an independent body, in the language of the Act, tasked to "perform its functions and exercise its powers independently and impartially without fear or favour".[1816] It is constituted by 10 persons, 3 of whom are nominees of various government departments and 7 of whom are appointed by the Minister subject to a process of vetting by parliament.[1817] Autonomy of the Authority did raise concern on the floor of the House. Reservations were expressed about its effectiveness in checking government excesses given that three of its members would be representatives of various government departments and the rest appointees of the Minister.[1818] The response to these concerns was that the qualifications for membership to the board, specifically the requirement of expertise and experience in competition and consumer welfare matters, would moderate the Minister's discretion.[1819] Vetting by Parliament would avail the other safeguard. So far, the agency has given no reason to doubt its independence but the risk

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[1812] Australia Competition and Consumer Act 2010 and Ireland Competition and Consumer Protection Act 2014.
[1813] 1998 Competition Act and Zimbabwe Competition Act 1996 and 1998 Competition Act.
[1814] For instance Rwanda Competition and Consumer Protection Act of 2012 and Zambia Competition and Consumer Protection Act 24 of 2010.
[1815] Hansard (19.11.2009) 3949. It was observed that at the time of presentation of the Competition Bill before parliament, there was in place the Kenya Bureau of Standards (KEBS) dealing with consurmer protection and there was a Consumer Protection Bill also to be brought before the House. The wisdom of having three Acts of Parliament on the same subject of consumer protection was questioned. Mudida et al. (2015) 38 *World Competition* 438 and 444 in one of the earliest comprehensive writings on Kenya's competition law observes that consumer protection provisions of the Act deservea separate treatment. They do not feature in his article titled 'Kenya's New Competition Policy Regime'.
[1816] Section 7(2) 2010 Competition Act.
[1817] Section 10 2010 Competition Act. Members of the Authority include representatives from the ministries responsible for finance and trade, a representative of the Attorney-General and seven other persons to be appointed by the Minister and who should be experienced in competition and at least one should be experienced in consumer welfare matters.
[1818] Hansard (19.11.2009) 3952 concern on the independence was raised on account of appointment by the Minister. It was felt that the Authority would be equivalent to a government department much like the Commission that preceded it. See also at 3956 and 3957 for reiteration of this point by different legislators.
[1819] Hansard above at 3960.

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of abuse of discretion cannot be said to be entirely eliminated. The Authority has a broad reach and is able to investigate, prosecute and adjudicate as well as carry out research and advocacy initiatives.[1820]

Appeals from decisions of the Authority lie with a Competition Tribunal made up of a Chair and not less than 2 but not more than 4 other members, all appointed by the Minister.[1821] It may either determine petitions substantively or exercise powers of review and refer matters back to the Authority for re-consideration.[1822] It was expected that with an empowered Authority, there would be more cases for the Tribunal to be more engaged than its predecessor.[1823] It has not entirely turned out that way. The Tribunal has heard two matters to conclusion, one on mergers and the other on restrictive trade practices.[1824] With regard to mergers, the low activity at the Tribunal may be directly attributable to the fact that no merger has so far been declined by the Authority. Indeed, the one appeal heard and concluded related only to the conditions imposed by the Authority for merger approval. The non-involvement of intervenors who could contest approvals at the Tribunal has also meant less likelihood of appeals. Only parties that the order of the Commission is directed at, meaning the merging parties, may file an appeal.[1825] That all mergers, regardless of size, are from the beginning to the end purely the mandate of the Authority, also takes away the opportunity to have its decisions reconsidered as happens with intermediate and large mergers in South Africa.[1826] A second tier for most crucial matters, if it were in place, would avail work for the Tribunal but more importantly make possible creation, expansion and refinement of jurisprudence.[1827] We think that there is sound reason to consider changes to that effect, otherwise the country is likely to continue facing a dearth of recorded competition law jurisprudence.

[1820] Section 9 2010 Competition Act is quite broad given the hybrid nature of the Act. Out of 14 functions only 2 refer to uniquely consumer protection outcomes, giving the Act a definite leaning towards competition matters.
[1821] Section 71 2010 Competition Act.
[1822] Sections 74(3) and 75 2010 Competition Act.
[1823] Hansard (19.11.2009) 3958 and 3959.
[1824] *East Africa Tea Trade Association v Competition Authority of Kenya* CT/001 of 2017 and *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[1825] Section 73(c) 2010 Competition Act.
[1826] Chapter 4 par 4.2.6. Sections 26 and 27 1998 Competition Act provide for establishment and functions of the South African Competition Tribunal respectively. For classification of mergers and specific institution responsible see sections 13, 13A and 14A 1998 Competition Act.
[1827] On large merger proceedings see section 14A 1998 Competition Act and appellate jurisdiction of the Tribunal section 16 1998 Competition Act.

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Appeals from decisions of the Tribunal go to the High Court.[1828] This court is a part of the judiciary in Kenya and is not a specialised tribunal for competition law.[1829] Competition law analysis has over the year increased in complexity. Modern competition litigation typically involves judicial evaluation of economic analysis and the question has been raised whether antitrust is too complicated for generalist judges. The general view held by among others the OECD, leans towards a finding that economic complexity reduces the quality of judicial findings.[1830] Gal and Fox point out that mergers especially, are a highly specialised area and in the formative stages of creating a competition culture, a risk arises that the law will be applied incorrectly in courts without the requisite expertise. This could negatively affect the ability of the competition agency to apply the law correctly in the future. Accordingly, we think it is critical that such cases be heard before a specialised court with specific knowledge of the issues that characterize competition law cases.[1831] The Act could be amended accordingly.

Part III of the Act deals with Restrictive Trade Practices and abuse of dominance. All agreements, decisions and concerted practices whose object or effect is prevention, distortion or lessening of competition are illegal unless exempted in accordance with the Act.[1832] Specific prohibited conduct includes price fixing, market allocation, collusive tendering, maintenance of minimum resale price, application of dissimilar conditions to equivalent transactions, tying and use of intellectual property rights in a manner that goes beyond the limits of what is fair, reasonable and non-discriminatory.[1833]

[1828] Sections 40(2), 49(2), 54(2) and 77 2010 Competition Act for restrictive trade practices and abuse of dominance, mergers, control of unwarranted concentration of economic power and the Authority's right to appeal respectively.
[1829] The Court is created by Article 165 Constitution of Kenya 2010. The only specialised courts at the status of the High Court in Kenya are two; those that deal with litigation on employment and labour and those dedicated to environment and land matters at Article 162(2) of the Constitution. Compare this with the South African situation at chapter 4 par 4.2.6.1. A Competition Appeals Court is created at chapter 4 of the 1998 Competition Act to hear appeals from the Competition Tribunal.
[1830] See for instance Baye MR & Wright JD "Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals" 2001 (54) *The Journal of Law & Economics* 1 at 1. An OECD Policy Round Table in 2008 found that in some jurisdictions, courts expressly conceded that the economics of competition law can be too complex to understand. Support was voiced for educating judges in economics and economic methodology in order to develop their analytical skills. Judges who may not understand the economics of the government's case may seek out some procedural resolution in order to dispose of the case in a manner that does not require them to deal with the actual substance of the case, in some. OECD (2008) "Presenting Complex Economic Theories to Judges" Policy Roundtables 2008 hereinafter OECD (2008) "Presenting Complex Economic Theories to Judges, 7 and 8 available at https://www.oecd.org/daf/competition/abuse/41776770.pdf (accessed 17/02/2020. See also generally Kaplow L "Antitrust, Law and Economics, and the Courts " (1987) (50) Law *and Contemporary Problems* 181.
[1831] Gal & Fox (2015) 32.
[1832] Section 21(1) 2010 Competition Act.
[1833] Section 21(3) 2010 Competition Act.

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Both horizontal and vertical agreements are subject to exactly the same rules, standards and procedures. Breach of either carries the same penalty.[1834] Kenya does not apply the *per se* rule at all with regard to restrictive trade practices. While the inclination today is in favour of the rule of reason,[1835] absolute abandonment of the *per se* rule fails to take into account the accepted position on the greater danger posed by horizontal, as compared to, vertical practices. Certain arrangements among competitors such as price fixing, group boycotts and tying arrangements are generally considered so harmful to competition and consumers that they deserve to be prohibited outright - hence the application of the *per se* rule on them.[1836] The 2010 Competition Act however fails to take this into account. In comparison, for South Africa under the 1998 Competition Act, price fixing, market allocation and collusive tendering are prohibited *per se* while vertical practices are subject to the rule of reason.[1837] Gal and Fox identify the ideal competition law for a developing economy as one that is tough against cartels and monopolists' use of power to heighten barriers to entry and exclude or marginalize competition.[1838] Kenya's blanket use of the rule of reason, extending it to even conduct that is generally accepted to be by design harmful to competition, is contrary to this wisdom.[1839]

The Act moves from full use of the rule of reason on restrictive practices to across-the-board use of the *per se* rule on all forms of abuse of dominance.[1840] Conduct that amounts to abuse of a dominant position includes imposing unfair purchase or selling prices or other unfair trading conditions; limiting or restricting production, market outlets or market access, predatory or other practices; applying dissimilar conditions to equivalent transactions; making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which have no connection with the subject-matter of the contract and abuse of an intellectual property right.[1841] In comparison, the South African approach in the 1998 Competition Act applies the rule of reason except for charge of excessive prices to the detriment of consumers and refusal to give a competitor access

[1834] Imprisonment for five years or a fine not exceeding 10 million shillings or both at section 22(6) 2010 Competition Act.
[1835] Chapter 2 par 2.2.2.1.
[1836] Chapter 2 par 2.2.2.1.
[1837] Sections 4(1)(a); 4(1)(b) 5(1) 1998 Competition Act. Chapter 4 par 4.2.6.
[1838] Gal & Fox (2015) 324.
[1839] Mudida et al. (2015) 38 *World Competition* 437 at 450.
[1840] Section 24(1) 2010 Competition Act.
[1841] Section 4(2) 2010 Competition Act.

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to an essential facility when it is economically feasible to do so.[1842] In determining an application for exemption, the CAK will inquire if there are exceptional and compelling reasons of public policy to merit exemption.[1843]

Amendments in January 2017 extended application of the Act to abuse of buyer power.[1844] Buyer power is defined as influence exerted by an undertaking in the position of purchaser of a product or service to either obtain from a supplier more favourable terms than would otherwise pertain or impose a long term opportunity cost including harm or withheld benefit, which, if carried out, would be significantly disproportionate to any resulting long term cost to the purchaser undertaking.[1845] Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.[1846] Impugned conduct includes delays in payment of suppliers without justifiable reason in breach of agreed terms of payment; unilateral termination or threats of termination of a commercial relationship without notice or on an unreasonably short notice period and without an objectively justifiable reason and transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the cost of a promotion of the goods or service.[1847] In establishing presence or otherwise of buyer power, the Authority takes into consideration the nature and determination of contract terms and the price paid to suppliers.[1848]

The Authority may at its discretion conduct a hearing to establish the impact of an unwarranted concentration of power which is defined as the existence of cross directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than forty per cent.[1849] An unwarranted concentration of economic power shall be deemed to be

[1842] Compare sections 8 and 9 of 1998 Competition Act. Chapter 4 par 4.2.6.
[1843] Sections 26(2) and 26 (3) 2010 Competition Act.
[1844] Competition (Amendment) Act No. 49 of 2016 which came into force through Kenya Gazette Notice No. 199 of 30 December 2016. The provisions of the Act were later amended through Competition (Amendment) Act No. 27 of 2019 which came into force on 13 January 2020 through Kenya Gazette Supplement No. 202 of 2020.
[1845] Section 2 2010 Competition Act.
[1846] Section 24A(1) 2010 Competition Act.
[1847] Section 24A(5) 2010 Competition Act.
[1848] Section 24A(4) 2010 Competition Act. The section provides that 'In determining any complaint in relation to abuse of buyer power, the Authority shall take into account all relevant circumstances, including (a) the nature and determination of contract terms between the concerned undertakings; (b) the payment requested for access to infrastructure; and (c) the price paid to suppliers.
[1849] Section 50(2) 2010 Competition Act gives the power to look into unwarranted concentrations of power and section 2 2010 Competition Act contains the definition.

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prejudicial to the public interest if, the effect would be to unreasonably increase the cost of production, supply, or distribution of goods or services; or unreasonably increase the price at which goods are sold; or the profits derived from the production, supply or distribution of goods of service; or lessen, distort, prevent or limit competition in the production, supply or distribution of any goods or service or result in an inadequacy in the production, supply or distribution of any goods or services.[1850] On completion of investigation, disposal of interests to remove the unwarranted concentration may be ordered.[1851]

Control of mergers falls in Part IV of the Act at sections 41 to 49. All mergers are notifiable, no merger may proceed without approval of the Authority.[1852] The Authority is enabled to set the threshold for excluding mergers from the requirement of notification by notice in the Gazette.[1853] The Kenyan Competition (General) Rules 2019 containing the Merger Threshold Guidelines classify merger transactions into three: full mergers, that is mergers that require full notification; exclusions, these being mergers where parties are required to make an application for exclusion from the requirement of notification; and mergers exempt from notification these being mergers that will be excluded from notification without the need for approval.[1854] The classification is dependent on the combined value of the merging firms.[1855] The third will be equivalent to small mergers in South Africa needing no notification.[1856]

A recommendation to exclude a category of mergers from notification requirements was made during the debate on the Competition Bill but was not adopted.[1857] Consequently, over inclusion presented the nascent Authority with one of its early headaches. The

[1850] Section 50 2010 Competition Act.
[1851] Section 52 2010 Competition Act.
[1852] Section 42(2) 2010 Competition Act provides that, 'No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is approved by the Authority; and implemented in accordance with any conditions attached to the approval.' Section 42(3) further provides that, 'No merger as described in section 41 carried out in the absence of an authorizing order by the Authority, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be enforceable in legal proceedings.'
[1853]Section 42(1) 2010 Competition Act.
[1854] The Competition (General) Rules, 2019 Kenya Gazette Supplement No. 191 Nairobi, Government Printer.
[1855] Rule 9 Competition (General) Rules above provides that a merger excluded pursuant to section 42(1) of the Act shall not require an authorizing order from the Authority. In determining a merger to be excluded from notification, the Authority is guided by the Merger Threshold Guidelines set out in the First Schedule of the Rules.
[1856] Chapter 4 par 4.3.2. Section 13 1998 Competition Act.
[1857] Hansard (19.11.2009) 3947, 3949 and 3950. See Government's response at 3960 where it was explained that the Authority to be formed would have power to designate mergers to be excluded from notification requirements.

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agency found itself dealing with numerous applications, the majority of which were finally anyway exempted.[1858] Merger thresholds drawn in 2013 to direct enforcement to actually deserving transactions made it possible for parties to apply for exclusion from the provisions of the Act.[1859] Nonetheless, all transactions remained subject to notification, if only to obtain exemption from further approval requirements. The vast majority of exclusion applications were granted. Of the 69 notifications in 2014, 32 were exempted; in 2015, the figure was 71 exemptions for 128 notifications and in 2016, 76 exemptions out of 131 notifications.[1860] In 2017, the Authority handled a total of 150 merger applications out of which 76 were excluded and in 2018, of the total 148 notifications, 42 mergers were adjudicated and 106 exclusions granted.[1861]

Contravention of the requirement to notify carries a criminal penalty - imprisonment for a term not exceeding five years or payment of a fine not exceeding ten million shillings, or both.[1862] The Authority may in addition levy an amount not exceeding 10% of the preceding year's gross annual turnover in Kenya of the offending undertakings.[1863] Guidance on factors to consider in coming up with penalties in specific situations are contained in the Authority's 2018 Fining and Settlement Guidelines.[1864] These Guidelines set out the principles for the determination of administrative penalties and procedure for pursuing settlements as provided for under the Act.[1865] For South Africa, these are in the Act.[1866]

[1858] Mudida et al. (2015) 38 *World Competition* at 457 and Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* 19.
[1859] Competition Authority of Kenya *Guidelines for Exclusion of Proposed Mergers from Provisions of Part IV of the Act* 1 August 2013. At Rule 5, mergers where the combined turnover of the merging parties is between one hundred million shillings and one billion shillings; in the healthcare sector, where the combined turnover of the merging parties is between fifty million shillings and five hundred million shillings; in the carbon based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger is below four billion shillings were excluded.
[1860] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 21and Annex 2 and Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* 16 and Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2016/2017* 22.
[1861] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 31 and Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2017/2018 77 and 80.*
[1862] Sections 21(9) 2010 Competition Act for restrictive practices, 24(3) for abuse of dominance, 42(5) for mergers, 54(3) for failure to abide by an order arising from unwarranted concentration power and 70 for breach of provisions relating to consumer protection.
[1863] Sections 42(6) and 36 2010 Competition Act.
[1864] Competition Authority of Kenya (2018) Fining and Settlement Guidelines 2018.
[1865] Guidelines 1 and 2. Competition Authority (2018) above.
[1866] Section 59(3) 1998 Competition Act. The Act also provides comprehensive factors that the Tribunal is bound to consider before imposing a penalty. These include the nature, duration, gravity and extent of the contravention; loss or damage suffered as a result of the contravention; the behaviour of the respondent; the market circumstances in which the contravention took place and the level of profit derived from the contravention. Sections 73(1), 73(A) and 74(a) 1998 Competition Act.

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Despite the shortcomings pointed out so far, it is not in doubt that with the passage of the 2010 Competition Act, Kenya made a major leap forward into a modern dispensation of antitrust enforcement. Effective enforcement, including in merger regulation, should serve the country's goal of sustainable development well.

5.2.5 Goals of Kenyan Competition Law

Review of competition policy was considered an essential part of Kenya's development agenda under Vision 2030. It was envisaged that a modern competition law would work alongside other regulatory frameworks to achieve free markets, promotion of the private sector and regulated market behavior.[1867] This was the impetus from which the 2010 Act sprang, in much the same way that departure from concentrated markets and ownership impelled South Africa's 1998. Competition Act[1868]

The base of the 2010 Competition Act is the goal of promotion and safeguarding of competition in the national economy.[1869] From a combined reading of the preamble and objects section, there must not only be protection of competition, but proactive promotion thereof as well.[1870] Per section 3, the object of the Act is enhancement of the welfare of the people of Kenya by promoting and protecting effective competition in order to achieve a list of eight intended ends. The Tribunal has held that the decisions of the competition agency on mergers should be filtered through section 3.[1871] These are to: increase efficiency in markets; promote innovation; maximise the efficient allocation of resources; protect consumers; create a conducive environment for investment; comply with national obligations in competition matters; bring national competition law, policy and practice in

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[1867] Mudida et al. (2015) 38 *World Competition* at 348. The speech of President Kenyatta in 2014 underscores this as follows, "As you may all be aware, we in Kenya have established a long track record of sound economic management founded on maintenance of macroeconomic stability, free markets, liberalization, deregulation, and promotion of the private sector as the engine of growth" at par 3 and While we recognize the central role of a liberalized and deregulated economy in promoting growth and reducingpoverty, we are equally aware that left to itself,a free economy may not always work as expected due to market rigidities that prevail in our economies for one reason or another." At par 6. Speech of President Uhuru Kenyatta on 9 December 2014 *Annual Competition Day* 2014 available at https://cak.go.ke/sites/default/files/2019-05/Cabinet%20Secretary%20National%20Treasury%20Speech%20at%20World%20Competition%20Day%20December%204%2C%202014.pdf (accessed 15/10/2019).

[1868] Chapter 4 pars 4.2.6 and 4.2.7.

[1869] Preamble to the Act reads 'An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes.

[1870] Under Kenyan law, the preamble and objects sections of statute are considered an extension one of the other in interpreting the purpose of the statute. *R v Council of Legal Education & Another Ex-Parte Mount Kenya University* Misc Civil Application 16 of 2016 [2016] eKLR. The objects section at section 3 uses verbs such as increase, promote and create, pointing towards addition to the current levels of efficiency, innovation and competitiveness.

[1871] Par 62 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.

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line with best international practices; and promote competitiveness of national undertakings in world markets. Of these eight outcomes, seven related to efficiency of markets, and creation of a conducive environment for trade and promotion of competitiveness of national firms.[1872] The one exception is the fourth objective which relates to consumer protection given the binary nature of the Act. According to the Tribunal, merger analysis should be aimed at achieving these outcomes.[1873]

These ends become especially pertinent viewed in the light of the preceding scenario in which private enterprise was afforded little space to thrive. It was envisaged that Kenya's 2010 Competition Act would be a "catalyst for increased competitiveness of firms".[1874] The Kenyan business arena prior to the 2010 Act was to a large extent the domain of the state. Per its objects section, the Act must be implemented in ways that engender efficiency and a conducive environment for competitive firms to exist and operate. Efficiency matters and should drive enforcement.[1875] The aspiration is that Kenya's competition law will be in line with "best international practices'.[1876]

Public interest goals are not included early in the Act, as is the case with South Africa.[1877] The only exception is promotion of competitiveness of national undertakings which is set out at section 3(h).[1878] That the only public interest consideration in the objects section of the 2010 Competition Act still relates to competitiveness of market players speaks volumes of the intended prioritisation in enforcement. Like with the South African Competition Act of 1998, public interest considerations are a prominent part of merger review where the agency may consider, along with efficiency-related concerns, the effect of a proposed merger on a particular industrial sector or region, employment, the ability of small undertakings to be competitive and ability of national industries to compete in international markets.[1879] The mandate of the CAK, set out in great detail in section 9, is

[1872] Section 3(d) 2010 Competition Act relates to consumer protection which we are not addressing here.
[1873] Par 62 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[1874] Hansard (19.11.2009) 3840.
[1875] It is noteworthy that all except one of the outcomes at section 3 relate to various aspects of market efficiency. Peripheral objectives such as as protecting small business are not included. This makes a strong statement about the importance of market efficiency to guide the enforecement of the law. See Mudida et al. (2015) 38 *World Competition* at 447.
[1876] Section 3(h) 2010 Competition Act.
[1877] Chapter 4 par 4.2.7
[1878] Chapter 4 par 4.2.7.
[1879] Sections 46(d)-(g) 2010 Competition Act.

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additionally instructive. The agency is obliged to *inter alia* study government policies, procedures, programmes, legislation and proposals so as to assess their effects on competition; investigate policies, procedures and programmes of regulatory authorities to assess their effects on competition; participate in deliberations and proceedings of government, commissions, regulatory authorities and other bodies in relation to competition; make representations to government, regulatory authorities and other bodies on matters relating to competition and advise the government on matters relating to competition. There is in the tenor of the section a determined turnabout from the prior state of affairs where policy paid lip service to competitiveness of markets.

Parliament's debate on the Competition Bill reveals in vivid detail the matters that were at the heart of the drive for the new Act.[1880] It was envisioned that the legislation would be a "catalyst for increased competitiveness of firms".[1881] Effective competition law would back the privatisation process by checking that "former public monopolies did not simply progress into private monopolies", the latter feared as more detrimental to the welfare of consumers than the former.[1882] A more open competitive environment was necessary to enable and encourage investment and the Act would support progress in that direction.[1883] Monopolies and oligopolies as well as market dominance and collusion featured prominently in the debate. The law was needed "to prevent the country from being over-ridden by dominant market players through monopolies, oligopolies or duopolies".[1884] The highly concentrated sugar and cement industries were presented as good evidence for why the country needed the law.[1885] Markets with more players would be more competitive than the prevailing situation.[1886] Reduction of prices, improved quality and variety of products, enhanced competitiveness of Kenyan companies abroad

[1880] Chapter 4 par 4.2.6.
[1881] Hansard (17.11.2009) 3840.
[1882] Hansard (19.11.2009) 3840. At 3947, the process of privatization was noted as having moved monopolies from the public to the private sector. A situation of increase of private monopolies was referred to as being "very dangerous" underlining the intention that the proposed law be applied to curb the possible monopolization of sectors of the economy.
[1883] Hansard above at 3947.
[1884] Hansard above.
[1885] Hansard (19.11.2009) 3950. See also chatper 2 par 2.3.
[1886] Hansard above at 3951

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and success of the Small and Medium Entreprises (hereafter SME) sector were expected additional benefits.[1887]

In a nutshell, the expectation was that the new law, once enforced, would produce outcomes in tandem with prevailing policy - that of growing businesses and improving trade and investment in the country.[1888] The country needed a law that could "bring about good competition, accelerate economic growth, enhance competition and attract foreign investment."[1889] This law would unleash the "positive effects of ongoing market oriented economic reforms by enhancing competition in the economy and therefore increasing firms' efficiency and innovation, with the end result of enhanced consumer welfare and protection."[1890] These statements point the high expectation placed on the intended legislation.

As previously pointed out, Kenya is an emerging economy and as such enforcement of its competition law must be suited to support the factors that contribute to economic take-off, chief among them open vibrant markets.[1891] Unobstructed competitive rivalry is indispensable for economic development as are efficient markets.[1892] That way firms are pressured to keep prices based purely on forces of demand and supply and thus competition facilitates equitable growth.[1893] In order to raise people's standards of living, a central objective of Kenya's merger policy must necessarily be the promotion of long-term growth of productivity.[1894] This necessitates encouragement of entrepreneurs' propensity to invest and removal of entry barriers.[1895]

The CAK rightly sees merger regulation as part of a forward looking proactive market structuring approach geared toward preventing anticompetitive conduct before it

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[1887] Hansard above at 3950 and 3958.
[1888] Hansard above at 3959.
[1889] Hansard above at 3947
[1890] Hansard above at 3840.
[1891] Chapter 3 par 3.2.4.
[1892] Roberts S "Competition Policy, Industrial Policy, and Corporate Conduct" in Stiglitz JE, Yifu JL and Patel E (eds.) *The Industrial Policy Revolution (*2013) 216-217.
[1893] Speech of Pres. Kenyatta 9 December 2014 *Annual Competition Day* 2014 par 14 available at http://www.cak.go.ke/images/docs/Cabinet%20Secretary%20National%20Treasury%20Speech%20-World%20Competition%20Day%202014%20(2).pdf (accessed 15/2/2020.
[1894] CUTS (2002) 10-11.
[1895] CUTS above.

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occurs.[1896] Overall, implementation of the Act should yield increased efficiency, ensure sustained innovation, create an environment conducive for investment and promote the competitiveness of national undertakings in global markets.[1897] This we dare say, is the right focus.

The quest for economic independence after gaining political independence saw Kenya develop national champions in the form of state-owned enterprises.[1898] The advent of Structural Adjustment Programmes in the 1980s gradually led to the opening up of the economy. The country has since been continuing to open up its markets and this is evident in that the private sector contributes about 80 per cent of the Country's GDP.[1899] The level of liberalisation in the country underpins the need to have competitive markets if its people are to benefit from the expected advantages of liberalisation.

5.3 SUBSTANTIVE MERGER ANALYSIS

5.3.1 Introduction

Compared to other areas, merger regulation by far makes up the larger portion of Kenya's competition law enforcement.[1900] Moreover, parties who present applications for analysis can be confident of a good ending. From the time the Authority began to operate, to mid-

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[1896] "Merger regulation as legislated in the Act entails a forward looking approach which is aimed at preventing anti-competitive conduct before it occurs. The activities that constitute regulation of market structure are provided under Part IV (control of mergers) and Part V (control of unwarranted concentration of economic power) of the Act. Kenya's merger control system provides for jurisdiction for all types of mergers (Horizontal, Conglomerate and vertical)." Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 20.

[1897] Presentation by Kariuki Wang'ombe, Director General Competition Authority of Kenya at Annual World Competition Day 9 December 2014 https://www.cak.go.ke/sites/default/files/2019-05/Director-General%27s%20Speech%20at%20the%20World%20Competition%20Day%20Commemoration%20on%20December%204%2C%202014.pdf (accessed 13/05/2020) par 5 underscores this as follows, ". . . effective competitionregulation is expected to enhance our welfare, as the citizens of Kenya. This is because it is expected to lead to increased efficiency in the production, distribution and supply of goods and services; ensure sustained innovation; create an environment conducive for investment and promote the competitiveness of our national undertakings in the global markets".

[1898] An example is the The Kenya Meat Commission formed in 1950 through the Kenya Meat Commission Act, Cap 363 Laws of Kenya with the objective of providing a ready market for local livestock farmers and providing meat products to consumers. The Kenya Wine Agency Limited incorporated in 1969 with the objective of consolidating importation and distribution of wines and spirtis from foreign owned companies and enable indigenous Kenyans take control the importation and distribution of wines and spirits in the country from hitherto foreign owned companies. The agency retained a monopoly status in manufacturing and distribution of wines and spirits until liberalization of the economy in 1992/1993.

[1899] CUTS (2015) 3.

[1900] In 2013, the Authority handled 65 merger notifications, 17 restrictive trade practices cases and 6 consumer complaints respectively. Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013* Annex 2 at 46-47; in 2014, the Authority analysed 148 merger notifications and finalized 88 merger applications, 17 restrictive trade practices cases 2 exemptions and 14 consumer cases - Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014 at* v; in 2015 there were 148 mergers as against 19 restrictive trade matters Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* at 21 and 24 and in 2016 there were 151 merger notifications against 27 restrictive trade matters and 66 consumer matters Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* . In 2017, 150 merger notifications were presented as against (22) restrictive trade practices cases - Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017;* and in 2018, 148 merger notifications, 26 restrictive practice cases and 100 consumer complaints. Appendices I-III at 68 to 73, Appendices VI and VIIat 77 and Appendix 9 at 90 respectively Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2017/2018.*

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2020, 801 merger applications have been considered and all have been granted; either fully or subject to conditions.[1901] This translates to an approval rate of 100 per cent, way above what is typical. The United States for all its benevolence towards the business of merging averages 95 per cent approval, South Africa 96 per cent.[1902]

While it is not in dispute that mergers and acquisitions are generally innocuous, by no means are they entirely so. For a start, horizontal mergers reduce the number of rivals in the market and increase concentration by simple aggregation without more.[1903] Not to mention that claimed efficiency benefits often turn out to be no more than "hazy chimeras".[1904] That said, one must appreciate the place of Kenya's competition enforcement. Developing country agencies are faced with singularly difficult economic realities in adjudicating mergers and acquisitions. A proposal for a takeover may be presented relating to a failing undertaking that no other competitor is interested in picking up. Given the want of investable capital and dismally low levels of employment common in these jurisdictions, the agency is confronted with a difficult choice. Approval is the only constructive option if jobs are to be saved and expensive assets saved from going to waste. Never mind that all indicators point to a high likelihood of reduced competition or creation of a dominant firm. Thus is approved a transaction which in a different setting, would not have seen the light of day.[1905]

The above scenario very closely represents CAK's terrain. One where common sense dictates that unions with the potential for efficiency be looked upon favourably with an eye on the larger picture of an economy requiring bigger, better resourced and more efficient undertakings for take-off. At the same time, public interest considerations are critical to decision making. To prevent job losses - the most proximate and, in a developing country, most socially reprehensible consequence of mergers - employment related conditions are

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[1901] Competition Authority of Kenya (2017) *The Competition Authority of Kenya Strategic Plan 2017/2018 – 2020/2021* at 9 and Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2017/2018 35* for merges concluded between June 2017 and June 2018; Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2018/2019* 9 for mergers concluded between July 2018 and June 2019 and Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2019/2020 53* for mergers concluded between July 2018 and June 2019.
[1902] Chapter 2 par 2.2.3 and chapter 4 par 4.3.2.
[1903] Chapter 2 par 2.2.3.
[1904] Lewis (2013) 112-113; chapter 2 par 2.2.2 and chapter 4 par 4.3.4.
[1905] Njoroge PM 'Enforcement of Competition Policy and Law in Kenya including Case Studies in the Areas of Mergers and Takeovers, Prevention of Possible Future Abuse of Dominance and Collusion/ Price Fixing' Monopolies and and Price Commission (2004) 141-142.

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commonly imposed for approvals.[1906] The Authority seeks to prescribe conditions so that a merger that poses competition and/or public interest concerns can become compatible with Kenya's goals for its competition policy.[1907]

There is also the likelihood that the high approval rates are part of a strategy to make a clean break with the past by giving private enterprises free rein to maneuver and become more profitable. If the preferred tool of choice be a merger, the agency will not be the one to stand in the way. Increasingly globalized markets also require agencies to enforce the law in ways that do not deter foreign direct investment.[1908] Kenya's merger analysis must be such that it positions the country in the radar of investment destinations of choice.

What follows is an in-depth scrutiny of the merger analysis regime under section 46(2) of the 2010 Competition Act. We will examine how well the exercise serves the ends of the jurisdiction as laid down in the Act and as declared by the drafters of the law. We also assess how well it aligns to the design recommended for the developing country established earlier.[1909] Alongside that, we will carry out a comparison with South Africa's merger analysis framework and approach to ascertain areas of departure and convergence and make reasoned recommendations.

5.3.2 Overview of Merger Regulation under Competitition Act 2010

A merger occurs when one or more undertakings directly or indirectly acquires or establishes control over the whole or part of the business of another undertaking.[1910] This definition at section 41(1) of the 2010 Competition Act, similar entirely to that of South Africa's 1998 Competition Act, marks an improvement from that of the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 for which only horizontal mergers

[1906] See par 5.3.4 below. As a recent example, The Proposed Merger between Commercial Bank Of Africa Limited and Nic Group Plc approved in 2019 which created the second largest bank in the Country was approved subject to none of the 1,872 employees of the joint entity being declared redundant for a period of 12 months from the date of closing of the transaction in Kenya. Par 20 The Proposed Merger between Commercial Bank Of Africa Limited and Nic Group Plc available at https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decision_on_Proposed_Merger_between_Commercial_Bank_of_Africa_Limited_and_NIC_Group_Plc%20%281%29.pdf (accessed 3/2/2020).

[1907] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 227.

[1908] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report & Financial Statements for the Financial Year 2017/2018* 23.

[1909] Chapter 3 par 3.3.2.

[1910] Sections 41(1) and 12(1)(a) 2010 Competition Act.

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mattered.[1911] The "substantially similar test" of the preceding Act, though providing a clear narrow threshold for enforcement, overlooked the potential of anticompetitive outcomes from vertical and conglomerate mergers.[1912]

The relevant provisions on notification and the considerations in analysing a merger are captured in sections 43 and 46 of the 2010 Competition Act and provide as follows:

43. Notice to be given to Authority of proposed merger

"(1) Where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.

(2) The Authority may, within thirty days of the date of receipt of the notification under subsection (1), request such further information in writing from any one or more of the undertakings concerned."

46. Determination of proposed merger

"(1) In making a determination in relation to a proposed merger, the Authority may either—(a) give approval for the implementation of the merger;

(b) decline to give approval for the implementation of the merger; or

(c) give approval for the implementation of the merger with conditions.

(2) The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including—

(a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services;

(b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed

[1911] Chapter 4 par 4.3.2.
[1912] Above par 5.2.3. See also chapter 2 par 2.2.3 for anticompetitive effects of conglomerate and vertical mergers.

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merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

(c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;

(d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;

(e) the extent to which the proposed merger would be likely to affect employment;

(f) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;

(g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and

(h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets."

Each undertaking to a proposed merger must notify the Authority of the proposal.[1913] No person may implement a proposed merger unless it is approved by the Authority and implemented in accordance with any conditions attached to the approval.[1914] A merger carried out in the absence of an authorising order by the Authority has no legal effect.[1915] Unlike in South Africa, the obligation to notify does not extend to notification of unions or employees of the merging firms, or to any other party.[1916] This is different from the case

[1913] Sections 43(1) 2010 Competition Act provides that 'Where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner' and section 42(2) that 'No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is (a) approved by the Authority; and (b) implemented in accordance with any conditions attached to the approval.' At section 43(3)(3), 'No merger as described in section 41 carried out in the absence of an authorizing order by the Authority, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be enforceable in legal proceedings.'
[1914] Section 42(2) 2010 Competition Act.
[1915] Section 43(3) 2010 Competition Act.
[1916] Chapter 4 par 4.3.2. The relevanta provisions are at sections 13A(2) and 13B(2) 1998 Competition Act.

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in South Africa, where the relevant Minister may participate as a party in any intermediate or large merger proceedings before the Commission, Tribunal or Competition Appeal Court.[1917] In a further reinforcement of the narrow scope of parties that may participate in merger proceedings, the Authority, where it establishes that a hearing conference will be necessary, is obligated to give notice only to the merging undertakings.[1918]

Any person not a party to a proposed merger may submit evidence in respect of the merger to an investigator appointed by the Authority or to the Authority itself.[1919] But it is not clear how such a person will have become aware of the existence of the application in the absence of a formal obligation on the merging parties to notify anyone other than the agency. The Authority does not have to, and so far has not, alerted the public to the existence of any merger applications. Such information tends to come through from the press and only for those mergers that the media deems will draw readership.

Without an obligation under the Act for merging parties to inform any parties other than the Authority, merger hearings as a matter of course have all proceeded without the involvement of objectors. This brings to mind the confidential *ex parte* merger proceedings under South Africa's 1979 Maintenance and Promotion of Competition Act.[1920] As Lewis observes, without the benefit of discovery, cross-examination or even just the mere presence of opponents, "it is impossible with mergers to know whether or not a large bluff is being perpetrated".[1921] Non-involvement of would be challengers in any decision-making undeniably increases the chances of a favourable outcome for the applicants. In view of this, we would recommend that there be a requirement to notify stakeholders - at the very least employees or their unions like under South Africa's 1998 Competition Act. It is noteworthy that section 48 of the Act requires the Tribunal to call for

[1917] Section 13B(3) 1998 Competition Act. The Minister of Trade and Industry has the right to make representations on public interest grounds where there is a material interest on the part of the government. See sections 18 and 53 1998 Competition Act.

[1918] Section 45(2) 2010 Competition Act reads as follows, 'If the Authority determines that a conference is necessary, it shall, before expiry of the period referred to in section 44(1) or (2) as the case may be, give reasonable notice to the undertakings involved in writing'. This clearly limits any such notice to the merging parties, since these are the parties that the preceding sections envisage. Also see with regard to appointment of an investigator ast section 46(3) 1998 Competition Act where'For the purpose of considering a proposed merger, the Authority may refer the particulars of the proposed merger to an investigator, who may include an employee of the Authority or any other suitable person, for investigation and a report in relation to the criteria referred to in subsection (2), and shall inform the undertakings involved of such referral.' Again the limitation is to the merging undertakings.

[1919] Section 43(5) 2010 Competition Act. Compare with section 13B(3) 1998 Competition Act.

[1920] Chapter 4 par 4.2.5.

[1921] Lewis (2013) 21. Lewis observes of the 1979 Maintenance and Promotion of Competition Act system where most merger hearings were conducted under conditions of secrecy as being 'ineluctably skewed in favour of those seeking a favourable merger decision from the Board." Lewis (2013) 17.

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public input in the event of an appeal. We find that the inclusion of third parties here, while useful, comes in a little too late and at the point where the matters at hand are more complex. It would yield more if their input was received at the first instance and not on appeal.

Once notified, substantive analysis of a proposed merger follows under section 46(2) of the 2010 Competition Act. The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including a list of eight criteria set out in the section. These are: "the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or provision of any service or to endanger the continuity of supplies or services; the extent to which the proposed merger would be likely to result in any undertaking acquiring or strengthening a dominant position in a market and the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment likely to result from any undertaking acquiring or strengthening a dominant position in a market; the extent to which the proposed merger would be likely to affect a particular industrial sector or region; employment; the ability of small undertakings to gain access to or to be competitive in any market; the ability of national industries to compete in international markets; and finally any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets." The list in section 46(2) is not a numerus clausus.

The Tribunal has held that there must be a finding of "substantial" lessening of competition, and not simply a lessening of competition.[1922] Furthermore, that pre-empting market outcomes is not the business of a competition agency. The exercise of merger analysis should not be used to organise markets which, as far as possible, should be left to self-correct.[1923]

[1922] Pars 107-112 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[1923] Pars 124-125 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.

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As established previously, two legal tests are generally applied in analysis of mergers - the Substantial Lessening of Competition test and the Market Dominance test .[1924] In some cases, both are employed. A competition law regime could indicate the creation or strengthening of a dominant position as the way in which effective competition may be impeded, thus combining both substantial lessening of competition and dominance in a hybrid test.[1925] Normally, though, the hybrid test is viewed as being nearly identical to the substantial lessening of competition-test and is treated as such.[1926] Public interest considerations may be invoked in merger analysis, normally as an integral part of the primary test, or as a means by which an otherwise anticompetitive merger might be allowed to proceed.[1927]

Kenya's scheme for merger analysis cannot be placed into any of the two mainstream models with ease. The Act does not sanction any competitive effects test against which to determine the fate of a merger application - neither the substantial lessening of competition-test nor the dominance test. Instead, it provides that the Authority may base its determination on any criteria which it considers relevant to the circumstances, including the eight listed at section 46(2) as indicated above. The first of these, in section 46(2)(a), relates to the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade - alluding to the substantial lessening of competition-test.[1928] The next, in section 46(2)(b), is effectively the dominance test.[1929] The sub-section provides that the Authority may consider the extent to which the proposed merger would be likely to result in an undertaking acquiring or strengthening a dominant position in a market. Sections 46(2)(a) and 46(2)(b) each stand as a separate and conclusive consideration, with neither being couched as the substantive test. The next six criteria are a combination of public interest considerations and possible efficiency

[1924] Chapter 1 par 1.2 and chapter 2 par 2.2.4.
[1925] Chapter 1 par 1.2 and chapter 2 par 2.2.4.
[1926] Chapter 1 par 1.2. See also generally generally OECD (2010) Standard for Merger Review. The European Union is considered as applying SLC.
[1927] As is the case with South Africa at chapter 4 par 4.3.5.
[1928] Section 46(2)(a) 2010 Competition Act ". . . the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services.'
[1929] Section 46(2)(b) 1998 Competition Act '. . . the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market.'

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benefits. Sections 46(2)(c)[1930] and (h)[1931] contain the efficiency considerations while the remaining four in sections 46(d), (e), (f) and (g) are public interest considerations.[1932]

There is no general consensus concerning overall superiority of either the substantial lessening of competition-test or the dominance test.[1933] Some postulate that the two have the same effect and the application of either generally produces approximately convergent results.[1934] Both tests require assessment of the consequences of a merger on competition and prohibit mergers that create or enhance market power.[1935] While some argue that there is not much difference in results between the two, others are of the view that there is in fact a difference such that the assessment of certain situations could lead to different outcomes depending on the test used.[1936] They argue that while it is not in doubt that the substantial lessening of competition-test can cover both unilateral and coordinated effects, the capacity of the dominance test to do so is dependent on how the notion of dominance is interpreted and mergers leading to potentially anticompetitive unilateral effects could escape scrutiny under the latter test.[1937] This argument explains why many jurisdictions have changed and others are moving their legal analysis standard from dominance and hybrid tests to a pure substantial lessening of competition-standard.[1938] The substantial lessening of competition-test is also thought to have the benefit of focusing attention towards the core objective of protecting competition.[1939]

[1930] Section 46(2)(c) 1998 Competition Act '. . . the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market.'
[1931] Section 46(2)(h) 1998 Competition Act '. . . any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets.'
[1932] Section 46(2)(d) 1998 Competition Act '. . . the extent to which the proposed merger would be likely to affect a particular industrial sector or region.' Section 46(2)(e) '. . . the extent to which the proposed merger would be likely to affect employment.' Section 46(2)(f) '. . . the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market' and section 46(2)(g) '. . . the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets'.
[1933] Chapter 1 par 1.2 and chapter 2 par 2.2.4. Statistics and studies suggest that in fact there is generally little difference in the outcome of merger reviews conducted in multiple jurisdictions that apply different tests. Clarke in Duns et al. (eds.) (2015) 182; and Whish in Rowley (ed.) (2001) 102.
[1934] Chapter 2 par 2.2.4.
[1935] Cseres KJ *Competition Law and Consumer Protection* (2005) 134.
[1936] Heimler argues that whichever test is applied will produce the same result (2008) 4(1) *European Competition Journal* 85 at 90 which Roller & La Mano agree with. Roller & La Mano (2006)(2)1 *European Competition Journal* 9 at 27. See also hereinafter OECD (2009) Competition Policy and the Informal Economy 7. Compare with Monti LSE Legal Studies Working Paper 2008 5-7. Available at https://ssrn.com/abstract=1153661 (accessed 10/03/2019).
[1937] Monti LSE Legal Studies Working Paper 2008 at 7 and 8. Available at https://ssrn.com/abstract=1153661 (accessed 10/03/2019).
[1938] By way of example, South Africa moved its merger regulation from the hybrid test under the Maintenance and Promotion of Competition Act Act 96 of 1979 to the currently applied SLC, Australia moved from dominance test to SLC 494 Trade Practices Legislation Amendment Act (1992).
[1939] Duns et al. (eds.) (2015) 181.

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Whichever the choice, Whish and Bailey point out that any fitting system of merger control must set a substantive test against which to determine whether a particular merger should be modified or prohibited.[1940] That test serves as the cornerstone of the merger control regimen, drawing a clear line between transactions that will make the cut and those that will not; those that will be given a second look and those that fail at the starting line.[1941] As indicated in Chapter Four, South Africa applies the substantial lessening of competition-test.[1942] 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 a set of factors set out in section 12A(1) of the 1998 Competition Act.[1943]

There is however a partiality in the CAK's Merger Guidelines for substantial lessening of competition as the measure of acceptability for mergers.[1944] The Authority applies "the dominance test within the analytical framework of the substantial prevention or lessening of competition test."[1945] In its determination of mergers, the Authority applies a competition test and a public interest test. The first focusas on economic efficiency and consumer benefit issues. Here the Authority reviews the transaction to see "whether it is likely to lead to a substantial lessening of competition which may be manifested through unilateral or coordinated effects.[1946] Though the two "interrelated tests" are taken into account, the ultimate measure is prevention or lessening of competition.[1947] Kenya should however consider moving to a clear test if for nothing else, for the sake of certainty.

[1940] Whish & Bailey Competition Law (2018) 822.
[1941] Malinauskaite J *Merger Control in Post-Communist Countries: EC Merger Regulation in Small Market Economies* (2011) at 3.6.2.
[1942] Malinauskaite above at 4.3.2.
[1943] Section 12A(1) 2010 Competition Act.
[1944] See for instance Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 42 and 215.
[1945] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 5. The paragraph clarifies that this will entail assessing the unilateral effects of a merger which is akin to assessing whether the merger will create or strengthen a dominant position held by one or more undertakings in a market in Kenya or a substantial part of Kenya. The market share threshold for assessing dominance will be consistent with the definition of dominance under section 23 of the Act."
[1946] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 41. See also par 215.
[1947] Competition Authority of Kenya above at pars 41 and 42. Par 42 brings out emphasis on the substantive lessening of competition by providing that "The applicable competitive effects test is whether proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. *These tests are interrelated as prevention or lessening of competition* results only from mergers that are likely to create, maintain or enhance the ability of the merged undertaking, unilaterally or in coordination with other undertakings, to exercise market power. The Authority recognises that mergers involving parties in competition with each other may prevent or lessen of competition in a market. However, *the mergers that are likely to raise concerns are those that substantially or adversely affect competition* by creating, maintaining or enhancing the ability of the merged undertaking, unilaterally or in coordination with other undertakings, to exercise market power

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Importantly focus on a specific test would enable the agency, Tribunal and courts to rely on international decisions which by virtue of longer practice are going to be more developed than what we have.[1948] Consideration should therefore be given to collapsing sections 46(2)(a) and (b) into a clear substantial lessening of competition-test.

In addition to the absence of a singular legal test from which to launch, Kenya's merger analysis differs from South Africa's in yet another way. Section 46(2) of the 2010 Competition Act provides an open list of eight factors not tiered or arranged in any particular order of progression or priority. One is at liberty to start at any point and move in any direction as long as the analysis remains within the confines of the section. In contrast, South Africa's Competition Act at section 12(A) provides levels of analysis as is the common practice.[1949] In terms of the South African approach it must be determined whether a merger is likely to substantially prevent or lessen competition. If concerns arise at this step, there must follow appraisal of any efficiency benefits that could result from the problematic merger and assessment whether the merger can or cannot be justified on substantial public interest grounds. Regardless of the results so far, it must finally be considered whether the merger can or cannot be justified on substantial specified public interest grounds. Even in the absence of agreement whether these levels are two or three, there is consensus on the existence of an analytical progression that must be adhered to.[1950] We consider that incorporation of a systematic progression for Kenya's merger analysis would go a long way in creating clarity and streamlining enforcement.

The third criterion at section 46(2)(c) of the 2010 Competition Act is consideration if relevant, of "the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment . . . likely to result from any undertaking . . . acquiring . . . or strengthening a dominant position in a market". What "benefit to the

[1948] OECD (2010) Standard for Merger Review 221.
[1949] Chapter 4 par 4.3.2. See also Art 26 COMESA Competition Regulations 2004; East African Community Competition Act 2006 Section 13(1) and Tanzania Fair Competition Act 2003, section 11(1)(1).
[1950] Chapter 4 par 4.3.2. Some see the process as having three steps and others see two. For the former which is the more accepted view, three separate but interrelated inquiries are carried out. First, a determination of whether a merger is likely to substantially prevent or lessen competition followed by if necessary appraisal of any efficiency benefits that could result from a problematic merger and assessment whether the merger can or cannot be justified on substantial public interest ground and finally consideration whether the merger can or cannot be justified on substantial specified public interest grounds. The latter is considered as the Act mandating an initial examination of the transaction within a 'traditional consumer welfare standard' followed by further testing of that finding in a broader inquiry for efficiency gains and public interest considerations.

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public" denotes is unclear and the Guidelines do not address themselves to a definition. Further, the "benefit to the public" will only matter for mergers that create or strengthen dominance, not for those that substantially reduce or eliminate competition. The presence of detailed public record of CAK decisions where "dominance creating" mergers were assessed would have helped to give clarity to this point. In the absence of such records, the only reasonable conclusion for us to make is that this provision was intended as a catch-all to cater for any benefits that cannot fit neatly into the efficiency consideration at section 46(2)(h). This latter section, which is clearly a consideration of efficiency benefits, requires the Authority to take into account any benefits likely to be derived from the proposed merger "relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets." In our opinion, section 46(2)(c) serves no useful purpose given the completeness of section 46(2)(h). We would recommend either its removal or clarification and zeroing in to those benefits to the public that would count. As it is, the provision is a wide open highway which does not augur well for enforcement.

The list of public interest considerations in the 2010 Competition Act is open, unlike that of the South African Competition Act.[1951] The Authority may take into account other public interest considerations beyond the four listed in section 46(2)(d) to (g). Discretion over what else is fit for inclusion is left to the competition agency which has shown an inclination towards elasticity. As an example, the impact of a merger on the poor, encouraging plurality, diversity and local production and salvaging of dormant or failing firms are all relevant public interest considerations under the Guidelines.[1952] This is not to say that these additions are in any way unmerited. After all, while markets that operate well reward efficiency and innovation, spread wealth and decentralise economic power, this is not always the case in unequal societies. Hence inclusion of non-economic goals in competition law.[1953] Fox, Bakhoum and Lianos recommend that mergers impacting informal sectors as well as those that have a significant impact on the poor receive special

[1951] Found at section 12A(3) 1998 Competition Act. See at Chapter 4 pars 4.3.2 and 4.3.5.
[1952] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 213, 240 and 242.
[1953] Chapter 3 par 3.3.2.

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attention.[1954] Given Kenya's economic landscape, we think that the focus on the poor is well advised.[1955]

While elasticity gives the CAK the ability to adjust merger analysis to fit the country's economic landscape, there is a need for caution. Public interest considerations could come in myriad shades and there is wisdom in delimiting those identified as most apposite for a jurisdiction. Section 12(A)(3) of the 1998 Competition Act does that for South Africa. Even the most morally worthy of concerns, as long as they are not within the boundaries of the sub-section, will not be taken into account.[1956] Unlike South Africa, Kenya did not have the benefit of a rigorous process wherein the matter of public interest consideration inclusion was interrogated and painstakingly selected concerns for inclusion in the Act settled on.[1957] We would recommend an amendment to the Act to restrict public interest considerations to the four the draftsman found fit to include and the three so far added by CAK in its Guidelines to wit, impact of a merger on the poor, encouraging plurality, diversity and local production and salvaging of dormant or failing firms.[1958] The list can be re-opened if and when necessary but any adjustments should be effected only through a judicious and rigorous exercise.

The CAK's Merger Guidelines divide merger analysis into a competition test and a public interest test.[1959] The competition test is conducted first. The public interest test assessment is separate but complementary and enables the Authority to ascertain whether a merger would have a substantial negative effect on public interest or conflict with stated government policies such as employment stability and growth of small

[1954] Chapter 3.3.2. Bakhoum recommends that agriculture and informal sectors receive special attention; Bakhoum in Gal et al. (ed.) (2015) 177, while Lianos and Fox recommend focus on sectors that affect the poor such as health care in Lianos et al. in Sokol et al. (eds.) (2013) 50 and Fox EM "Imagine: Pro-Poor (er) Competition Law: The role of competition law and policy in helping to empower the poorer populations of the world. OECD Roundtable on: The Impact of Cartels on the Poor" 2 July 2013 at 4.
[1955] Though poverty in Kenya is below the sub-Saharan Africa average and is amongst the lowest in the Eastern Africa, it is approximately twice as high the average for countrys in its middle-income group. In a poverty assessment of Kenya carried out by the World Bank in 2018, the proportion of the population living beneath the national poverty line stood at 36.1 per cent in 2015/16. Poverty under the international poverty line of US$ 1.90 a day was 36.8 per cent in 2015/16. Figure 1a, Figure 1b and Figure 1c. Pape & Mejia-Mantilla (2018) Kenya Poverty and Gender Assessment 2015-2016: Reflecting on a Decade of Progress and the Road Ahead available at http://documents.worldbank.org/curated/en/905491550155961925/Kenya-Poverty-and-Gender-Assessment-2015-2016-Reflecting-on-a-Decade-of-Progress-and-the-Road-Ahead (accessed 23/1/2020.
[1956] Chapter 4 par 4.3.5.
[1957] Chapter 4 pars 4.3.5 and 4.2.6.
[1958] Compare progress to the 1998 Competition Act at chapter 4 par 4.2.5 and 4.2.6 and progress to 2010 Competition Act at pars 5.2.3 and 5.2.4 above.
[1959] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 4, 41 and 215.

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businesses.[1960] It is carried out regardless of the outcome of the competition assessment and just like with South Africa, a merger that raises no competition concerns may be prohibited on public interest grounds and one that does raise competition concerns may be passed on public interest grounds.[1961] The Authority uses a "balancing approach" while ensuring that "merger specificity" is maintained.[1962] The Guidelines which contain this procedure are not a legal document and the Authority has discretion start off with either the competition test or the public interest test.[1963] This further supports our recommendation that some sort of analytical progression should be incorporated into section 46(2) and a substantive legal test adopted. If for nothing else, for certainty and consistency of application. The Guidelines should exist only to flesh out content already captured in the Act.

The competition test is focused on "economic efficiency and consumer benefits issues".[1964] The applicable competitive test is whether the proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. These two effects tests are treated as interrelated as "prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged undertaking, unilaterally or in coordination with other undertakings, to exercise market power."[1965] The test incorporates assessment of the extent to which the merger is likely prevent or lessen competition or restrict output; lead to acquisition or strengthening dominance; or minimise efficiency in production and distribution.[1966] In other words, the

[1960] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 41. Par 216 clarifies further that the Public Interest Test will focus on the extent to which a merger would affect employment; ability of SMEs to gain access or to be competitive in any market and ability of national industries to compete in international markets and a particular industrial sector. Pars 209 and 210 clarify the connection with government policy providing as follows – "The Guidelines have been informed by international best practice and also case law of mainly Commonwealth jurisdictions. Nonetheless, and most importantly, the parameters ***encapsulated in the Guidelines are premised on the Kenya Government's overall economic*** *agenda as articulated in the Vision 2030 and as cascaded in the current Medium Term Plan for the Vision.* In summary, the two documents visualize a competitive economy, globally, and to paraphrase, with shared prosperity. This is also the Vision of the Authority. At par 210.To achieve the above, the Guidelines take cognizant of the need to enhance and sustain employment, of both human and capital resources, through supporting (i) measures to ensure no substantial job losses occur as a result of mergers; (ii) salvaging of failing and dormant undertakings and; (iii) also, encouraging mergers of media undertakings that will enhance production of local content/programmes and thereof support youth employment." See further at par 5.3.4 below.

[1961] Competition Authority of Kenya above pars *217* and 218.

[1962] Competition Authority of Kenya above pars 4 and *217.*

[1963] The Guidelines are intended to explain how the substantive law provisions and rules are interpreted by the Authority. Par 3. The Guidelines also provide at at 1 as follows. "This publication is not a legal document. It contains general information intended for the convenient use and guide on how the provisions under Part IV of the Competition Act, Act No.12of 2010 are applied."

[1964] Competition Authority of Kenya above pars 41and 215.

[1965] Competition Authority of Kenya above par 41

[1966] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 215.

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competition test is made up of three components with mergers being weighed for impact on each. The only anti-competitive effect that will raise concern is that which "goes over or is substantially adverse in impact".[1967] For South Africa, the equivalent is "demonstration beyond a test of materiality".[1968] The public interest test considers the extent to which a merger would affect the concerns set out in sections 46(2)(d-g) to wit; employment, ability of SMEs to gain access to markets or to become competitive; ability of national industries to compete in international markets and impact of the merger on a particular industrial sector.[1969] To this list the Guidelines add salvaging of dormant and failing firms and mergers in areas that have a direct impact on the poor.[1970]

For all its complexity, the bottom line of Kenya's merger analysis is the self-same universal preclusion of mergers that facilitate acquisition of market power.[1971] The Merger Guidelines state that "The central tenet held by the Authority, with respect to the merger review standard it should apply, is that mergers should not be permitted to create or enhance market power or facilitate its exercise."[1972] The lookout is for mergers "that are likely to create or enhance the ability of the merged firm either unilaterally or in coordination with others, to exercise market power".[1973] In further adherence to the conventional, the exercise of analysis is counterfactual. Assessment starts at the place of defining relevant markets, followed by ascertaining market shares and levels of concentration in the market. Not just that, but full assessment of competitive effects is based on the very same concerns in other jurisdictions, including for instance, ease of entry and presence or otherwise of countervailing power.[1974] The legal and economic considerations taken into account in reaching a decision as to whether a merger is likely to substantially prevent or lessen competition include, but are not limited to, market definition, market concentration, possible unilateral effects and foreclosure, possible

[1967] Competition Authority of Kenya above par 42.
[1968] Chapter 4 par 4.3.3.
[1969] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 216. See also Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* 22.
[1970] Competition Authority of Kenya *Public Interests Tests in Merger Determination Guidelines* (2013) par 11.
[1971] For the general standards, see chapter 2 par 2.2.3 and Chapter 4 pars 4.3 and 4.3.2 for South Africa's application of the same.
[1972] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 61.
[1973] Competition Authority of Kenya above par 42.
[1974] Competition Authority of Kenya above pars 6 and 47. See also chapter 2 par 2.2.3.

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coordinated effects, barriers to entry, presence or absence of countervailing power, efficiencies and failing undertakings.[1975] The overarching objective is ensuring that effective competition evidenced by strong rivalry between undertakings is maintained with the outcome of better prices and greater choice for the consumer.[1976]

5.3.3 The Competition Test

In executing the competition test, product and geographic dimensions of the merger market are delineated first.[1977] The purpose is to identify actual competitors of the merging parties and their capacity to constrain post-merger behavior and prevent obtaining of market power.[1978] The SSNIP Test is used.[1979] Substitutability by reason of characteristics, prices and intended use determine the relevant market.[1980] While both demand and supply substitutability constitute factors to be considered, the former is valued as a more immediate and effective disciplinary force on suppliers.[1981] The latter becomes relevant only where found feasible and in situations in which its consequences are effective and immediate.[1982] Supply side substitution may also be taken into account when defining markets in those situations in which its consequences are effective and immediate. The Authority may define the market based on the demand side only.[1983]

There is a noticeable difference between how South African and Kenyan Authorities approach merger analysis with regard to market definition.[1984] First, though widely used elsewhere, the SSNIP Test is rarely directly applied by South African Agencies and when used, is given a South African relevant effect.[1985] So that while demand-side substitution customarily counts for more under SSNIP, weight is still given to supply side substitution and particularly when the question of entry barriers is relevant.[1986] Kenya's economic

[1975] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) Par 46.
[1976] Competition Authority of Kenya above par 43.
[1977] Competition Authority of Kenya above pars 50, 53 and 54 and Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) par 7.
[1978] *Competition Authority of Kenya Guidelines on Relevant Market Definition* (2013) par 3.
[1979] Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) par 11 and Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 51.
[1980] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 51. See par 52 for definition of geographic market. See too Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) par 8.
[1981] Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) par 10.
[1982] Competition Authority of Kenya above pars 20 and 21.
[1983] Competition Authority of Kenya above par 32.
[1984] Chapter 4 par 4.3.3.
[1985] Chapter 4 par 4.3.3.1.
[1986] Chapter 4 par 4.3.3.

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landscape is much closer to that of South Africa than it is to the advanced jurisdictions where SSNIP was developed and continues to be used prevalently.[1987] One would therefore expect of Kenya greater congruence with South Africa than say, with the United States which routinely applies SSNIP for market definition and indeed, overall merger analysis.[1988] SSNIP is more economic in orientation and more complex. The OECD recommends that analysis rely on statistical investigation or non-statistical analysis such as evidence of functional substitution and the past behaviour of customers in terms of willingness to substitute. Information for such purpose may be obtained from surveys, interviews, documents from the merging parties and the like.[1989] Market definition is one of the areas where it is recommended that developing country merger regimes operate a more flexible lens than is usual in advanced jurisdictions.[1990] Merger analysis must be flexible enough to accommodate the market definition most felicitous for inclusive development. We find that for Kenya, adopting the strict version of the SSNIP as applied in Western jurisdictions, may not be the best way to do this.

Product characteristics and intended use is the first step in limiting the field of possible substitutes in Kenya's merger analysis.[1991] But since responsiveness to relative price changes may be the outcome of considerations other than functional interchangeability, the CAK considers additional factors such as evidence of substitution in the recent past and views of customers and competitors. Possible barriers to substitution, such as the need to incur specific capital investment, are factored in where appropriate.[1992] This is the same flexibility evident in South African merger analysis where Authorities refuse to be bound to rigid interpretations of relevant markets and give due weight to views of market participants and is commendable.[1993] The geographic scope of the market is defined using the same framework as the product market.[1994] Other than willingness of customers

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[1987] Chapter 2 par 2.2.4.
[1988] For a discussion on how the test is applied at the Federal Trade Commission see Coate MB and Fischer JH "A Practical Guide to the Hypothetical Monopoly Test *for* Market Definition" 2008 (4) J*ournal of Competition Law and Economics* 1031.
[1989] Maier-Rigaud & Schwalbe (2012) and Kokkoris (2005) 26(4) *European Competition Law Review* 209.
[1990] Chapter 3 par 3.3.2.
[1991] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 5.
[1992] Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) pars 13-15. See pars 23 for supply side substitution and pars 16 and 17 for barriers to shifting.
[1993] Chapter 4 par 4.3.3.
[1994] Competition Authority of Kenya *Guidelines on Relevant Market Definition* (2013) par 26. See too pars 27- 29 for market definition.

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to switch to products from neighbouring areas, the Authority looks at the capacity of the alternative firms to respond to the shift in the short run.[1995] A breadth of factors such as preference for national brands, views of customers as well as competitors, and switching costs, are factored in where appropriate.[1996]

The CAK's decision in the acquisition of Buzeki Dairy Limited by Brookside Dairy Limited, however, brings out some of the areas of weakness in the CAK's approach to market definition.[1997] The Authority's Annual Report for the year 2013 contains a summary of how the decision to approve the merger unconditionally was arrived at. At hand was a horizontal merger between two direct competitors in the milk processing industry - one being the largest and the other being the fifth largest in the market. Both were involved in the purchase of raw milk for processing and selling processed milk and milk products to mainly retailers. Areas of overlap were therefore two; one in respect of buying milk from dairy farmers and the other in marketing of processed fresh milk and related products. Of the milk that farmers did not retain for household use, dairy processors were found to absorb 24 per cent. The remaining 76 per cent would go to other channels, both formal and informal, where it would be sold to the ultimate consumer either pasteurised or raw. The Authority opted to define the relevant product market quite widely, finding processed and raw milk to be substitutable in terms of homogeneity and purpose. This conclusion was largely informed by the response of customers to imposition of value added tax on processed milk the preceding year. Three months' data obtained from one of the largest retail chains in the country showed that milk sales for all processors declined after the implementation of the tax. Implying in the perspective of the agency that all other milk including the raw milk sold via informal channels, was easily substitutable for processed milk. The decline in processed milk sales was attributed to consumers moving to other products, more particularly to raw milk. The agency concluded that the informal sector was therefore capable of offering a competitive push to milk processors making it impossible for them to dictate prices. The post-merger market share of the entity at 8.79

[1995] Competition Authority of Kenya above par 30.
[1996] Competition Authority of Kenya above pars 34, 35 and 37.
[1997] Competition Authority of Kenya Acquisition of Buzeki Dairy Limited by Brookside Dairy Limited 2013 at 21, Annual Report 2013/14 and Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016* 3.

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per cent was thought too small to pose a threat to competition. Consequently, the merger was approved.

This finding of substitutability of raw milk for processed milk has been queried, especially in view of the long term impact of the merger on the relevant market.[1998] There is a good likelihood that consumers turned not to raw milk as a substitute as taken by the Authority, but largely to mini-bars and retail chains that sold pasteurised milk at an average of half the cost of processed milk. Not to mention that the sale of raw milk to consumers is illegal in Kenya and it would have been difficult to establish its "market share".[1999] The breadth of the market created by the inclusion of raw milk had the effect of making the merger under consideration appear innocuous when as a matter of fact it was not.[2000] Before the merger, of the processed milk market Brookside's market share was 37 per cent and Buzeki's 7 per cent. Post-merger, Brookside now held 44 per cent, a good 23 per cent ahead of the nearest competitor's market share. Not just that, but the merger created a dominant firm going by the definition of dominance under the Act.[2001] In our opinion, this was an appropriate occasion to divide the market into submarkets.[2002] For some reason, the CAK appears to have had no qualms fitting "fish paste and beluga caviar in one market".[2003]

The developing country's agency must be wary of creating dominant players and unduly concentrating markets. Delineation of the relevant markets is the critical starting point in this effort. In any event, the preamble and objects sections of the 2010 Competition Act

[1998] In a study of the processed milk market in Kenya in 2018 Nderitu and Ndiritu observed that the series of mergers and acquisitions that culminated in the Brookside Buzeki acquisition had a significant effect on product price in the processed milk market for both suppliers and ultimate consumers by reducing on the former and increasing the latter. See Nderitu PC and Ndiritu SW "Effects of Mergers on Processed Milk Market in Kenya" 2018 8(2) *Journal of Agribusiness in Developing and Emerging Economies* 48 hereinafter Nderitu & Ndiritu (2018) 8(3) *Journal of Agribusiness in Developing and Emerging Economies*. The article assessed the effects of the merger and those preceding it in the sector on market prices and consumer welfare using data from the 34 licensed and active milk processors in Kenya.

[1999] Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016 4.*

[2000] Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016 6* and Nderitu & Ndiritu (2018) 8(3) *Journal of Agribusiness in Developing and Emerging Economies* 480.

[2001] The criteria for determining dominant position is at Section 23 2010 Competition Act. A dominant undertaking is one which produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof. An undertaking shall also be deemed to be dominant where the undertaking though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not
have market power or controls less than forty per cent of the market share but has market power.

[2002] Such as in *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group.*08/LM/Feb02 19/03/2003 par 148.

[2003] *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group* above par 147.

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are clear on the place of promoting and safeguarding effective competition in the national economy. The drafters of the Act were also desirous of the country moving away from monopolistic markets to the more fragmented variety. We urge that caution be exercised to avoid moving markets in the opposite direction or cementing dominance.

With the market defined follows ascertainment of concentration. Like South African Authorities, the Kenyan Authorities use concentration ratios and the Herfindahl-Hirschman Index (HHI).[2004] Both countries' agencies add in a qualitative enquiry to arrive at a more accurate assessment of the impact of a merger on the relevant market.[2005] The CAK will investigate the history of market shares over a period of time considering it to be a more informative and therefore, reliable, indicator of market power than fixed shares at the particular time of the merger.[2006] The number of undertakings is the start-off point as a basic measure of concentration.[2007] Unilateral effects are assumed to be more likely where a merger results in an undertaking with a large market share. Consequently, mergers resulting in a market share of more than 50% invite further investigation as will unions in already concentrated markets, especially where the outcome is a potentially more efficient outfit.[2008] The breadth of approach and the care to keep a keen lookout for mergers that would enhance concentration and create monoliths is very much similar to South Africa whose Authorities have little time for mergers that may concentrate already concentrated markets.[2009] What is more, it adheres closely with the spirit of the 2010 Act as expressed in debate over the Bill where it was stated that a law was needed "to prevent the country from being over-ridden by dominant market players through monopolies, oligopolies or duopolies".[2010]

The CAK's actual decisions by and large exhibit preference for dynamic fragmented markets. As should be for a developing country, there is a partiality for markets with low

[2004] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 41 and Appendix 1. Compare with chapter 4 par 4.3.3 for South Africa's use of the Herfindahl-Hirschman Index (HHI) in assessment of concentration.
[2005] Chapter 4 par 4.3.3.
[2006] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 59. ". . .Market power is more likely to exist if an undertaking or a group of undertakings has a persistently high market share and when all other competitors have very low market shares".
[2007] Competition Authority of Kenya above.
[2008] Competition Authority of Kenya above.
[2009] Chapter 4 par 4.3.3.
[2010] Hansard (19.11.2009) 3947.

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concentration and effective competitors at hand to keep the merged firm in check.[2011] The 2013 decision on acquisition of Real Insurance Company Limited by British-American Investments Company (Kenya) Limited reveals the CAK's preference for highly fragmented markets.[2012] The relevant market was defined as that for provision of non-life insurance in Kenya. The merged firm's final market share would stand at 7.47 per cent. In the specific market segments, shares of the merged firm would be less than 10 per cent; save for personal accident, engineering and marine sectors where the shares would be 14.7 per cent, 16.9 per cent and 12.4 per cent respectively. The Authority pronounced the market as ideal and approved the merger subject to an employment related condition. In 2016, an acquisition of 100% of the issued share capital of Engen International Holdings (Mauritius) Limited by Vivo Energy Holding B.V. was approved subject to divestiture conditions to reduce concentration in two of the relevant markets.[2013] Both firms were active in the distribution and marketing of fuels and lubricants to retailers. The CAK carried out an analysis of the geographical locations of the parties' fuel stations to establish the likelihood of the proposed transaction lessening or preventing competition. Out of the fifteen locations, thirteen were cleared. In these, the distance between the two parties' stations was at least three kilometres apart, which the agency considered incapable of increasing concentration. The presence of several competitor stations in close proximity would provide vital competitive restraint, a fact that stacked in favour of approval. In the two remaining localities, the merged firm's stations were found to be too closely situated, leaving it as the dominant player in those areas. Further to that, these locations had high barriers to entry owing principally to the absence of affordable property along the roads for competitors to set up. The Authority directed divestiture within 36 months to a player at the time not operating in the relevant area for the first outlet, and a condition to not renew dealership for the other.

In another matter of 2016, the acquisition of 100% of the issued share capital in Gulf African Petroleum Corporation (GAPCO) by Total Outre-Mer S.A was determined on the

[2011] Chapter 4 par 4.3.3.
[2012] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* 22
[2013] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 96.

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basis of similar considerations.[2014] Total Kenya, the acquiring firm, had a countrywide network of 180 service stations and the target, GAPCO Kenya, had nine. Investigations revealed that all the acquiring party's stations and the target's stations were over five kilometres apart. On that account, the CAK determined that no competition concerns were likely to arise post-merger. The fact that all through there were competing petrol stations at close proximity worked further in favour of approval.[2015] Acquisition of 100% of shares of Artcaffé Coffee & Bakery Limited by Artcaffé Group in 2018 was approved on the same ground of highly fragmented markets.[2016] The market for provision of restaurant services was found to have many commercial enterprises, often located within close proximity of each other and offering a broad range of foods and beverages, many of which are substitutes.[2017] Further, the Authority considered that Artcaffé Group's business would face competition from other non-restaurant operators, including retail supermarkets which operate eateries.[2018] Similarly, in the proposed acquisition of 100% of the Issued Share Capital of Saham SA by Sanlam Emerging Markets (Ireland) Limited determined in 2019, the merged firms' combined market share was assessed as 6.6 per cent and considered low compared to major players in the market, one of whom held 23 per cent and the other two 13 per cent. Given the market structure and low levels of concentration of the market, the merger was approved.[2019]

There is of course the place of letting the occasional dominant firm-creating merger through. In South Africa, size has been accommodated where necessary to achieve specific ends such as innovation, especially in markets with easy entry.[2020] Similarly, Kenya's Authority too on occasion will approve mergers creating firms with large shares. Some of these instances, however, give reason for concern. One such instance is the

[2014] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 34.
[2015] Competition Authority of Kenya above at 35.
[2016] The Acquisition of 100% of Shares of Artcaffé Coffee & Bakery Limited By Artcaffé Group available at https://www.cak.go.ke/index.php/latest-determinations (accessed 26/12/2019).
[2017] Competition Authority of Kenya above at pars 10 and 11.
[2018] Competition Authority of Kenya above at pars 14 and 15. See too The Proposed Acquisition of Hillcrest between Education Asia Holdings Limited And Hillcrest Investments Limited available https://www.cak.go.ke/index.php/latest-determinations accessed 14/12/2019).
[2019] Par 10 The Proposed Acquisition of 100% Of The Issued Share Capital Of Saham S.A By Sanlam Emerging Markets (Ireland) Limited https://www.cak.go.ke/sites/default/files/2019-06/CAK%20Decision%20on%20Saham%20Acquisition%20by%20SEMIL.pdf available at (accessed 19/12/2019).
[2020] Chatper 4 par 4.3.3.

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global merger involving acquisition of CFAO by Toyota Tshusho Corporation.[2021] The merger would cause dominance in two relevant markets. In one, the resultant entity's market share would be 53.1 per cent against its competitors' 31 per cent and 11.6 per cent respectively. In the other, the merged firm would control 58.4 per cent and the remaining two firms 22.7 per cent and 18.9 per cent respectively. Approval was granted on the condition that the firm would not infringe any of the provisions of the Act in its future conduct.[2022] Here was a four to three merger that would leave the market with an out-rightly dominant player.[2023] That notwithstanding, the condition imposed did not address the issue of dominance directly and in point of fact is a duty anyhow owed by all market participants. The decision in the merger between Airtel Kenya Limited and Telkom Kenya Limited, a three to two merger, had a similar condition imposed, specifically, that the merged entity honour all existing contractual terms with government entities.[2024] The decisions in the acquisition of Essar Telecom Kenya Limited (ETKL) by Safaricom Kenya Limited[2025] considered in detail below and that of Buzeki Dairy Limited by Brookside Dairy Limited discussed above, raise similar concerns.[2026]

For a developing country, this does not bode well. It cannot be overstated that Kenya needs to be wary of creating dominant firms and shrinking already narrow markets.[2027] As previously observed, merger analysts in the developing country must be wary of even small reductions in competition and since errors of both over-enforcement and under-enforcement are inevitable, when in doubt, enforcement should err on the side of over-enforcement.[2028] The choice is often a difficult one between short-term efficiency and long-term distortions and preference. The likely cost of non-intervention in the circumstances of a developing country market is thought to be higher than that of intervening. In analysing a merger for anticompetitive impacts, Gal argues that national competition agencies should adopt a relatively flexible balancing approach that gives

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[2021] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2012/2013 20.*
[2022] Competition Authority of Kenya above.
[2023] Under section 4(3)(b) A firm has a dominant position in a market if it produces, supplies, distributes or otherwise controls not less than one-half of the total goods that are produced,supplied or distributed in the country or a substantial part thereof.
[2024] *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[2025] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 22.
[2026] Acquisition of Buzeki Dairy Limited by Brookside Dairy Limited 2013 Annual Report 2013/14 21.
[2027] Kenyan markets have been found to be highly concentrated. See below at 5.3.3 for the state of the Banking, Fertilizer and Cement markets.
[2028] Chapter 3 par 3.2.2.

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much weight to long-term dynamic considerations and less to protecting competition *per se*.[2029]

Once a market is defined and concentration levels established, the CAK embarks on measuring possible reduction of competition in the identified market. Guideline 46 of the merger guidelines lays out the "quantitative and legal and economic conceptual constructs that will be undertaken in reaching a decision on whether a merger is likely to substantially prevent or lessen competition."[2030] Market definition and concentration are the first two. The remainder are: assessment of horizontal mergers and their possible unilateral and coordinated effects; non-horizontal mergers and their possible foreclosure and coordinated effects; barriers to entry; countervailing power; efficiencies and failing undertakings.[2031]

Horizontal mergers are assessed for unilateral and coordinated effects.[2032] Given that all horizontal mergers will have some effect on competition and ultimately the market power held in the post-merger market, the Authority is primarily concerned with those that are likely to prevent or lessen competition by assessing the strength of competition in the relevant market, and the probability that the undertakings in the market after the merger, will behave competitively or co-operatively.[2033] The central tenet held by the Authority, with respect to the standard to apply, is that mergers should not be permitted to create or enhance market power or to facilitate its exercise.[2034] However, when assessing horizontal mergers, the Authority considers not only the possible effects of the merger on competition but also possible efficiencies benefiting consumers, effects of the merger on employment, a particular industrial sector or region and the ability of national industries to compete in international markets, among others.[2035] The more immediate and direct the perceived negative effects of a merger, the more likely the Authority will raise

[2029] Gal (2013) Swedish Competition Authority's *Pros and Cons Series* (11) at 73.
[2030] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013).
[2031] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 46. Compare with section 12(A)(2) 1998 Competition Act. Chapter 4 par 4.3.3.
[2032] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 60 to 71.
[2033] Par 61 Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013).
[2034] Competition Authority of Kenya above par 61.
[2035] Competition Authority of Kenya above par 62.

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concerns. Likewise, the more immediate and direct the positive effects of a merger, the more likely the Authority will find that they counteract any negative effects.[2036]

The Authority is stricter where a few undertakings account for most sales of a product making coordination and collusion easier, or where control of an important facility remains in the hands of a single player.[2037] An application considered in 2016 and found unlikely to lessen or prevent competition was nevertheless approved subject to a condition that the policy of availing hospitality at the acquirer's petroleum storage facility be retained and all existing hospitality agreements with third parties be honoured.[2038] In 2017, the acquisition of Associated Vehicle Assemblers Limited by Simba Corporation Limited was approved on condition that the merged entity keep its plant open to existing third party brands and any other competing brand that may wish to use the plant for assembly.[2039] The rationale behind the condition was that it would protect third parties and other competing brands from being locked out of the market thus retaining players in the market. This, we think, is a good initiative because it keeps markets vibrant and rivalry thriving.

Ease of entry is considered in assessing competitiveness. Entry that would support approval is that which is likely, timely and sufficient - the same standard that is applied in South Africa under the 1998 Competition Act.[2040] Assessment will depend on the circumstances of each particular merger but approval will generally be granted where markets have low barriers to entry.[2041] The 2016 decision over the proposed acquisition of assets of Yako Supermarket Limited by Nakumatt Holdings Limited hinged on barriers to entry and market concentration. [2042] The relevant product market was defined as that

[2036] Competition Authority of Kenya above par 62.
[2037] Competition Authority of Kenya above pars 68 and 69.
[2038] Acquisition of 100% of the issued share capital in Gulf African Petroleum Corporation by Total Outre-Mer S.A. Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2016/2017* 34.
[2039] Acquisition of Associated Vehicle Assemblers Limited by Simba Corporation Limited available at https://www.cak.go.ke/index.php/latest-determinations (accessed 16/6/2019).
[2040] Entry is likely where it is economically profitable at pre-merger prices. The longer it would take for potential entrants to become effective competitors, the less likely such entry is timely. Sufficient entry is that which is sufficient in scope and magnitude to deter or defeat the anticompetitive effects of the merger. Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 72. For South Africa's definition see chapter 4 par 4.3.3.3.
[2041] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 73. The paragraph provides in part that ". . . the underlying test is always whether the potential for entry provides an effective competitive constraint that would prevent a significant and sustainable increase in the market power of market participants post-merger".
[2042] *Competition Authority of Kenya Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016 24.*

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for branded formal retail while the geographic market was Kakamega, a town in the west of the Country. Pre-transaction market shares were found to be; Nakumatt Holdings 16.7 per cent, Tuskys and Yako 16.7 per cent each, Mama Watoto 33.2 per cent and Walias 16.7 per cent. Post-transaction, the merged firm's market share would increase to 33.4 per cent. The transaction was found unlikely to lead to lessening or preventing of competition. The retail market in the town was found to have minimal barriers evidenced by the entry of two retailers in the previous two years. There was ample affordable space for new entrants to set up shop and existing ones to expand. To add to the fact of ease of entry, the merged entity would face brisk competition from the other retailers who retained the much bigger portion of the market. The acquisition was approved subject to the retention of all 283 employees of the acquired firm.

In the 2018 application for approval of the proposed acquisition of 90% of the issued share capital of Panthera Publishers Limited by Ramco Plexus Limited, assessment found low barriers to entry and therefore more players could easily join the market and enhance competition.[2043] The market share of the merged entity would be approximately 14% and small, relative to that of competitors. There was therefore no likelihood of lessening or distortion of competition in the sector. The Authority deemed it necessary to salvage the jobs of 21 employees of the target firm and set this as the condition for approval.[2044] The acquisition of KenolKobil Plc by Rubis Energie SAS was similarly approved by virtue of the market being a contestable one without prohibitive barriers to entry.[2045] An application in a market where significant barriers to entry exist may be approved if satisfactory reasons are tendered. The CAK has approved such mergers subject to remedial conditions like the order for divestiture in the Engen International Holdings (Mauritius) Limited and Vivo Energy Holding B.V. merger.[2046]

[2043] Proposed Acquisition of 90% of The Issued Share Capital of Panthera Publishers Limited by Ramco Plexus Limited available at https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decisions_June_12_2018.pdf (accessed 3/12/2019).

[2044] As reported in the press Ngunjiri "CAK stops Ramco from sacking workers in merger" June 12, 2018 *Business Daily* The CAK's assessment also showed that the soft paper printing industry has low barriers to entry and, therefore, more players are at liberty to join the market and enhance competition. Par 1.1 at 2 Proposed Acquisition of 90% of The Issued Share Capital of Panthera Publishers Limited by Ramco Plexus Limited available at https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decisions_June_12_2018.pdf (accessed 3/12/2019).

[2045] The Acquisition of KenolKobil Plc by Rubis Energie SAS available at https://www.cak.go.ke/index.php/latest-determinations (accessed 26/2/2019). See especially par 23. See also Proposed Acquisition of 90% of The Issued Share Capital Of Panthera Publishers Limited by Ramco Plexus Limited available at https://www.cak.go.ke/index.php/latest-determinations (accessed 6/2/2019).

[2046] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 96.

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Barriers to entry are especially of concern in developing country markets, and even more for Kenya with its past of markets that were not very supportive of private players. An open competitive environment is necessary to enable and encourage investment. Parliament found this to be lacking and considered the proposed Act capable of resolving the problem.[2047] The objects of the 2010 Competition Act as stated in section 3 include opening up markets and creating an environment conducive for investment. We think that the CAK's approach, which is not very different from that of South Africa's Agencies, is spot on. There is nonetheless room for improvement as illustrated by the Brookside Buzeki matter above. The agency considered that the market had low barriers given the entry of 5 new players in the past five years pre-merger. What it failed to take into account was the fact that of the total 10 players in the market during that period, 5 had been bought out by Brookside, 2 by Buzeki and 2 had exited the market.[2048] While it was easy to join the market, it was obviously difficult to stay on and that ought to have been considered.

The presence of countervailing power, which the Merger Guidelines define as "the ability of *large buyers or suppliers* to prevent the exercise of suppliers' or buyers' market power" will favour approval.[2049] There appears to be an incorrect presumption that big firms will push back against exercise of market power. The reality is that powerful firms will often in fact not exercise countervailing power if they are able to pass on price increases to their customers.[2050] That said, the Authority's Guidelines are cognizant that the benefits of the exercise of buyer power are not necessarily passed on to the customer.[2051] In Kenya as in South Africa, countervailing power will therefore not count unless it is shown that it is applied not only to benefit the buyer itself but also that it benefits small and medium sized entities that may not have sufficient countervailing power.[2052] The Authority

[2047] Hansard (19.11.2009) 3947.
[2048] Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016* 11.
[2049] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 75. Compate with the broader approach in South Africa at chapter 4 par 4.3.3.5.
[2050] *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03 pars 114-115.
[2051] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 77. The paragraph provides that, "While buyer power can offset the market power of suppliers, the benefits from the exercise of buyer power in lowering suppliers'prices are not necessarily passed on to customers. Much depends on how effective competition is between the various buyers in the market that they supply".
[2052] Competition Authority of Kenya above at par 78 In general, when considering the overall arguments on countervailing power, the Authority looks at whether there is evidence that the customer has sufficient size, is commercially significant to the supplier, is able and also possesses the incentive to use their negotiating position to prevent exploitative pricing by the supplier or other harm to competition. In particular, the Authority will look at whether the customers that have the power to constrain the entity in the post-merger market possesses the incentive to exert countervailing power for the benefit of itself but also to the benefit of small and

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will take into account circumstances where the competitive harm possible cannot be countered by countervailing power. These include competitive harm such as slow or reduced innovation and reduction in consumer choice.[2053] We think that the CAK's approach to the matter of countervailing power is suited to the jurisdiction. The concern for SMEs is especially apt given that they play a pivotal role in driving growth of the Kenyan economy, constituting 98 per cent of all business in Kenya, creating 30 per cent of the jobs annually and contributing 3 per cent of the GDP.[2054]

The presence or absence of import competition, will be considered during merger analysis. The larger the participation of imports and/or the possibility of importing, the smaller the likelihood that market power will be exercised.[2055] Barriers such as import tariffs, distribution costs as well as the capacity of importers to increase imports without needing to invest in new physical assets are taken into account, as they are in SA.[2056] The 2018 acquisition of 73.6% of the issued share capital of Sintel Security Print Solutions by Ramco Plexus Limited involved imports in the market as a determining factor.[2057] Sintel was engaged in printing security sensitive documents such as recharge scratch cards, cheques and bank cards and academic certificates for among others telecommunication, financial and educational institutions. Due to the sensitivity and complexity of security printing, most of the consumers in the country preferred to outsource these service from

medium-sized entities. For application see Brookside/Buzeki merger at Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016* at 10. For South African approach to countervailing power see chapter 4 par 4.3.3.5.

[2053] The Authority will also consider circumstances under which countervailing power will not prevent certain types of competitive harm such as slow or reduced innovation and reduction in consumer choice. Par 79 Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013).

[2054] Viffa Consult 2018 Kenyan SME Survey 1 Available at http://viffaconsult.co.ke/wp-content/uploads/2018/07/2018-SME-Finance-Survey-Report.pdf (accessed 12/2/2020. Vision 2030, the country's economic blue print has a strategic focus on SMEs. A key strategy to the development of SMEs in Kenya is the development of SME industrial parks and boosting science, technology as well as innovation in the SME sector by increasing investments in the research and development. Par 4.4 and at 22 Government of Kenya Marking 10 years of Progress 2018 available at http://vision2030.go.ke/inc/uploads/2018/09/Kenya-Vision-2030-Sector-Progress-Project-Updates-June-2018.pdf (accessed 30/1/2020.

[2055] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 83. It is taken that the larger the participation of imports and/or the possibility of importing, the smaller the probability that market power will be exercised. Par 84 provides elasticity of imports demand will be taken into account, that is, the responsiveness of quantity imported to changes in domestic prices. If a small increase in domestic prices will result in a big switch to imports, then imports will be considered as constraining on the ability of merged entity to exercise market power

[2056] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 85. In order to verify the elasticity of imports, the Authority consider barriers to imports, such as: import tariffs; distribution costs; the degree of dependency of imports in relation to local producers; the existence of exclusivity contracts between local importers and foreign undertakings; and the capacity of importers to accommodate increments in imports without the need to invest in new physical assets.

[2057] The Acquisition of 73.6% of the issued Share Capital of Sintel Security Print Solutions by Ramco Plexus Limited available at https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decision_on_Acquisition_of_Sintel_Security_Print_Solutions_by_Ramco_Plexus.pdf (accessed 6/12/2019).

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abroad. That reduced the likelihood of the merger having anticompetitive effects and it was approved.[2058] In the same manner, the presence of import competition had a bearing on the 2019 decision in the application for acquisition of 100% of the assets of Desbro (Kenya) Limited by Brenntang (Holding) B.V or its Nominee.[2059] The relevant market was considered to be highly competitive with all players having less than 5% of the market share. It was also highly dependent on imports that accounted for 80% of the market.[2060]

The extent to which a merger makes coordination possible, or strengthens existing collusion will be considered.[2061] Characteristics of the market, such as structural features and past behavior of undertakings will be relevant in that assessment.[2062] The fewer the competitors in a market, the easier it is to coordinate. In such a set up, it is easier for market players to identify and pursue common objectives.[2063] Such markets are closely scrutinized.[2064] This issue has not been addressed in any of the Kenyan merger decisions whose detail is available.

The approach of the Kenyan agency to vertical mergers is the same as that under the South African regime where Authorities employ a more permissive approach.[2065] In Kenya, such transactions will only be precluded where the merged entity can acquire or increase significantly the degree of market power in at least one of the markets concerned.[2066] This is particularly where they make possible foreclosure which has potential to discourage entry or expansion of rivals or to precipitate their exit.[2067] It is sufficient that rivals are disadvantaged and consequently compete less effectively.[2068] The Merger Guidelines indicate further that efficiencies that result from vertical mergers

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[2058] Competition Authority of Kenya above pars 10, 25 and 26.
[2059] The Acquisition of 100% of the Business and Assets of Desbro (Kenya) Limited By Brenntag (Holding) B.V or its Nominee available at (https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decision_on_Acquisition_of_Desbro_Kenya_Limited_by_Brenntang_Holding_B.V.pdf (accessed 1/2/ 2020.
[2060] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2018) Pars 86 to 89 .
[2061] Competition Authority of Kenya above at par 86.
[2062] Competition Authority of Kenya above at par 89.
[2063] Competition Authority of Kenya above at par 87.
[2064] Competition Authority of Kenya above at par 96. The Guideline recognises that transparency is higher in markets with lower numbers of active participants.
[2065] Chapter 4 par 4.3.3.7.
[2066] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 112. For detail on input and customer foreclosure, see pars 125-150.
[2067] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 113.
[2068] Competition Authority of Kenya above par 114.

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are prized. The view is that a degree of foreclosure, if it yields returns for the consumer, is acceptable and may mitigate a negative finding.[2069] For both input and customer foreclosure, concern is more with regard to industries that are opening up to competition or that are expected to do so in the foreseeable future.[2070] This is in cognisance of the section 3 object of enforcement that aims to create an environment conducive to?? investment and promote the competitiveness of undertakings. It is also mindful of a specific intention expressed by the Parliament that the law not be used to discourage vertical integrations.[2071]

The CAK's 2017 decision in the proposed acquisition of the entire issued share capital of Pan African Paper Mills Limited by Tarlochan Limited was based on the potential for foreclosure and the presence of a failing firm.[2072] The acquirer was in the logging business and the target in the downstream saw-milling market. The Authority approved the merger subject to a condition that Tarlochan sell materials for pulpwood and fuelwood to its downstream subsidiary Pan Paper Mills at rates to be gazetted by the sector regulator and these same rates be applied to all other buyers. The condition would ensure that there was no input foreclosure to 149 existent market players.[2073] In the Acquisition of 100% of The Business and Assets of Desbro (Kenya) Limited by Brenntang (Holding) B.V or its Nominee in 2018, post-merger, the merged entity would have a market share of less than 5 per cent. [2074] It was anticipated that it would face brisk competition from the other players in the relevant market. The possibility of the merged entity creating input foreclosure was low due to that fact and that the acquirer did not possess market power as evidenced by the minimal market share.[2075] The merger was approved subject to the target's 80 employees being retained for at least a year post merger.

[2069] Competition Authority of Kenya above par 116.
[2070] Competition Authority of Kenya above par 134.
[2071] Hansard (17.11.2009) 3950.
[2072] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 45.
[2073] Competition Authority of Kenya above at 46.
[2074] The Acquisition of 100% of The Business and Assets of Desbro (Kenya) Limited By Brenntang (Holding) B.V or its Nominee available at https://www.cak.go.ke/index.php/latest-determinations (accessed 6/2/2020.
[2075] The Acquisition of 100% of The Business and Assets of Desbro (Kenya) Limited By Brenntang (Holding) B.V or its Nominee available at https://www.cak.go.ke/index.php/latest-determinations (accessed 6/2/2020 pars 9, 11 and 12. Additionally, the possibility of the merged entity creating input foreclosure was taken to be low due to the fact that the market share of the merged entity was low and the acquirer distributed less than 1% of itsproducts in the market. The acquirer's minimal market share was taken to equate absence of market power.

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Conglomerate mergers rarely lead to competition concerns, except for the risk of foreclosure.[2076] Under the Merger Guidelines, foreclosure is the main concern for this type of mergers. The Authority will intervene in situations where the combination of products in related markets may confer the ability and incentive to leverage a strong market position by means of exclusionary practices such as tying and bundling.[2077] In order to be able to foreclose competitors, the new entity must have a significant degree of market power in one of the markets concerned.[2078] The effect on competition is assessed in light of the efficiencies arising from the merger.[2079] Kenya's approach to conglomerate mergers is appropriate both for the country as a developing economy and with reference to the objects of the Act. As alluded to earlier in this chapter, section 3 lists increase of efficiency in production, distribution and supply of products; promotion of innovation; and maximisation of the efficient allocation of resources as desired outcomes.[2080] South African Authorities too do not apply "strict antitrust" to conglomerate transactions and recognition is duly given to the efficiency enhancing attributes they come with.[2081]

Section 46(2)(h) of the Act caters for consideration of efficiencies that could arise from a merger, stating that: "The Authority may base its determination in relation to a proposed merger on any criteria which it considers relevant . . . including any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets." Congruently, the Guidelines treat efficiency as a consideration in determining the value of a proposed merger. The Authority recognises that "horizontal and non-horizontal mergers may lead to pro-competitive effects owing to efficiencies that are realised by the mergers", suggesting that efficiency is not a defence but rather an attribute that could weigh in favour of approval.[2082] Within the same Merger Guidelines,

[2076] See chapter 2 par 2.2.3 for the controversy surrounding the the 'potential competition' doctrine used to justify intervention in conglomerate mergers. Generally, this type of mergers are considered innocuous.
[2077] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 159. Guidelines on analysis of conglomerate mergers run from pars 155 to 186.
[2078] Competition Authority of Kenya above par 164. Market power will not necessarily be equated to dominance. See also par 161 by which the three elements applied in assessment are listed as ability to foreclose, economic incentive to do so and establishing of whether the foreclosure would have a detrimental effect on competition.
[2079] Competition Authority of Kenya above at par 181.
[2080] Section 3(a)-(c) 2010 Competition Act.
[2081] See at chapter 4 par 4.3.3.7.
[2082] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 187. Par 188 and 189 for specific detail of efficiencies sought and include economies of scale and scope from combining

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however, are paragraphs in which efficiency is framed as a defence. Per paragraph 196, the Authority may consider "whether the evidence presented on efficiency is sufficiently compelling so as to negate any findings of substantial lessening of competition reached in the Authority's overall assessment of the merger." Further, the Authority must also consider whether "the effects of the claimed efficiency will counteract any adverse effects the merger may have on competition in the post-merger market."[2083]

In actual enforcement, efficiency gains are treated as a consideration in assessment of merger impact on competition, and not as a defence to an anticompetitive finding. The acquisition of 100% of the issued share capital in Central Glass Industries Limited by Consol Glass Proprietary Limited from East African Breweries Limited in 2016 illustrates the Kenyan approach to the question of merger efficiencies.[2084] There was no risk of dominance or prevention or lessening of competition. The transaction was approved on two grounds; first that it would remove an existing vertical relationship between a brewer and its subsidiary in the downstream market of product packaging; and second, that it gave rise to efficiencies of scale. The transaction had the potential to lead to efficiencies in terms of increased production from 31,500 metric tonnes of glass packaging per year to 36,500 metric tonnes per year. Additionally, it would confer on the merged firm the ability to compete in the local and regional markets. The merger was approved "in order to ensure efficiency and protect against job losses."[2085] Notably the Brookside/Buzeki merger discussed above, was approved because it would give Brookside "an opportunity to realise efficiencies through the economies of scale and scope, enhancing its ability to export to the COMESA region and beyond".[2086]

Theoretically, efficiency can be applied in merger analysis either as an integrated part of the competition analysis, as the "efficiency defence", or both.[2087] Within the first approach,

production, distribution and marketing activities; greater innovation yields from combining investment in research and development and reduced transaction costs. In non-horizontal mergers elimination of double-marginalisation involving complementary products. Par 197 connects substantial lesseding of competition with efficiencies providing that the Authority "will consider whether the claimed efficiency *prevents* a substantial lessening of competition by enhancing rivalry among market players in the post-merger market."

[2083] Competition Authority of Kenya above at par 201.

[2084] *Competition Authority of Kenya Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016* 23.

[2085] Competition Authority of Kenya above.

[2086] Macharia & Mosoti *10th Annual Conference on Competition Law, Economics and Policy 6th and 7th October 2016 at* 10.

[2087] See chapter 4 par 4.3.4 for a summary of the two approachs. See also generally Renckens (2007) 3 *Journal of Competition Law and Economics* 149.

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they are an additional element influencing the appraisal of a merger and are seen as the factor which might help to solve the competition problem. An efficiency defence approach entails a trade-off where the appraisers have the option of approving a merger even if it has been determined that doing so will impede competition. According to the ICN no one modality for the treatment of merger efficiencies is necessarily correct or appropriate for all countries.[2088] However, as indicated earlier, it is more common to have efficiencies examined as part of the competition findings and not as a defence.[2089] In other words, Kenya is within the mainstream on this matter, at least as far as the couching of section 46(2) and enforcement is concerned. There is nevertheless need to align the Merger Guidelines with the 2010 Competition Act for consistency. We would propose that the clashing provisions in the Guidelines be expunged. A party having notified the Authority of a merger would not know whether to prepare to argue efficiencies as a defence or as a pro-competitive benefit. Merger analysis is already fraught with uncertainty arising due in one part, to the unsettled nature of the analytical models employed, and on the other because of the large amount of material agencies must process during the course of analysis, much of it futuristic.[2090] As established earlier, complex law increases chances of poor decisions and as such, developing country merger law must remain simple.[2091] With South Africa, both in the Act and at enforcement, efficiency is consistently espoused as a defence.[2092]

The absence of clarity aside, we think that the approach to merger efficiencies is largely well within the ideal for a developing country as well as consistent with the goals of the legislation. According to the preamble and objects section of the 2010 Competition Act, a more efficient economy is the priority. The Act is to be enforced in a manner that brings about increased efficiency in the production, distribution and supply of goods and services, promotes innovation and maximises the efficient allocation of resources.[2093] Consideration of efficiencies from mergers is especially pertinent in economies such as

[2088] ICN Efficiencies Report on merger guidelines and efficiencies International Competition Network ICN Merger Working Group at 1 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc558.pdf (accessed 16/11/2019). See also chapter 2 par 2.2.4.
[2089] Chapter 4 par 4.3.4. South Africa and Canada are the only two countries that have a statutory efficiency defence.
[2090] Chapter 2 par 2.2.4 and chapter 3 par 3.3.2.
[2091] Chapter 3 par 3.3.2.
[2092] Chapter 4 par 4.3.4.
[2093] Section 3 2010 Competition Act.

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Kenya's where production efficiency often demands high market shares.[2094] Time and again the choice is between precluding an anticompetitive merger at the price of foregone efficiency, which price may be unconscionable for a growing economy.[2095]

That said, the healthy scepticism of South African Authorities to efficiency claims is well advised.[2096] Not all claims of efficiency are plausible. Emphasis on efficiency benefits and the non-interventionist outcomes this approach yields also has two kinds of effects pertinent for developing country domestic firms and which their competition agencies must be mindful of. On the one hand, it may enlarge their range of strategy options, pushing up their profitability and growth. But on the other hand it may let in foreign rivals who are able to exploit the advantage of greater financial muscle to the detriment of domestic firms.[2097] Easy approvals on grounds of efficiency may in point of fact draw more foreign firms pushing smaller local ones to the periphery of the market. Competitiveness of domestic firms should guide merger enforcement in developing countries and there is therefore need for great circumspection.[2098]

Finally, the Authority may determine that a problematic merger is nevertheless "compatible with the Act if one or both of the merging parties is a failing undertaking".[2099] What "compatible with the Act" means is difficult to establish given that the 2010 Competition Act does not establish a substantive merger analysis standard. The Act itself is silent on the place of failing firms in the overall scheme of merger analysis. Unlike with the South African Competition Act, it is not one of the considerations under section 46(2) of the Kenyan Act.[2100] The issue of failing firms appears in the Merger Guidelines - first in the manner of a failing firm doctrine *a la* South Africa and then too as a public interest consideration.[2101]

[2094] Sutherland (2008) 125(1) *SALJ* 2008 331 at 333.
[2095] *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 par 102. See also generally chatper 3 par 3.2.4.
[2096] Chapter 4 par 4.3.4.
[2097] Chapter 3 par 3.2.3.
[2098] Chapter 3 par 3.3.2.
[2099] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 202. The Authority may decide that an otherwise problematic merger is nevertheless compatible with the Act if one or both of the merging parties is (or are) a failing undertaking. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merge
[2100] Chapter 4 par 4.3.3.8. Failing firm is a consideration at section 12A(2)(g) 1998 Competition Act.
[2101] Par 202 to 204 under the Competition Test and Par 210 under the Public Interest Test Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013).

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Mergers involving a failing or dormant undertaking will be "fast-tracked with the aim of saving jobs and choice for consumers".[2102] Denoting that the presence of a failing firm will work for faster processing and almost guarantee approval. The basic requirement is proof that the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.[2103] That is, the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. Three elements must be proven: first, that without merger, the failing undertaking would in the near future be forced out of the market; second, that there is no less anticompetitive alternative purchase and third that without the merger, the assets of the failing undertaking will exit the market.[2104] The obligation is on the merging parties to provide all the relevant information necessary.[2105]

From the available detail on past decisions "fast tracked" seems to almost refer to guaranteed approval. In the 2017 merger application for the proposed acquisition of the entire issued share capital of Pan African Paper Mills Limited by Tarlochan Limited,[2106] the Authority gave great weight to the fact that the target firm in the vertical merger was under receivership and without the merger, "the assets of Pan Paper Mills would be rendered valueless".[2107] The merger was approved in order to "ensure revival of the

[2102] Under Public Interest assessement, pars 209 and 210 provide as follows - The Guidelines have been informed by international best practice and also case law of mainly Commonwealth jurisdictions. Nonetheless, and most importantly, the parameters *encapsulated in the Guidelines are premised on the Kenya Government's overall economic agenda as articulated in the Vision 2030 and as cascaded in the current Medium Term Plan for the Vision.* In summary, the two documents visualize a competitive economy, globally, and to paraphrase, with shared prosperity. This is also the Vision of the Authority. 210.To achieve the above, the Guidelines take cognizance of the need to enhance and sustain employment, of both human and capital resources, through supporting (i) measures to ensure no substantial job losses occur as a result of mergers; (ii) salvaging of failing and dormant undertakings and; (iii) also, encouraging mergers of media undertakings that will enhance production of local content/programmes and thereof support youth employment. Par 242 provides potential remedies in cases that raise public interest concerns, and provides that " Mergers involving a failing undertakinga dormant undertakingand also an undertakingunder receivership will be fast-tracked, with the aim of saving jobs and choice for consumers".

[2103] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 202 - The Authority may decide that an otherwise problematic merger is nevertheless compatible with the Act if one or both of the merging parties is (or are) a failing undertaking. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This will arise where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.

[2104] Competition Authority of Kenya above par 203.The Authority considers the following three criteria to be especially relevant for assessing a failing undertaking argument. First, the allegedly failing undertaking would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking. Second, there is no less anticompetitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing undertaking would inevitable exit the market.

[2105] Competition Authority of Kenya above par 204. It is for the parties to provide all the relevant information necessary to demonstrate that the deterioration of the competitive structure that follows the merger is not caused by the merger.This undertakings claim that can undertaking is failing will be based on the facts and figures of the undertaking concerned. This is a case by case analysis and the burden will be on the notifying parties to prove that the one or more undertakings are failing.

[2106] Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 45.

[2107] Competition Authority of Kenya above at 45-46.

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dormant firm".[2108] In yet another transaction, this one in 2014 in the telecommunications market,[2109] the agency appeared ready to overlook enhancement of dominance in an already problematic market for the sake of salvaging a failing firm.[2110] The proposed Acquisition of Essar Telecom Kenya Limited (ETKL) by Safaricom Kenya Limited was a horizontal merger between competitors at the same level of service delivery in the telecommunications industry. The target firm, ETKL was failing. Post-merger Safaricom's share of the national market for electromagnetic spectrum would jump to 43 per cent against the competitors' 27 per cent and 30 per cent respectively. Its share of the market for telecom towers would increase to 56 per cent against the 24 per cent and 20 per cent of the remaining competitors. The transaction was all the same approved "to salvage a failing firm and save jobs."[2111] As noted early in this chapter, Safaricom's market dominance continues to be a challenge to date. Here is evidence that previous merger decisions may be partly responsible. That Essar was a failing firm also played the central role in the approval of the acquisition of mobile ETKL's business, subscribers and Licenses to operate by Airtel Network Kenya Limited. The transaction was approved because it did not raise competition concerns and further "salvaged a failing firm and saved jobs that would have been lost had the target exited the market".[2112]

The Tribunal has established that the matter of whether a firm is failing or not should not be one of speculation but must be based on proof submitted by the parties.[2113] Under the 2010 Competition Act as under South Africa's 1998 Competition Act, the presence of a failing firm in a transaction is not a defence but rather a concern in assessment of the impact of a merger on competition.[2114] Differently though between the jurisdictions, with South Africa, imminent failure of a firm will not save a merger which raises competition concerns that weigh more than the loss from the departure of the failing firm.[2115] While the developing country merger regime should at all costs seek to keep assets and capital within the market as well as protect jobs, it is submitted that the presence of a failing firm

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[2108] Competition Authority of Kenya above at 46.
[2109] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 22.
[2110] Competition Authority of Kenya above.
[2111] Competition Authority of Kenya above.
[2112] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* 23.
[2113] Par 148 and 149 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[2114] Chapter 4 par 4.3.3.
[2115] Chapter 4 par 4.3.3.

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in a transaction should not present an open ticket of approval. So doing leaves the door open for monopolisation, "the standard problem presented by a failing firm defence".[2116] We recommend that there is need to reconsider the CAK's approach to the matter of failing firms in merger analysis.

Overall, enforcement in Kenya must remain cognisant of the fact that the long years of state ownership Kenya's economy laboured under debilitated competition in ways that carry over well into the post privatisation period.[2117] Some sectors of the economy can still be validly characterised as having "uncontested firms in incontestable markets."[2118] Apt examples include the banking industry with market segments that are relatively highly concentrated and whose top tier 9 banks (referred to as the large peer group) account for 74.60 per cent of the market assets, hold 96.78 per cent of all loan accounts and 74.24 per cent of deposit accounts. The remainder is shared among 9 medium peer group banks and 24 small banks.[2119] A study of Kenya's banking sector conducted by the Competition Authority revealed that at 2016, four of the country's large retail banks accounted for approximately 80 per cent of deposit and loan accounts.[2120] As one would expect, cost reductions in this market are not passed through to consumers in the form of lower pricing, pointing to a lack of competitive pressure on pricing.[2121] The same situation pertains in the fertiliser industry. A market inquiry jointly carried out by the Authority described the market as being characterized by "close control amongst a small number of traders and

[2116] *Iscor Ltd/Saldanha Steel* (*Pty*) *Ltd* 67/LM/Dec0167/LM/Dec01 par 140.
[2117] At par 5.2.2 above. The Government control of economies for many years was one of the grounds for discounting the welfare model preferred by the West. See chapter 3 par 3.2.3.
[2118] Lewis (2006) Speech of David Lewis Competition and Development, 2 May 2006, Cape Town South Africa available at http://www.internationalcompetitionnetwork.org/uploads/library/doc417.pdf (accessed 03/12/2018).
[2119] Central Bank of Kenya "Bank Supervision Annual Report 2020" Appendix iv at 85 Banking Sector Market Share - December 2020 available at https://www.centralbank.go.ke/uploads/banking_sector_annual_reports/1375903848_Bank%20Supervision%20Annual%20Report%202020.pdf (accessed 19/02/2021).
[2120] Competition Authority of Kenya *Competition and consumer protection in the Kenyan banking sector Phase II Redacted Version* Competition Authority of Kenya 30 June 2017 51 Figure 6 available at https://www.cak.go.ke/images/new/june/Banking%20Sector%20Study%20Phase%20II.pdf accessed 14/10/2019).
[2121] Competition Authority of Kenya above at 4, 50 and 52.

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suppliers in tight oligopolistic, concentrated markets with a long history of cartel conduct".[2122] The cement[2123] and the sugar industries[2124] are equally highly concentrated.

Developing jurisdictions should work towards enforcement that engenders competitive markets, taken to mean inclusive markets. For the developing country, a "competitive market" is one with many participants, low barriers to entry and rewards for the investment made.[2125] The CAK's merger enforcement should mirror that.

5.3.4 The Public Interest Test

The parameters in the public interest assessment are "premised on the Kenya Government's overall economic Agenda".[2126] In applying the public interest test, the Authority will establish whether there is *prima facie* evidence of negative impact on any of the four factors set out under the Act or as added in the Public Interest Guidelines.[2127] As already stated, given that section 46(2) of the 2010 Competition Act is not a numerus clausus and is therefore open to additional considerations, there is need for caution.[2128] The contentious nature of the inclusion of public interest considerations in merger analysis calls for circumspection.[2129] Amendment to the Act to close the list of public interest considerations would in our opinion be sound. As we have earlier recommended, the closed list of public interest considerations can be re-opened if and when necessary following judicious and rigorous reflection. While legislative amendments typically involve a long process, amendments to the Competition Act have generally been fast-tracked by

[2122] Nduati et al. (2015) Non-confidential Final Report: Market Inquiry on Fertilizer in Kenya 10. See also 5 and 78. Available at https://cak.go.ke/sites/default/files/Kenya%20Fertiliser%20Market%20Inquiry.pdf (accessed 30/1/2020).

[2123] Mbongwe T, Nyagol BO, Amunkete T, Humavindu M, Khumalo J, Nguruse G and Chokwe E "Understanding Competition at the Regional Level: An Assessment of Competitive Dynamics in the Cement Industry across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia" Draft paper for presentation at pre-ICN conference, 22 April 2014 (2014) available at https://cak.go.ke/sites/default/files/Regional%20Cement%20Sector%20Study.pdf (accessed 13/01/2020).

[2124] Chisanga B, Gathiaka J, Nguruse G, Onyancha S and Thando V "Competition in the regional sugar sector: the Case of Kenya, South Africa, Tanzania and Zambia" (22 April 2014) Draft paper for presentation at the Pre-ICN Conference and Fifth Meeting of the UNCTAD Research Partnership Forum available at https://www.cak.go.ke/sites/default/files/Regional%20Sugar%20Sector%20Study_0.pdf (accessed 13/11/2019).

[2125] Chapter 3 par 3.2.4.

[2126] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 209 and 210. Par 209 states that ". . . the parameters encapsulated in the Guidelines are premised on the Kenya Government's overall economic agenda as articulated in the Vision 2030 and as cascaded in the current Medium Term Plan for the Vision. In summary, the two documents visualize a competitive economy, globally, and to paraphrase, with shared prosperity. This is also the Vision of the Authority.

[2127] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 220.

[2128] Par 5.3.2 above.

[2129] See chapter 4 par 4.3.5 for the South African experience and the contention preceding inclusion of public interest considerations into merger analysis and chapter 3 par 3.2.4 for the value of these considerations in the merger analysis of a developing Country.

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parliament in view of the value of the law to the economy. An example is the inclusion of abuse of buyer power provisions into the Competition Act in January 2017. [2130] The Act was amended shortly after in 2019 to refine the enforcement of the provisions.[2131]

Consideration of public interest concerns is on a case by case basis.[2132] Once a *prima facie* case has been established, the evidential burden shifts to the notifying parties to justify the negative impact on the public interest factor under consideration.[2133] The Authority conducts a "net balancing assessment" to reach a conclusion.[2134] As part of their submissions, parties to a merger are required to provide detailed information on the likely impact, positive or negative, on public interest.[2135] Stakeholders directly or indirectly affected by the proposed merger may also make submissions to the Authority.[2136] As already discussed, there is no obligation under the 2010 Competition Act to notify non-parties to a merger.[2137] It can only be imposed by the Authority and only during a review of a merger that presents public interest concerns.[2138] Notified non-parties are expected to provide evidence of the impact of the merger and "engage in good faith with the notifying parties in reaching measures aimed at addressing the public interest concerns." They should also "engage in good faith with the Authority". Since the expression "good faith" is not used elsewhere in the Guidelines, it can be taken to denote sincerity of intention as is the ordinary meaning of the expression. The inclusion of public interest

[2130] Act No. 49 of 2016 s5
[2131] Act No. 27 of 2019, s. 4.
[2132] Pars 166-167 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[2133] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 220. Par 225 contains the list of evidences that it will consider during its public interest assessment including due diligence reports, correspondence between executives of the merging parties including confidentiality agreements and documents on entry strategy by an undertaking. At par 220, the Authority will not give weight to any claims of the potential effects on a public interest factor that are not substantiated by either documentary or oral evidence.
[2134] Competition Authority of Kenya above par 220.
[2135] Competition Authority of Kenya above par 226. The Guideline contains requirements on the parties to a merger review. In addition to furnishing detailed information on likely impact of the merger on public interest, the notifying parties are also required to give employees and/or their representatives' meaningful and correct information concerning how the merger will impact their jobs in a timely manner. They are also to the Authority evidence of their engagements with affected parties, such as employee representatives and SMEs to ensure that they have been treated fairly and provide measures and/or commitment aimed at ameliorating negative impacts on the public interest concerns.
[2136] Third parties are referred to as being 'Those stakeholders directly or indirectly affected by the proposed merger' at par 226 Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013). The requirements from third parties are listed at the par as being to provide evidence of impact (whether positive or negative) on the public interest criteria; engage in good faith with the notifying parties in reaching measures that are aimed at addressing the public interest concerns resulting from the merger; propose remedies that are appropriate, proportional and capable of enforcement and eage in good faith with the Authority.
[2137] See par 5.3.2 above.
[2138] Par 226 Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013).

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considerations in merger analysis is a concession that allows consideration of multi-goals beyond the economic.[2139] Proving injury to public interest by a merger should be the business of those that the merger impacts negatively as in the South African scheme.[2140] The agency becomes an adjudicator between the affected stakeholder and the merging parties. All the more reason why Kenya's law must be adjusted to accommodate participation by intervenors. Further, the inclusion of stakeholders in the Guidelines supports further our proposal that the Act be amended to formalise their participation and give it legal weight as is with South Africa's Competition Act.[2141]

The need to enhance and sustain employment is achieved through strategies which include ensuring that no substantial job losses occur as a result of mergers, salvaging of failing and dormant firms and encouraging mergers of media firms that "enhance production of local content and thereof support youth employment".[2142] Failing firms as a public interest is connected to the expected loss of employment as evidenced in the decision over the proposed acquisition of indirect control of Abraaj Investment Management Limited by Actis International Limited in 2018.[2143] The target was in the process of liquidation and absent the merger it was likely to exit the market. Such an eventuality would negatively impact public interest through loss of employment.[2144] The merger was approved to forestall that eventuality.

Mergers that are likely to create employment will be looked upon positively.[2145] This is different from the South African situation where what is considered is the negative impact of a merger on employment.[2146] In the proposed acquisition of Nova Academies Tatu City Property Limited by Summit Real Estate Proprietary Limited in 2018, it was noted that the merger was likely to result in more employment opportunities in the education sector

[2139] Chapter 3 par 3.3.2.
[2140] Chapter 4 par 4.3.5.
[2141] Chapter 4 par 4.3.5.
[2142] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 210.
[2143] Proposed acquisition of indirect control of Abraaj Investment Management Limited by Actis International Limited available at https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decision_on_Acquisition_of_Java_House_by_Actis_International.pdf (accessed 6/2/2020.
[2144] Proposed acquisition of indirect control of Abraaj Investment Management Limited by Actis International Limited above at par 14.
[2145] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) The language at par 210 reads '. . .the Guidelines take cognizant of the need to *enhance and sustain employment*, of both human and capital resources, through supporting . . .'.
[2146] Chapter 4 par 4.3.5.

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which weighed in its favour.[2147] Transactions likely to redeem or secure jobs are also favoured. The 2018 proposed acquisition of the Stationery and Shavers Manufacturing, Sales and Distribution of Stationery, Lighters and Shavers Business of Haco Industries Kenya Limited by Bic East Africa Limited is one such example.[2148] The merger was approved not only since it raised neither competition nor public interest concerns but also because as the Authority noted, it was likely to secure the employment of current staff. Failure to proceed with the merger raised the risk of loss of employment since without it, the target firm would close down its activities in the country.[2149]

It is however not only the fact that the merger may create jobs that is considered but also the possibility of jobs losses occurring as a result of the merger. Both the Tribunal and the Authority agree that it is important that as far as possible, employment be safeguarded when considering a merger application.[2150] Whereas the possibility of job creation may lead to approval, the presence of merger related job losses may attract conditions attached to approval. After the Authority has established that there is *prima facie* evidence of substantial job losses, the evidential burden shifts to the notifying undertakings to justify them.[2151] It must be shown, like with South African merger analysis, that a rational process has been followed to arrive at the determination of the number of jobs to be lost and that the loss is balanced by an equally weighty, but countervailing public interest gain justifying the job loss.[2152] This other gain must be one cognisable under the Act.[2153] Efficiency gains

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[2147] Proposed Acquisition of Nova Academies Tatu City Property Limited by Summit Real Estate Proprietary Limited proposed acquisition of indirect control of Abraaj Investment Management Limited by Actis International Limited par 20 available at https://www.cak.go.ke/index.php/latest-determinations (accessed 6/1/2020.

[2148] Proposed acquisition of the Stationery and Shavers Manufacturing, Sales and Distribution of Stationery, Lighters and Shavers Business of Haco Industries Kenya Limited by Bic East Africa https://www.cak.go.ke/sites/default/files/2019-06/CAK_Decision_on_Acquisition_of_Haco_Industries_Kenya_Limited_by_Bic_East_Africa_Limited.pdf (accessed 11/01/20.

[2149] Proposed Acquisition of the Stationery and Shavers Manufacturing, Sales and Distribution of Stationery, Lighters and Shavers Business of Haco Industries Kenya Limited by Bic East Africa par 18.

[2150] Par 170-173 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.

[2151] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 221. The Authority considers that while a negative impact on employment may be clearly connected to a particular claimed efficiency this does not discharge the notifying parties' duty to show that the employment losses can be justified for a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger. The Authority will only have to establish whether a *prima facie* case exists for substantial job losses and once a *prima facie* case has been established, the evidential burden shifts to the notifying undertakings to justify the job losses. Per par 220, the notifying undertakings must demonstrate that there is a rational connection between the reason for the employment reduction and the number of jobs proposed to be shed.

[2152] Competition Authority of Kenya above at par 221. For South Africa's similar approach see chapter 4 par 4.3.5.

[2153] Competition Authority of Kenya above par 221. The public interest in preventing job losses is balanced against the countervailing public interest justifying the job losses.

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will be a plausible justification only if they are public in nature. Private gains will not do.[2154] This is similar to the South African application.[2155]

Any condition or combination of conditions may be imposed as long as these are rational, proportionate, enforceable and time bound.[2156] The possibilities set out include: requiring the merged undertaking to set up a development fund to ensure that a particular industry or local sector continues to be competitive; training staff for alternative employment; requiring the merged undertaking to supply a key input or technology over a defined period of time; imposing a moratorium on job losses for a defined period of time; requiring the redeployment of staff; re-skilling and training staff for alternative employment; maintaining contracts with suppliers for a prescribed period; putting a limit on imports and requiring the merged undertaking to comply with existing labour agreement and acknowledge existing unions.[2157] Characteristically, the Authority has imposed the condition of requiring retention of staff post-merger, especially the vulnerable lower cadre employees.[2158] Examples of the employment related conditions imposed in actual decisions include to not terminate any current short-term employment contracts of the target firm's employees and to retain all permanent long-term employees for at least 24 months;[2159] to absorb all the target's employees in order to ensure that "jobs are safeguarded in line with Vision 2030";[2160] to retain at least 2,279 employees and submit a compliance report to the Authority 2 years post transaction;[2161] to retain 43 of the 53 employees of the target firm,[2162] and to retain all employees for at least 1 year.[2163] We

[2154] Competition Authority of Kenya above par 245.
[2155] Chapter 4 par at 4.3.5.
[2156] Par 30 *Telkom Kenya Limited and Airtel Networks Kenya Limited v Competition Authority of Kenya* CT/005 of 2020.
[2157] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 244 and 245. Potential remedies in cases that raise public interest concerns can be imposed singularly or in combination.
[2158] A sampling of press reports illustrates this Ngugi "I&M ordered to retain Giro Bank staff in merger bid Monday" November 7, 2016 *Business Daily*; Mutua "Regulator now bars KCB from sacking National Bank staff" Monday, September 9, 2019 *Business Daily*; Alushula "Competition Authority approves four mergers, orders job protection" September 4th 2017 *Daily Standard*.
[2159] Acquisition of 100% of the Issued Share Capital in Gulf African Petroleum Corporation By Total Outre-Mer S.A Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 34.
[2160] The Acquisition of 57.73% Shareholding in General Motors East Africa Limited (GMEA) by Isuzu Motors Limited (Isuzu) at Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2016/2017* 36.
[2161] Competition Authority of Kenya above at 96.
[2162] Nokia Corporation and Alcatel Lucent Telecommunication Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016* 72 *at* 75; *First Assurance Holdings Limited and First Assurance Company Limited* at 77 Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016, I&M Holdings at 72 of* Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016 and Greenspan Mall Limited at 25 and 77* Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016.*
[2163] Acquisition of Trillvane Limited by Kuehne + Nagel Limited par 4 available at https://www.cak.go.ke/index.php/latest-determinations (accessed 6/2/2019).

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think that there is a need for more creativity and innovation on the matter of employment loss post-merger.[2164] The Guidelines give an array of nine possible conditions, six of which relate to employment and the Authority will do well to apply the other five.[2165]

Merger applications involving small and medium enterprises will be fast tracked as an initiative towards enhancing their capacity to penetrate markets, offer credible competition and enhance employment.[2166] It is recommended that the interests of small businesses guide enforcement in developing countries and we think the CAK's approach is appropriate.[2167] Kenya's SMEs grapple with the same challenges of similar enterprises in other developing countries. To take the example of the construction industry, customers with substantial projects often require construction firms to post a bond which acts as a financial guarantee. These bond requirements present formidable obstacles to smaller firms. Machines acquired for projects sometimes cannot be used after the assignments thus becoming a sunk cost which is a greater burden for the SME than it is for a bigger firm.[2168]

As indicated in the Guidelines, mergers aimed at exports will be under relatively less competition scrutiny in order to support local undertakings to become more competitive in the international market.[2169] But only so long as these local firms do not have buyer-power to distort competition to the detriment of their suppliers.[2170]

The Authority will consider stability of individual industrial sectors to ensure stability and economic growth.[2171] A party acquiring another, especially where there is dominance, may lead to the merger being approved on condition that manufacture of the products of the acquired party be continued for a period to be based on the time which new entry in the said market is feasible.[2172] For example, a 2015 transaction was approved on

[2164] Compare with South Africa's array of remedies at chapter 4 par 4.3.5.
[2165] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) pars 244 and 245.
[2166] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 211 and Competition Authority of Kenya *Public Interests Tests in Merger Determination Guidelines* (2013) par 5.
[2167] Chapter 3 par 3.3.2.
[2168] Competition Authority of Kenya (2017) *The Construction Industry: Analysis of the State of Competition* 24-32 available at https://www.cak.go.ke/images/new/june/Construction_Industry_Study_Report.pdf (accessed 12/1/2020)
[2169] Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 212.
[2170] Competition Authority of Kenya above par 241.
[2171] Competition Authority of Kenya above at par 237.
[2172] Competition Authority of Kenya par 238.

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condition of production of a given brand being continued for at least 3 years post-transaction.[2173]

The Guidelines add in two further public interest considerations to the four in sections 46(2)(d) to (g) of the Act. Mergers in sectors which have a high impact on the poor and the vulnerable, such as those involving supply of utilities will be subject to 'in-depth scrutiny'.[2174] Additionally, for mergers in the media industry, the Authority will consider the strength and competitiveness of media firms indigenous to Kenya, the spread in ownership or control of media businesses in the country and the extent to which diversity of local content is reflected through the activities of the various media business in an initiative to encourage plurality, diversity and local production.[2175]

Rather peculiarly, there was no reference to public interest concerns as part of competition law during the debate on the Bill. The objects section of the Act at section 3 is virtually silent on the matter of public interest concerns as outcomes of competition law. The only public interest related objective is the promotion of competitiveness of national undertakings in world markets.[2176] However, that the Act was passed with public interest concerns in the merger analysis provisions points at tacit approval. Furthermore, public interest concerns remain a core part of the country's economic development agenda. For instance, the Second Medium Term Plan of Vision 2030 for 2013 to 2017 focused on addressing the acute challenges of poverty and inequality by prioritising job creation.[2177] Support of SMEs was part of the employment creation strategy.[2178] Any enforcement that does not take public interest concerns into account fails in its mandate. So far, we think that the CAK has overall remained true to the cause.

5.3.5 Scoring Kenya's Merger Analysis

In its orthodox application, competition law assumes existence of markets with large numbers of participants, absence of natural monopolies, fully rational economic agents

[2173] A global restructuring involving the acquisition of Keringet Brand in Kenya by The Coca Cola Company (TCCC) Competition Authority of Kenya *Competition Authority of Kenya: Annual Report & Financial Statements 2015/2016 22.*
[2174] For mergers concerning utilities see Competition Authority of Kenya *Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act* (2013) par 213 and 243.
[2175] Competition Authority of Kenya above pars 214 and 240.
[2176] Section 3(h) 2010 Competition Act.
[2177] Republic of Kenya (2003) *Second Medium Term Plan: 2013 – 2017: Transforming Kenya: Pathway To Devolution, Socio-Economic Development, Equity And National Unity* ii and 8.
[2178] Republic of Kenya above at 12.

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and governments equipped with means to effect redistribution.[2179] Developing economies such as Kenya are far removed from this ideal world. What their situation calls for are organic goals that are country-specific and respectful to political and economic history.[2180]

The overall tenor of the 2010 Competition Act, as intended by the drafters and as driven by the demands of the season, points to enabling of investment. The goal is economic progress driven by private investment.[2181] The agency has committed itself to significantly contributing to these ends.[2182] The desired end is more efficient firms able to create a vibrant market place locally and to compete globally. We think, while Kenya's merger regulation is not where it could be, it is firmly on the journey there. Save for the need to be wary of efficiency claims and to look out against compounding concentration, we have not found a major reason on which to fault the CAK's approach to merger analysis. Developing country merger analysis should be focused on preventive as opposed to curative measures and the CAK cannot afford to lose focus of that.[2183] What shortcomings exist can be remedied and detailed recommendations of how to achieve this are contained in the next chapter.

5.4 CONCLUSION

The move towards a more market-oriented economy is relatively recent for Kenya. Progress towards liberalisation was sporadic throughout the 1980s and deregulation of markets finally took root in the late 1990s. The current Competition Act was passed in 2010 as part of a toolkit required for that shift. The law was also an outcome of a wave that took modern competition legislation to the mainly developing countries that hitherto did not have such laws.

Reform of Kenya's competition regime has moved alongside the evolution of the economy from a protected one with price controls to the current liberal regime with a contemporary competition legislation. The country's economic history reveals the trends over time and

[2179] Chapter 3 par 3.1.
[2180] Chapter 3 par 3.2.1.
[2181] Above at pars 5.2.3 and 5.2.5.
[2182] Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report & Financial Statements for the Financial Year 2017/2018* 24.
[2183] Chapter 3 par 3.3.2.

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reveals the motivation behind the current law and what the attendant merger regulation should be inclined towards.

The colonial era from early 20th Century to independence in 1963 transformed the country's economy from one of subsistence farming to a capitalist oriented system driven by private enterprise. Nonetheless, throughout the colonial period, the degree of trade and industrialisation in the economy remained rudimentary. The focus was on agriculture and the Colony served as a source of raw materials for export. There was consequently little need to regulate competition. The Price Control Ordinance, passed in 1956 with the purpose of protecting consumers against price increases of basic commodities and preventing monopolistic pricing practices, was considered adequate.

The independence Government inherited a heavily foreign-owned economy and set about interventions to replace the foreign capital and personnel. The path towards 'Kenyanisation' of the economy was through state-owned enterprises known as parastatals. With time, this created a large state sector. The prominent form of state intervention in markets remained price control under the Price Control Act of 1956.

At the end of the 1970s, the combination of locally manufactured products which could not yet compete in export markets, and a small domestic market were contributing towards economic decline. The government began to implement an outward oriented industrial development strategy aimed at promoting manufactured exports, reducing protection of the manufacturing sector and opening up domestic markets to imports. Lack of political will and mismanagement of the crucial agriculture sector prevented full achievement of the policy changes. Parastatals presented a problem because they were inefficient and protected from competition.

As the 1980s came to an end, government signaled a move towards less reliance on instruments of direct control and increasingly on competitive elements in the economy. The Restrictive Trade Monopolies and Price Control Act was passed in 1988. The Act was intended to encourage competition in the economy and its mandate extended to cover conduct by Government agencies and state enterprises. It comprised the three main competition law areas of restrictive trade practices, control of monopolies and

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concentration of economic power and regulation of mergers. Mergers were prohibited unless authorised by the Minister. The definition of a merger was narrow and extended to horizontal mergers only. Any reduction on competition caused by a merger would be acceptable if adequately counterbalanced by a benefit to the country.

Though the 1988 Act marked progress from the Price Control Act of 1956, it did not have the full desired impact. There was little activity in terms of decisions save for merger approvals. Markets continued to suffer from high degrees of concentration and presence of attendant anticompetitive practices. The Minister had full discretion on decisions of the competition agency and executive intrusion occurred on occasion. By and large, monopolisation and concentration increased.

The country's economic performance continued to decline through the 1990s owing to a combination of mismanagement and heavy regulation. In order to respond to the ensuing economic challenges and build a globally competitive and prosperous economy, the government began to implement economic and structural reforms for recovery of the economy under the Vision 2030 blue print. There was a shift from direct management of the economy to increased reliance on market dynamics. Increasing liberalisation mandated a sound competition policy to support private enterprise as well as draw out and reinforce the benefits of privatisation of public enterprises. The Competition Act was passed in 2010 to meet achieve those ends.

The 2010 Competition Act establishes the Competition Authority of Kenya as the enforcement agency and a Competition Tribunal to hear Appeals from the CAK's decisions. The Act covers restrictive trade practices and abuse of dominance, control of unwarranted concentration and regulation of mergers. Abuse of buyer power provisions were added into the Act in 2017. The Act also contains consumer protection provisions which are enforceable by the competition agency. No merger may proceed without approval. The agency is enabled to set the threshold for excluding mergers from the requirement of notification.

The goal of 2010 Competition Act is promotion and safeguarding of competition in the national economy. The Act displays a strong orientation toward the promotion of efficiency

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focused on protection as well as proactive promotion of competition. Public interest goals are not included early in the Act but are a prominent part of merger review. The Appeals Tribunal has heard four matters to conclusion, one on mergers and the other on restrictive trade practices. The low activity at the Tribunal may be directly attributable to the fact that no merger has so far been declined by the CAK. An additional contributing factor may be the non-involvement of intervenors in the merger analysis process. Only merging parties may file appeals. Appeals from decisions of the Tribunal go to the High Court which is part of the judiciary and is not a specialised tribunal for competition law.

Parliament intended the 2010 Act as a catalyst for increased competitiveness of firms and checking monopolisation and dominance. It was also intended to support the crucial SME sector. The Act should be enforced in a manner that supports free markets and robust growth as well as inclusive development. Since Kenya is a developing economy, enforcement of competition law must be suited to support the factors that contribute to economic take-off, chief among them open, vibrant markets.

The definition of mergers is broad. A merger occurs when one or more undertakings directly or indirectly acquires or establishes control over the whole or part of the business of another undertaking. Each undertaking to a proposed merger must notify the Authority. There is no obligation on the merging undertakings to notify third parties, though a third party may present evidence in respect of a merger application before the Authority. Proceedings are conducted in confidence which may increase the chances of a favourable outcome for the applicants.

Substantive analysis of a proposed merger is conducted under section 46(2) of the Act. Kenya's merger analysis cannot be fitted into any of the two mainstream models, neither the substantive lessening of competition standard nor the dominance test. The Authority may base its determination on any criteria it considers relevant including eight set out at section 46(2). The first factor alludes to the substantial lessening of competition-test, the next to the dominance test, and the remaining six are a combination of public interest considerations and efficiency benefits. Though there is no general consensus on superiority of either scheme, there is doubt whether the dominance test can cover both

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unilateral and coordinated effects in cases of possible dominance. The Merger Guidelines show a partiality for the substantial lessening of competition-test but it is necessary that Kenya moves to this test for certainty and to be able to rely on decisions of more settled jurisdictions most of which apply the substantial lessening of competition-test. The list of eight factors in section 46(2) is not tiered or arranged in any particular order of progression. A systematic progression for merger analysis could streamline enforcement.

Section 46(2)(c) of the Act requires the agency to take into account the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment likely to result from acquisition or enhancement of a dominant position by a firm. "Benefit to the public" is not defined and its consideration only counts for mergers that create or strengthen dominance. The provision may have been intended as a catch-all to cater for benefits that cannot fit neatly into the efficiency consideration in section 46(2)(h). It is best removed or the benefits to the public narrowed down and defined for clarity and predictability of enforcement.

The list of public interest considerations in the 2010 Competition Act is open. Discretion is left to the competition agency over any additions and the agency has tended to be liberal in its approach. The Merger Guidelines add salvaging of dormant and failing firms and mergers in areas that have a direct impact on the poor to the public interest considerations in the Act. There is need for caution in view of the wide breadth of possible public interest considerations and section 46(2) is best amended to lock in specified public interest considerations.

The Merger Guidelines divide merger analysis into a competition test and a public interest test. The competition test is focused on economic efficiency and consumer welfare and is carried out first. The public interest assessment considers the extent to which a merger would affect employment, competitiveness of SMEs, ability of national industries to compete in international markets and the impact of the merger on a particular industrial sector. It is carried out separately and independently of the outcome of the competition test. A merger that raises no competition concerns may be prohibited on public interest grounds and one that does raise competition concerns passed on public interest grounds.

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The Guidelines which set out the tests are not a legally binding document and analysis could start at either test. A clear analytical progression incorporated into section 46(2) for is however necessary for predictability.

The SSNIP Test is used for market definition. SSNIP is complex and more economic in orientation. In defining markets, it is recommended that developing country merger regimes operate a more flexible lens than is usual in advanced jurisdictions in order to accommodate the definition most felicitous for inclusive development. Developing countries should use less of SSNIP and, when used, adjust the test to take into account the jurisdictional exigencies of their markets as is done in South Africa.

Concentration ratios and the Herfindahl-Hirschman Index are used to establish market concentration. The competition agency also investigates the history of market shares over a period of time. Unilateral effects are assumed to be more likely where a merger results in an undertaking with a large market share and in already concentrated markets, particularly where the merged entity will potentially be more efficient. Decisions of the agency reveal preference for dynamic fragmented markets in accordance with the spirit of the Act.

Mergers are assessed for possible reduction in competition after market definition and establishment of concentration levels in the relevant market. Horizontal mergers are assessed for unilateral and coordinated effects. Possible efficiencies that could benefit consumers, effects of the merger on employment and on the ability of national industries to compete in international market and ease of entry post-merger are among other factors taken into account. Approval will generally be granted where markets have low barriers to entry.

The presence of countervailing power, defined as the ability of large buyers or suppliers, is taken into account. Where existing it will favour approval. The Guidelines are cognizant that the benefits of the exercise of buyer power are not necessarily passed on to the customer and countervailing power will therefore not count unless it is shown that it is applied not only to benefit the buyer itself but also of small and medium sized entities. This is appropriate given that small and medium enterprises play a pivotal role in driving

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growth of the Kenyan economy. Where there is participation of imports and/or the possibility of importing, the merger is likely to be approved.

The approach to vertical mergers is more permissive. A degree of foreclosure that yields returns for the consumer is acceptable and may mitigate a negative finding. Concern is more with regard to industries that are opening up to competition or that are expected to do so in the foreseeable future. Foreclosure is also the main concern for conglomerate mergers. A merger may not be approved where the combination of products in related markets may confer the ability and incentive to leverage a strong market position by means of exclusionary practices such as tying and bundling. The approach to conglomerate mergers is appropriate for a developing economy and within the objects of the Act.

Section 46(2)(h) of the Act caters for consideration of efficiencies that could arise from a merger. The Guidelines treat efficiency both as a consideration that could weigh in favour of approval and as a defence to a merger with anticompetitive outcomes. In actual enforcement, efficiency is treated as a consideration in favour of approval. It is necessary to align the Merger Guidelines with the Act for consistency and to keep the law as simple as is necessary for enforcement in a developing jurisdiction. There is also a need for greater circumspection in granting merger approvals on grounds of increase of efficiency.

The Act is silent on the place of failing firms in the scheme of merger analysis but the Guidelines provide that a problematic merger may be considered compatible with the Act if one or both of the merging parties is a failing undertaking. A failing firm can be treated either as a defence or a public interest consideration that could favour approval. Presence of a failing firm tends to guarantee approval of a merger application. Greater circumspection is needed to avoid approving mergers that could lead to monopolisation.

The public interest considerations taken into account are those framed within the Kenyan Government's overall economic Agenda. Once a *prima facie* case has been established that the merger will negatively impact a public interest consideration, the evidential burden shifts to the notifying parties to justify the negative impact to the public interest factor under consideration. It is necessary to provide for participation by intervenors for more

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effective consideration of public interest considerations. Mergers that are likely to create employment will be looked upon positively.

Mergers that involve SMEs will be favourably considered in order to enhance their sustainability. The approach is in recognition of the contribution of SMEs to the economy and is appropriate. The agency will consider stability of individual industrial sectors. Mergers in sectors which have a high impact on the poor and the vulnerable will have in-depth scrutiny. For mergers in the media industry, the agency will consider the strength and competitiveness of indigenous firms and the spread in ownership or control of media businesses in the country.

The drafters of the 2010 Competition Act intended it to support economic progress driven by private investment. The desired end of enforcement is more efficient firms and competitive local markets. At the same time the needs of groups and interests should be taken into account to achieve inclusive growth. Overall, the merger analysis under the 2010 Competition Act succeeds in this endeavour.

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CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

6.1 Introduction

6.2 General conclusions on competition law goals from American antitrust

6.3 The developing country and competition law goals

6.4 Lessons from South African merger analysis

6.5 General conclusions on Kenya's merger analysis

6.6 Recommendations for reform

6.7 Topics for further research

6.1 INTRODUCTION

This research tested the hypothesis that merger regulation in a developing country such as Kenya, is most beneficial when the analysis of mergers takes into account the socio-economic context, without sacrificing the competitiveness of the market structure. The questions addressed were the following: whether competition law goals are immutable or adaptable; what competition law goal(s) best serve(s) a developing country; the nature of merger analysis that delivers the ideal goal(s); whether it is efficient for Kenya to have a competition test that is hybrid in nature; whether a tiered approach to merger analysis, commencing with the assessment of the effect of the merger on competition in the relevant market and using public interest as a further filter, is more appropriate for Kenya than the current scheme set out in section 46(2) of the Competition Act of 2010; how efficiency benefits should be treated in Kenya's merger analysis; which public interest concerns should be considered under the Kenyan Competition Act as appropriate in the context of merger analysis; whether there are aspects in section 46(2) of Kenya's Competition Act that should be discarded or amended; and what curative measures could be taken with regard to apparent inadequacies.

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To address the above questions, the research was organised into 5 chapters. Chapter 1 provided a background, setting out the justification for the study, its focus and hypothesis, the research questions to be addressed, limitations and delineations of the study and rationalisation of the chosen comparator. Chapter 2 examined the various approaches and schools of thought regarding the ends of competition law, using the American experience to illustrate that goals of competition law are not immutable and are essentially part of the greater policy direction.

Chapter 3 considered the question of whether developing jurisdictions should align their law to that of developed countries with mature competition law, or whether they should focus it to cater for their jurisdictional exigencies and chosen policy direction. It settled that the most appropriate and pragmatic object of competition law for developing nations is economic development. The nature and elements of a merger analysis that would resonate best with this identified object was established, and South Africa's merger analysis identified as a suitable prototype for application by comparable jurisdictions.

Chapter 4 scrutinised South Africa's merger regime, zeroing in on its analysis of mergers. The chapter presented an historical overview of competition law over the years, identifying the ends for which the law was fashioned and applied at various historical junctures. An assessment of present day South African merger analysis was conducted to establish its responsiveness to goals set out in the legislation, and further whether the framework of analysis qualifies to serve as a template for countries in similar circumstances.

Chapter 5 examined Kenya's merger analysis within the greater context of its competition law. A historical overview was presented to provide context to the current legislation. A detailed evaluation of the law and practice of merger analysis was conducted, alongside an appraisal of the strengths and shortcomings of the current dispensation and their implications. Possible solutions to identified areas of limitation were recommended.

This closing chapter contains a compilation of all the findings of the research, together with conclusions on these principal findings. It finally presents recommendations for improvement, divided into two categories: those that relate to the ways in which the

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competition agency applies merger analysis and proposals for amendments to the Competition Act of 2010.

This research proceeded from the premise that regulation of market conduct through appropriate policy and legislative measures is essential for safeguarding fair competition. Such regulation deters anti-competitive practices and facilitates efficient markets, which directly contribute to economic growth.[2184] It also accepted and reaffirmed the position that, while developing countries are better off adopting and enforcing competition law, care must be taken to do so in ways that are directly pertinent and therefore capable of producing optimal results.[2185] Accordingly, merger regulation in developing countries is most effective when the legislative framework takes into account the social-economic context.[2186]

The practical purpose of this study has been to assess the fitness of Kenya's merger analysis regime, both the law and its application, to the country's jurisdictional particularities using the South African equivalent as a comparator. Our conclusions can be summarised into the broad observations that follow.

6.2 LESSONS ON COMPETITION LAW GOALS FROM AMERICAN ANTITRUST

A study of the normative foundations of competition law is essentially a journey through America's antitrust over the last century or so. We found that competition legislation across jurisdictions typically follow the prototype of American law.[2187] Furthermore, we established that conceptions that have already manifested in earlier seasons of antitrust in due course manifest in other jurisdictions, making the jurisdiction appropriate to forecast the path that others are likely to take.[2188] The trajectory of American antitrust was therefore taken to carry relevant lessons for other competition law regimes, those of developing jurisdictions included.

Competition law is typically the body of rules set up to safeguard and support markets where vigorous yet fair competition results in the most effective allocation of economic

[2184] Chapters 1, 2 and chapter 3 par 3.2.1.
[2185] See chapter 3 gerally and especillay par 3.2.1.
[2186] Chapter 1 par 1.9.
[2187] Chapter 2 par 2.1.
[2188] Chapter 2 par 2.1,

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resources.[2189] In such a market, production of goods and services at the lowest price is possible and the market operates efficiently for the benefit of society. Archetypal competition law proscribes a range of conduct that comprises collusion and cartels, abuse of monopolies and dominance, and anticompetitive mergers and acquisitions.

We found that mergers could be said to have impelled antitrust law. The thesis established that the passing of the Sherman Act was motivated by the flagrant combination of firms using the trust device to control markets.[2190] In the same manner, economic benefits associated with averting anticompetitive mergers have inspired the proliferation of competition laws in contemporary times.[2191]

We found mergers to impact economies in ways that are particularly significant to a developing country, hence the need for sound decision-making on whether to approve them or not. They enable firms to engage in efficient consolidation, increase productivity and benefit from technological innovation.[2192] In turn, effectual businesses grow economies. Pro-consumer benefits such as lower costs are a direct outcome of the more efficient firms that result from mergers.[2193] Cross-border mergers are a conduit for foreign direct investment, so much so that one of the factors that prompted adoption of competition policy by developing countries in the 1990s was the global merger wave of between 1990 and 1998.[2194] The productivity of domestically owned firms is positively related to the presence of foreign firms. However, given that most domestic firms tend to be much smaller than multinational firms, unequal competition between large multinationals and domestic corporations can push smaller domestic firms out of markets. Careful attention must therefore be paid to ensure sound analysis of merger effects before approval.[2195]

The core question in merger analysis is whether a prospective or already effected merger will enhance or diminish the economic performance of an industry. The ideal regulation

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2189 Chapter 2 par 2.2.2.
2190 Chapter 2 par 2.2.2.3.
2191 Chapter 2 par 2.2.2.3.
2192 Chapter 2 par 2.2.2.3.
2193 Chapter 2 par 2.2.2.3.
2194 Chapter 2 par 2.2.2.3.
2195 Chapter 2 par 2.2.2.3.

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policy is one that can consistently prevent anticompetitive unions while allowing those that do not pose a risk to the market.[2196] Analysis of mergers involves a counterfactual comparison of the market situation before and after the merger to assess the potential effect on competition in the market(s) where the merging firms are active. Public interest concerns may be incorporated into that step, or used alongside or separately from it.

Though native to the United States, the debate on the normative foundations of competition law has acquired a global quality. The dominant concern for developing countries is usually whether the goals to be pursued are already fixed or whether adaptations that best fit their circumstances can be adopted. A further matter of concern for them is whether non-economic public interest considerations are appropriate ends to seek, especially at merger analysis.

To the question of the value of engaging with the notion of goals of the law, a matter which may of little concern to enforcers and courts, we found support in Bork's assertion that policy cannot be made rational until a firm answer is given to the question of the point of the law.[2197] For substantive analysis to be accurate, goals must be defined, and especially for countries which lack the benefit of accumulated competition jurisprudence on which to base their enforcement.

Ezrachi points out that the ideal traits of stability, purity and predictability are, as a matter of fact, not inherent in competition law.[2198] Consequently, the understanding of what competition denotes is the sum of vastly different jurisdictional experiences, expectations and perceptions. Two questions were found that address the dichotomy on goals of competition law. The first is whether the law should seek to enhance competition by maintaining an atomistic structure in which numerous businesses compete, that is to encourage decentralization, or whether it should aim to maximize welfare with the focus on efficiency, that is, promote total or consumer welfare as an outcome.[2199] A second question is which is superior between monist reading of the purpose of competition or a

[2196] Chapter 2 par 2.2.3.
[2197] Chapter 2 par 2.3.1.
[2198] Ezrachi at chapter 2 par 2.3.1.
[2199] Chapter 2 par 2.2.3.

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reading supporting multiple goals.[2200] Essentially, the divide can be reduced into a "means-end" dichotomy where the point in issue is whether what is to be safeguarded is the process of competition or its outcome.

Another facet of the debate was identified as the matter of whether legitimate competition law goals are limited to purely economic concerns or whether the law is pliant enough to pursue non-economic goals.[2201] This discussion has been brought to the fore by the increased adoption of competition law by developing economies where concerns such as poverty, unemployment and sustainability of small and middle size enterprises are relevant.

The absence of a universal definition of competition or consensus about what constitutes its promotion and what ends it should yield has resulted in merger regimes promoting a varied range of policy goals. We established however, that largely similar merger laws can validly produce diverse economic and social goals varying from one jurisdiction to the next.[2202] According to Lewis, it is wholly possible to carry out a mandate which requires sensitivity to a number of industrial and social policy considerations without compromising the core objectives and approaches of orthodox competition law and policy.[2203]

According to Foer, picking a competition law goal is not merely a product of economic theorising, but of political economy.[2204] And as Fox observes, trends in goals of enforcement of competition law generally are a consequence of external impetus.[2205] The thesis identified a set of three factors to which the unsettled character of competition law goals can be attributed. This thesis identified that the triad of the course of the politics of the day and hence government policy; the dominant economic scholarship and philosophy of the season; and the judiciary's perception and interpretation of the law in the given season, drove antitrust from the early days of the Sherman Act and continue to do so to date.[2206] The open-grained nature of the law facilitated courts, agencies,

[2200] Chapter 2 par 2.2.3.
[2201] Chapter 2 par 2.2.3.
[2202] Chapter 2 par 2.3.2.
[2203] Lewis at chapter 2 par 2.3.2.
[2204] Foer (2005); chapter 2 par 2.3.2.
[2205] Fox chapter 2 par 2.3.2.
[2206] Chapter 2 par 2.3.3.

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economists and scholars to influence the direction of antitrust. The same position was found to have pertained with regard to the European Union where competition policy has been applied with reference to the legal, economic, political and social context.[2207]

The dominant view of antitrust enforcement policy in the United States today is that it exists to promote economic welfare. This was not always so. We found the current position to be the product of ideology evolving to meet dynamic economic conditions and changing enforcement philosophy.[2208] On the merger front, we found a remarkable transformation of goals pursued yet with little modification of the underlying statute.[2209] We also found a close interdependence between antitrust goals and merger trends with each of the five merger waves so far experienced by the United States being a response to a shift in competition law goals, or itself motivating the shift.[2210]

We established that from its inception, the Sherman Act was a political document, principally intended to rein in the powerful corporate monopolies that dominated manufacturing and mining in Post-Civil War late-nineteenth-century America.[2211] The legislation was intended as a charter of economic liberty and an instrument with which to dismantle these powerful corporations and prevent amalgamation of economic power that could threaten the political arm. Implementation of the Act was similarly politically angled to achieve pre-determined goals and prevailing policy.[2212]

Though passed in 1898, it was not until 1904[2213] that the law was applied to intervene in market conduct. The per se rule introduced that year was overturned shortly after in 1911.[2214] The Supreme Court whittled down the doctrine of restraint of trade established in the 1904 decision and held that monopoly *per se* or the acquisition of market power *simpliciter* was not a violation of the law. We found this back and forth between light and firm enforcement to be similar to the scenario of many developing countries in the early

[2207] Chapter 2 par 2.3.3.
[2208] Chapter 2 par 2.4.
[2209] Chapter 2 par 2.4.
[2210] Chapter 2 par 2.4.1.
[2211] Chapter 2 par 2.4.1.
[2212] Chapter 2 par 2.4.
[2213] *Northern Securities Company v. United States* 193 U.S. 197 (1904). with the court establishing that the could forestall anticompetitive mergers
[2214] *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911) and *United States v. American Tobacco Company* 221 U.S. 106 (1911).

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days of their competition law enforcement while the appropriate approach is established.[2215]

Congress construed the strict interpretation of the law to be the beginning of unwarranted narrowing down of the antitrust statute by conservative judges. There was the additional concern that Big Business had become too big, wielding control of money and credit in the country and having the power to plunge the nation into a financial crisis. Congress passed the Clayton Act in 1914 to deal with this apparent threat. Whereas the Sherman Act only declared monopolisation illegal, the Clayton Act made certain business practices conducive to the formation of monopolies, illegal. It reduced judicial discretion by prohibiting certain tying arrangements, exclusive dealing agreements, and mergers achieved by purchasing stock. We found this development to be an adjustment of the law to fit the political nuances of the time. Stringent enforcement and a broad law was the preferred approach of the time to manage Big Business for socio-political purposes.[2216]

Woodrow Wilson won the 1912 elections on a ticket of firm antitrust.[2217] However, the First World War followed shortly and brought to an end erstwhile intentions of applying antitrust to control Big Business. Most major antitrust cases were suspended for the period of the war, as antitrust policy receded. The executive branch discouraged aggressive prosecution while court decisions narrowed down the antitrust agencies' mandate. Decisions on collusion and cooperation reflected tolerance as courts applied broad market definitions that made findings of dominance unlikely. This approach facilitated the contribution of Big Business to the war effort. Through the First World War, antitrust became, in the words of Pitofsky, a "faded passion".[2218]

The more tolerant approach toward consolidation, cooperation and associationalism was retained after the war. The goal of antitrust remained centralisation of economic power in order to support the contemporary need of the country at the time, this being economic

[2215] Chapter 3 par 3.2.
[2216] Chapter 2 par 2.4.2.
[2217] Chapter 2 par 2.4.2.
[2218] Pitofsky in chapter 2 par 2.4.2.

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recovery. Our conclusion was that antitrust retained its initial character as a tool of political expediency.[2219]

The Great Depression which lasted from 1929 until the late 1930s saw a continuation of a policy tolerant of associationalist preferences. Cartelisation of industries was a part of national policy and businesses were urged to cooperate. The fortunes of many small family-owned businesses was at risk and light touch antitrust was seen as a lifeline. It was evident to us that at the time, antitrust was responding to the call of the time which was rescue and protection of small businesses. We found this to call to mind the prioritization of Small and Medium-sized Enterprises that is a common concern for competition law in many developing countries.[2220] Hawkins points out that change in antitrust policy towards more lenient measures does not necessarily imply laxity or non-existence.[2221] We concluded that antitrust did not die during the Great Depression, as is held by some. Rather, it just changed in character.

The Second World War saw the further decline of antitrust in the face of war planning and production.[2222] Guidelines for industry collaborations, permitting pooling of small firms, were issued. States and the federal government were free to overlook restraints of trade. We found that though antitrust had not changed in content, as mentioned above, it had changed in character. The goals for which it was applied had changed as demanded by the prevailing political economy.

Decades of conservative antitrust favoured the business class to a point that Big Business began to be viewed as a genuine challenge to legitimate government. As the country moved out of the Second World War, views on the dangers of being big and the importance of protecting small firms experienced a resurgence.[2223] The structure-conduct-performance paradigm anchored the enforcement that was to follow. It advanced that an industry's structure, this being the number of firms in the market and their relative sizes, determine how effectively firms will perform in that market. We considered that the

[2219] Chapter 2 par 2.4.2.
[2220] Chapter 3 pars 3.2.3 and 3.3.2.
[2221] Hawkins JR "Antitrust Enforcement During the Great Depression" (29 June 2012) available at https://ssrn.com/abstract=2175995 (accessed 18/05 2019) in chapter 2 par 2.4.2.
[2222] Chapter 2 par 2.4.2.
[2223] Chapter 2 par 2.4.3.

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unfolding shift was a direct outcome of a change in policy. The chosen goal of enforcement at that time was revitalisation of antitrust and reaffirmation of the primacy of competition, now taken to be rivalry. A stronger role for the court in policing the national economy was favoured. The economic and the political thought converged around suspicion of Big Business and the courts followed with what Pitofsky refers to as "the most aggressive enforcement program in the nation's history".[2224]

The language of *per se* rules became common in decisions starting from the 1940s. Horizontal price fixing agreements were condemned summarily regardless of their actual effects and courts grew more willing to find that dominant firms had acted improperly. Judges presumed illegality of conduct by firms with market power, regardless of the effect on consumers. It did not matter how the firm had become a monopoly, the offence was simply becoming one. Efficiencies associated with large-scale enterprises were downplayed. The Celler-Kefauver Act, also known as the 'Anti-Merger Act' was passed in 1950, adding vertical and conglomerate mergers to the list of possible antitrust violations.

We found Justice Warren's opinion in *Brown Shoe Co. v. United States,*[2225] that in the Sherman Act, Congress' desire was to promote competition through the protection of viable, small, locally owned business, to aptly reveal the goal of antitrust enforcement of that era. The law was now applied to achieve the goal of decentralization and had effectively become a second tier of government's antitrust policy. In addition to partiality for small business, courts interpreted the antitrust statutes to accommodate an array of social and political goals, some with an explicitly anticompetitive bent. We found this to be similar to many developing countries merger regimes today.[2226]

Starting in the 1940s, economists, economically trained lawyers and academics, mostly at Chicago University, challenged the existing model of enforcement and the goals which the law had been allocated.[2227] Their examination of business behaviour was based on economic and empirical assessment, excluding from consideration political or social

[2224] Pitofsky in chapter 2 par 2.4.3.
[2225] 370 U.S. 294 (1962).
[2226] Chapter 3 pars 3.1 and 3.3.2.
[2227] Chapte 2 par 2.4.4.

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values. They argued that sound economics did not support the application of the antitrust laws in many of the situations in which the laws were being applied. Markets could self-regulate and keep themselves competitive much better than the prevailing intrusive policies could. Efficiency explanations were attributed to the many phenomena that antitrust law has so far disfavored. The lectures of professors Aaron Director and Edward Levi formed the launching pad for this new thought which came to be referred to as Chicago antitrust.

Robert Bork's book *The Antitrust Paradox: A Policy at War with Itself* gave flight to Chicago antitrust.[2228] In it, he postulated that while touted as quintessentially pro-competition, Harvard antitrust was in reality restraining competition by favouring small players against big market players. He argued that what had actually concerned Congress was that trusts and certain other business forms would acquire monopoly or market power and with it the ability to artificially raise prices and restrict output, thus harming the consumer. To that extent, antitrust laws embodied only a concern for consumer welfare. Congress had adopted the Sherman Act as a consumer welfare prescription.

As trade barriers fell in the 1970s and international trade opportunities emerged, restrictive antitrust law was seen as an obstacle to American firms being able to compete well in international markets. Ronald Reagan won the 1980 election on a mandate to shrink regulation. This turn of events favoured the rise of Chicago antitrust. We saw the law as responding to circumstance and priorities of the season as it had in preceding eras. The liberal Chicago approach progressively replaced Harvard's structure-conduct-performance paradigm. By 1990, the United States Supreme Court had adopted an approach weighing the totality of the circumstances. Market concentration, though influential, was no longer determinative in evaluating horizontal mergers. Antitrust law today has the single end of maximizing economic efficiency.

[2228] Chapte 2 par 2.4.4.

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There is some discontent with arguments that Chicago analysis has overshot the mark and produced a regulatory scheme that is exceptionally generous to the private sector.[2229] The primary source of the Post Chicago thought is not quite agreed, but we saw the political economy at play with the thought connected to the re-ignition of policy debate in the political arena. Today, antitrust is poised at a critical tipping point between the Harvard and Chicago Schools. The calls by and large are for a return to stricter antitrust.[2230] Some Post Chicago scholars have as a matter of fact argued for partial restoration of the structural presumptions of Harvard.

Stucke posits that the new policy cycle, like those before it, will be defined by the three fundamental questions of what is competition, what are the goals of competition law and what the legal standards to promote these goals should be. He further asserts that over the next thirty years, the goals of competition law will broaden to include political, social, and ethical concerns.[2231]

This thesis presented a look through the history and experience of competition law in the United States and established that there is no purity to competition law goals. A study of the historical experience of American antitrust revealed that all through its existence, this branch of law has been moulded and adapted, from one epoch to the other, to suit already pre-determined ends adjudged at the time to be the most appropriate for the county. Further, that the most important determinants of policy have been political rather than economic. The standards used have been subjective and a direct consequence of the domestic environment. Antitrust has spoken to particular moments and composite pictures of it revealed formations, patterns and themes spanning epochs. Drawing from that, the thesis established that goals of competition law and hence, of merger enforcement, are ultimately country specific.[2232]

6.3 THE DEVELOPING COUNTRY AND COMPETITION LAW GOALS

As established in Chapter 2, developing countries mostly adopt their competition law, sometimes virtually wholesale, from established Western jurisdictions. Often it is

[2229] Chapter 2 par 2.4.5.
[2230] Chapter 2 par 2.4.5.
[2231] Stucke at chapter 2 par 2.4.5.
[2232] Chapter 2 pars 2.4.1 & 2.5.

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expected that the application of the new laws will be effected in a manner to bring convergence with the principles, goals and themes of developed jurisdictions which apply the Economics Based Model conception of competition law. Norms, substantive standards, procedures and institutional capability are part of this convergence. [2233] The Economics Based Model conception of competition law is focused on efficiency outcomes, relying on economics to provide the baseline values of the law and standard for liability. Market conduct is measured against its economic effects only.

Merger review is a key cog in the standardisation wheel. Consequently, merger policy is the subject of a push towards the perceived benefits of convergence said to include investment-attraction, cost minimization in cross-border transactions, certainty of interpretation and sharing of academic discourse and a pull to apply the law in a manner cognisant of the individual character of the relevant jurisdiction.[2234]

Some of the grounds put forth in support of convergence include that modifying the law to suit local conditions exposes it to the risk of being overwhelmed by local political forces that could erode its core.[2235] We found that argument defective having established earlier at Chapter 2 that competition law has not been apolitical and that its core shifts to align with prevailing policy and jurisdictional requirements.[2236] A further argument is that the defining characteristics of most developing country markets, such as high barriers to entry and an extensive informal economy do not mandate differentiation in implementation of competition laws since all countries suffer from these inadequacies.[2237] However, we established that the reality is that often the differences between developing and developed countries in terms of these elements are so stark, as to make it unwise to apply standard approaches.

We concluded that where circumstance so dictate, it is in order to engage the law to even out levels of inequality in the market and provide a fair opportunity to compete. Western jurisdictions, the United States and the European Union included, have in prior seasons

[2233] Chapter 3 par 3.2.2.
[2234] Chapter 3 par 3.2.2.
[2235] Priest at chapter 3 par 3.2.3.
[2236] Chapter 2 par 2.4.
[2237] Priest at chapter 3 par 3.2.3

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engaged competition law for purposes of distribution as was deemed ideal at the time.[2238] Though today efficiency is held up as the lodestar, it was in fact not the original desired end of competition law.[2239]

A review of the history of competition law in a number of pioneering jurisdictions including the European Union, the United Kingdom and Canada, revealed that the actual reasons for adoption of competition laws and the objectives of early enforcement were not the efficiency standard.[2240] For the European Union, integration of the European market rather than efficiency, was always the paramount objective and British anti-cartel laws began to be more strictly enforced only in the 1950s, with ample room for exemptions.[2241] The Sherman Act was motivated by populist political concerns about Big Business. Trusts and monopolies were condemned because they extracted wealth from consumers and antitrust put that wealth back into the correct hands.[2242] We found it accurate to conclude that the antitrust Act was passed to further economic objectives that were primarily of a distributive rather than an efficiency nature. In subsequent enforcement, the concerns addressed were not always economic. It was not until the ascent of Chicago School antitrust in the 1970s that these other ideals were abandoned in favor of efficiency.[2243] We concluded therefore that similarly, developing country competition law should be enforced to suit the needs of the season.

The economic thinking behind the Economics Based Model moves on the assumption of an existing market economy with some competition and in which interactions between producers and consumers are mediated through the price system, leading to an efficient equilibrium.[2244] This scenario does not avail in virtually all developing economies. This finding affirmed our conclusion that the developing country must find its way to a place of effective competitive markets before convergence can be effected.

[2238] Chapter 2 generally.
[2239] Chapter 2 par 2.4 and 2.4 generally.
[2240] Chapter 3 par 3.2.3.
[2241] Chapter 3 par 3.2.3.
[2242] Chapter 2 par 2.2.1.
[2243] Chapter 2 par 2.4.3.
[2244] Chapter 3 par 3.2.3.

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Developing countries require inclusive, sustainable economic development. Bakhoum asserts that developing countries expect from competition law enforcement a solution to their development challenges.[2245] According to Amartya Sen, development should not be parochially focused on growth in income but should aim to increase human capability so as to allow individuals to take advantage of life's opportunities and freedom to fulfill their full potential.[2246]

Arguments for convergence overlook the fundamental tension between the requisites for economic development and the strategy of global competition law convergence.[2247] The light-touch of the Economics-Based Model enforcement archetype may permit dominant firms to engage in conduct highly detrimental to SMEs which are often a crucial component of the developing economy. A more limited scope of enforcement provides fewer constraints on the conduct of foreign rivals, allowing them opportunities to abuse their often greater market power to the detriment of domestic firms. The expertise required to support costly forms of economic analysis is seldom available in developing countries which may contribute to flawed decisions on competitiveness of mergers.

The kind of law that will support competitive markets and hence economic development is dependent on the markets wherein this law is to be transplanted.[2248] Fox and Gal pick out four economic characteristics of markets in developing countries that should be taken into account.[2249] The first is that for many developing countries the move towards a more market-oriented economy is a recent phenomenon, long periods of state ownership having debilitated competition by creating players that are unconstrained by actual or potential competition or regulation. The remaining three characteristics are the fact that markets in developing economies generally suffer from high entry barriers which depress the levels of competition, the existence of extreme inequality in the distribution of wealth and opportunity and the high economic vulnerability of markets. To these four we identified additional factors including the highly concentrated nature of developing country markets, dearth of resources to dedicate to competition law enforcement, inefficient

[2245] Bakhoum at chapter 3 par 3.2.4.
[2246] Sen (1999) at chapter 3 par 3.2.4.
[2247] Chapter 3 par 3.2.4.
[2248] Chapter 3 par 3.2.4.
[2249] Gal and Fox in chapter 3 par 3.2.4.

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enforcement which emboldens would-be offenders and absent or weak supporting apparatuses such as independent effective judicial and appeal systems.[2250]

Our conclusion was that since developing countries need development but are faced with markets that either suffer from absence of competitiveness or are nominally competitive, the Chicago School approach that is committed to efficiency above growth and inclusion is impractical. We found parallels to exist between present day developing markets and those of the markets that precipitated the Harvard era of antitrust. Consequently, the ideal approach for developing country competition law goals is one that values competition as a process rather than an outcome.

We concluded that developing jurisdictions should first strive to have a policy that engenders competitive markets, taken to mean inclusive markets with low barriers to entry so that a wider section of society is enabled to participate. The goal of the law should be creating a dynamic and entrepreneurial economy and addressing high levels of concentration in the economy. The law must take cognisance of distinctive features of the socio-economic environment and be tailored accordingly. With regard to merger analysis, the challenge is to resolve those instances in which the unique characteristics pull leads in a different direction and is stronger than the follower push and to design rules accordingly.

In consonance with the rest of competition law, analysis of mergers should be angled towards growth and sustenance of robust inclusive markets with an appreciation of the role of mergers in structuring markets. In view of the parallels between markets in the developing world today and Harvard day markets, we consider that the best approach to merger analysis is the Harvard approach with its significantly stricter more prophylactic paradigm. A structural, as opposed to a conduct, approach is the better tool to prevent anticompetitive practices.[2251] In any event, the laws of many developing jurisdictions already lean the way of Harvard thought with broad object clauses and public interest considerations in merger analysis.[2252]

[2250] Chapter 3 par 3.2.4.
[2251] Chapter 2 par 2.4.3.
[2252] Chapter 3 par 3.1 and 3.2.

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Merger analysis in developing countries must be wary of even small reductions in competition in the market. The chief concern should be ensuring that a sufficient number of competitors operate in each market and therefore the understanding of competition should be that of rivalry.[2253] Small business protection should guide enforcement.[2254] Competitiveness of markets should be measured from the perspective of the ability of economic actors to enter and compete in markets.[2255] Since complex law significantly increases chances of poor decisions merger law must be kept simple, for instance through adoption of clear legal presumptions with regard to the economic effects of mergers.[2256] International competitiveness of domestic firms should also be taken into account.[2257] Analysis should be guided by dynamic efficiency, the most likely of the three to be in line with an overall development agenda.[2258] The merger regime should operate with a wider lens than is usual elsewhere. It should take into account the specific market in which the merging parties operate as well as other markets in which the parent or holding companies operate. Often, conglomerates in these countries wield not only economic but also political clout and have influence across the economy.[2259]

Wider industrial policy or socio-economic considerations should be incorporated into merger analysis in order to reduce inequality in the distribution of benefits created in the marketplace. As Lewis states, it is possible to carry out a statutory mandate which requires sensitivity to a number of industrial and social policy considerations without compromising the core objectives of orthodox competition law and policy. [2260]

Fox sets out six possible models that could form a template of merger analysis for developing jurisdictions, zeroing down to the South African model which she approves as the perfect fit, being tailored specifically to the goal of inclusive development.[2261] The scheme stands out for its low tolerance for dominance and concentration, focus on

[2253] Chapter 3 par 3.3.2.
[2254] Chapter 3 par 3.3.2.
[2255] Chapter 3 par 3.3.2.
[2256] Chapter 3 par 3.3.2.
[2257] Chapter 3 par 3.3.2.
[2258] Chapter 3 par 3.3.2.
[2259] Chapter 3 par 3.3.2.
[2260] Lewis at chapter 3 par 3.3.2.
[2261] Chapter 3 par 3.3.2.

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efficient inclusive markets and adoption of simple analysis.[2262] It is a law that aims to achieve the traditional concerns of competition law, and while at that, cater also for wider public-interest goals.[2263] The resulting merger jurisprudence has built-in checks to ensure that enforcement is efficient and serves the people, giving the law legitimacy.

This thesis established therefore, that developing countries, with market scenarios that are fundamentally different from those of jurisdictions in the developed world, are best served by tailored competition policy goals that correspond to their different concerns.[2264] The ideal overall goal for developing country competition law would be economic development.[2265] A developing country should implement its competition laws in ways that foster, rather than delay or impede, economic development. The approach to merger analysis is one focused on opening up markets and constructing a market environment conducive to inclusive participation. In addition, competition agencies and courts must effect merger analysis in a manner true to the intention of those who envisioned the legislation.

6.4 LESSONS FROM SOUTH AFRICAN MERGER ANALYSIS

This study found in South Africa, support for the thesis that competition law is like a sponge, into which may be forced the influences of prevalent social, economic and political preferences.[2266] We found the contemporary legislation to be an exceptional specimen of a law fitting its season.[2267]

The prevalent thought in the country at the beginning of the 20th Century was that markets can self-regulate. Early legislation was minimalist, configured for intervention only where the need was palpable. The law designed was incidental and fragmentary in nature, domiciled in assorted legislation.[2268] The passing of the Board of Trade and Industries Act 28 of 1923 brought in some focus. The Act gave the Board of Trade and Industry the task of enquiring into and advising the government on competition policy, monopoly

[2262] Chapter 3 par 3.3.2 and chapter 4 par 4.3.1.
[2263] Chapter 4 par 4.1.
[2264] Chapter 2 par 2.3.2 and chapter 3 par 3.1.
[2265] Chapter 3 par 3.2.4.
[2266] Chapter 2 par 2.3 generally.
[2267] Chapter 4 par 4.2.6.
[2268] Chapter 4 par 4.2.3

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situations and restrictive practices. However, the Board was only an advisory body and the powers to sanction resided in the Minister for Trade and Industry. Alongside the 1923 Act operated sector specific legislations.

The Undue Restraint of Trade Act 59 of 1949 expanded the areas that the Board could investigate but the power to inquire and report on anticompetitive practices was subject to the direction of the Minister. There was heavy reliance on negotiation with offending parties and voluntary compliance. We found that, in a manner similar to the American antitrust enforcement of that era, what pertained was close management of the economy with the Minister at the helm, to ensure enforcement in tandem with economic policy.[2269] In the light of the involvement of the state in industry, state support for alternatives to mining and tacit approval of big firms in mining, the law was a tool of political expediency in the same manner as antitrust in the early decades of the 20th Century.[2270]

The Regulation of Monopolistic Conditions Act 24 of 1955 came into operation on 1 January 1956. Like its predecessors, enforcement was through an administrative machinery. The Board could commence investigation only in response to a directive of the Minister who had the discretion whether to adopt the Board's recommendations. The Act applied to 'monopolistic conditions' whose definition was broad enough to cover a wide array of market conduct, including according to many, the regulation of horizontal and vertical mergers.[2271] However, there was apparent disinclination to apply the Act. In twenty years, the Minister ordered only eighteen investigations into suspected monopolistic conditions, the Board failed to deal with mergers and dominance directly, and state monopolies continued to exercise mostly unfettered market power.

We attributed the seemingly light enforcement to be the result of how government wished to use competition law at the time. Through the 1950s and 1960s, the ooverarching policy was focused on creation and support of a self-reliant diversified economy which required some level of tolerance for concentration.[2272] The small size of the economy, reduced

[2269] See Chapter 2.4 generally.
[2270] Chapter 2 par 2.4.2.
[2271] Chapter 4 par 4.2.4.
[2272] Chapter 4 par 4.2.4

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options for investment and value of size in the critical mining sector, would have been incompatible with firm-handed merger regulation.[2273]

The 1970s were years of economic and political turbulence, caused by both international and domestic factors. Economic policies adopted so far, including running an insular economy made up of concentrated market structures, were a key contributory factor to the challenges of that period. A Commission of Inquiry was appointed in 1975 to investigate and report on the efficacy of the 1955 Act, the economic concentration in South Africa and the legislation necessary for controlling economic concentration. It recommended that legislation be passed to support workable or effective competition. Concentration was not found to be irreconcilable with effective competition. Special focus on merger and takeover activity was prescribed, but only for those transactions which would have a serious impact on competition and the economy generally. The Restrictive Trade Practices and Monopolies Act 1979 was passed in response to the recommendation.

The Restrictive Trade Practices and Monopolies Act was an enabling statute that did not provide for *per se* offences. All conduct was lawful until declared to be unlawful by the Minister, following investigation by the Board, whose members the Minister appointed. The standard of evaluation was a public interest test which was open-ended, variable and elastic, at times accommodating social and political considerations and at others purely focusing on efficiency. Most merger hearings were conducted privately. In terms of ideological commitment, enforcement under the 1979 Act was sensitive to Chicago type arguments. A moderated approach was preferred. Big firms were still considered a powerful engine for meaningful competition through investment, expansion and efficiency. We concluded that the approach of enforcement was a direct outcome of the economic policy by which size and a high level of concentration was still tolerable and even desirable.[2274]

[2273] Chapter 4 pars 4.2.2 and 4.2.4.
[2274] Chapter 4 par 4.2.4.

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As the 20th Century came to a close, the years of apartheid policies and persistent economic decline had shaped South African society into one with highly unequal distribution of wealth and income, rising unemployment, poverty and attendant socio-economic imbalances. Upon taking power in 1994 the African National Congress (ANC) committed to restructuring to create a robust economy characterized by growth, employment and equity. The overarching intention was to set the country on a path of economic development for fair and just redistribution outcomes.[2275]

The high levels of concentration, both in terms of ownership and market shares, were considered the most urgent concern. Addressing them dominated the overarching policy debate.[2276] Competition law was viewed by many as the instrument that would render valuable support to other policies in the battle against the excessive concentration of private economic power and unequal spread of ownership. Developmental concerns such as addressing poverty and unemployment, equity and redistribution, were part of the discourse alongside the traditional concerns of promotion of competition and economic efficiency.[2277] The envisaged law would promote the traditional economic goals alongside broader social and political purposes, using a uniquely South African approach to competition policy. The resulting Act was the Competition Act of 1998,

Like typical competition legislation, the 1998 Competition Act intervenes in the free market to regulate practices that are harmful, or potentially harmful to competition. In addition, it also supports social objectives expressed in the preamble, the objects clause and the body of the law. The preamble recognises that the country's history resulted in excessive concentrations of ownership and control, inadequate restraints against anticompetitive trade practices and unjust restrictions on full and free participation in the economy. A declaration that a competitive environment balancing all stakeholders' interests will fetch better outcomes for all South Africans follows, followed by a list of eight rationales for the legislation, follow. These span across economic efficiency and consumer welfare to social concerns typically pursued via trade or industrial policy.[2278]

[2275] Chapter 4 par 4.2.6.
[2276] Chapter 4 pars 4.2.6 and 4.2.6.1.
[2277] Chapter 4 par 4.2.6.
[2278] Chapter 4 par 4.2.6.1.

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Section 1(2) of the Act mandates that it be interpreted in a manner that gives effect to the purpose stated in section 2. This purpose is stated as promoting and maintaining competition in the Republic in order to achieve a set of six particular expected goals or policy outcomes. These are of both economic and social nature. They are not arranged in a particular hierarchical structure.

We established that though the Act does not fit neatly into any particular theoretical school or framework, it seems to reflect Harvard School of thought tendencies.[2279] We found this to be in accordance with the recommended approach identified at Chapter 3 and therefore appropriate.[2280] Analysis of mergers is confined to the language and framework of section 12A of the Competition Act. The preamble and objectives clause may be applied to provide perspective and clarity to the provisions of section 12A. The Authorities tend to be conservative, and in keeping with the normal practice, the vast majority of merger applications are approved.[2281] Where the merger under appraisal is pro-competitive but has a negative impact on a public interest concern, conditions are imposed to mitigate the harm.

We established that in keeping with the recommended approach for developing countries, the agencies keep assessment of the relevant market uncomplicated.[2282] Where necessary, markets are broken down into market segments or sub-markets and market definition is given an effect relevant to South Africa. Each case is assessed on its unique facts. We found this to be appropriate, being in compliance with the intention of the drafters that policy be applied from a uniquely South African approach.[2283]

The agencies exhibit a partiality towards markets with many competitors in an approach similar to that of the United States' Warren Court.[2284] Large market shares are taken to point towards dominance and raise concerns *prima facie*. Small post-merger shares are considered an indicator that the merger is likely to be benign or

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[2279] Chapter 4 par 4.2.6.1.
[2280] Chapter 3 par 3.3.2.
[2281] Chapter 2 par 2.2.3.
[2282] Chapter 3 par 3.3.2.
[2283] Chapter 4 par 4.2.6.1.
[2284] Chapter 2 par 2.4.3.

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pro-competitive. We found this to resonate with spirit of the Act and the goal of addressing the high levels of concentration in the economy.[2285] Furthermore, as established at Chapter 3, it is recommended that the understanding of competition for use in merger analysis be that of rivalry.[2286]

Ready competition from imports will work in favour of approval. Ease of entry into the market ranks highly in establishing the outcome of merger analysis. Competitive rivalry is appreciated in dynamic terms, including in the sense of opportunities for new participants to enter markets. This we found to be in congruence with the preamble to the Act and appropriate. Parliament intended that the legislation be enforced in a manner that would provide to all South Africans an equal opportunity to participate fairly in the national economy.[2287]

Mergers that will further concentrate markets that already have high levels of concentration are typically not approved. We found this approach to coincide with the intention of the drafters of the Act who saw concentration of economic power and high degrees of monopolisation as responsible for the many economic and social ills of the country.[2288] It similarly adheres to the recommendation that developing country merger regimes focus on preventing further concentration of markets.[2289] The history of collusion in the market is taken into account and pre-emptive conditions applied to prevent eventuality of continuation and enhancement of collusion.

Where it is found that customers are able to exert effective countervailing power, the transaction under review will be approved unless it is found to create a player with a very high market share or where the final consumer is not likely to benefit from the countervailing power exercised by customers. We found this to abide by the preamble and section 2 requirement that enforcement be directed at providing markets in which

[2285] Chapter 4 par 4.2.6.1.
[2286] Chapter 3 par 3.3.2.
[2287] Chapter 4 par 4.2.6.1.
[2288] Chapter 4 par 4.2.6.
[2289] Chapter 3 par 3.3.2.

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consumers have access to competitively priced goods and services of quality and variety.[2290]

The dynamic characteristics of the market are critical and a merger that stifles dynamism will be prohibited. Mergers that support innovation are looked on favourably even if the expected benefits of the innovation are in the longer term. Since developing countries are encouraged to prioritise dynamic efficiency, we found the approach of the South African agencies to be appropriate.[2291]

Failure of a firm is one of eight possible factors in the list at section 12(A)(2), not a rationalisation for a merger already found to be anticompetitive. Each case is assessed on its merits. The agencies apply a wide sweep approach that looks into the causes of failure. We found this to be appropriate in view of the recommendation that developing jurisdictions' merger analysis be applied with a wide lens.[2292]

Whether a merger will result in the removal or creation of an effective competitor is considered. Removal of an effective competitor will be accommodated only if not likely to have a deep impact on competition or where some synergies between the merging firms can be realised. We consider this to be in order, given that the preamble and the objectives of the Act require enforcement that safeguards choice and low prices for consumers.[2293]

Efficiency considerations of a merger will be taken into account. The anticompetitive effect of the merger should be over-compensated by its pro-efficiency gains which must be in terms of economic welfare, not purely commercial benefits. Developing country agencies are encouraged to be guided by dynamic efficiency, the most likely of the three to be in line with an overall development agenda.[2294]

Public interest arguments are appraised and balanced against the competition and efficiency findings, acknowledging the concessionary nature of their inclusion in the

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[2290] Chapter 4 par 4.2.6.1.
[2291] Chapter 3 par 3.3.2.
[2292] Chapter 3par 3.3.2.
[2293] Chapter 4.2.6.1.
[2294] Chapter 3 par 3.3.2.

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law.[2295] The agencies treat their jurisdiction as secondary to that of statutory and regulatory bodies and exhibit caution even in regard to the listed considerations. The four listed considerations are however construed broadly which we found to pay cognisance to the tone of sections 2 and 12A of the Act which call for a broad perspective beyond the standard consumer welfare approach and incorporation of uniquely South African elements.[2296]

Authorities have sometimes been accused of imposing conditions to protect employment even when the merger under review does not raise any competition concerns. We found, however, that given that the Act establishes one of its objectives as being promotion of employment and advancement of the social and economic welfare of South Africans, it is a justifiable argument that employment was one of the key areas where the legislature intended a role for the competition authorities.[2297] Furthermore, the agencies intervene only where it is established that employment losses cannot be addressed by other means.

The drafters of the Competition Act envisioned that the law, and merger regulation as a component of it, would support economic development.[2298] This thesis established that overall, the Act is implemented in ways cognisant of the country's historical context, broader socio-economic goals and congruent to the recommended framework for developing country's competition law enforcement.

Economic, social justice, developmental and transformatory objectives are taken into account. The law is analysed against the backdrop of the transformation process of establishment of a constitutional democracy. Enforcement is generally pivoted on market concentration, exhibits low tolerance for dominance, is focused on efficient inclusive development, and adopts simple schemes for analysis. Unconditional approval is more likely when there are low barriers to entry into the market, when other countervailing market power exists, and when there is evidence that either the industry or the market is growing or is otherwise very dynamic. In terms of adherence to the spirit of

[2295] Chapter 4 par 4.2.6.
[2296] Chapter 4 pars 4.2.6 and 4.2.6.1.
[2297] Chapter 4 par 4.2.6.
[2298] Chapter 4 par 4.2.6.

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the law and the goals for which the Act was passed and with reference to the merger analysis scheme recommended for the developing country, we found South African agencies to have got it right.

6.5 GENERAL CONCLUSIONS ON KENYA'S MERGER ANALYSIS

While the passing of the Kenyan Competition Act of 2010 was somewhat less dramatic than that of its South African counterpart, the expectation was no less momentous. The legislation was part of a toolkit to support a turnaround from an era of inefficiently run government monopolies in highly regulated markets, to a liberalised market economy supportive of private enterprise.

The process of reform of Kenya's competition law has tracked alongside the evolution of the economy from a protected one to today's comparatively liberal regime. Agriculture was at the centre of the colonial economic system. For the British, the country was a source of raw materials and market for finished goods manufactured in Britain. In the absence of a manufacturing complex, there was little need for regulation of competition. The earliest legislative regulation of market conduct was through the Price Control Ordinance passed in 1956. Price controls were applied at both the production and retail levels of essential foodstuffs, with the underlying purpose of preventing monopolistic pricing practices and protecting consumers against price increases of basic commodities.

Following independence in 1963, the government set about 'Kenyanisation' of the economy. Key industrial corporations were turned into quasi-government bodies known as parastatals. The corollary was creation of a large state sector in the form of state-owned industrial enterprises. State intervention in markets was accepted as an extension of the independence struggle. In the decade that followed, the country embarked on rapid industrialisation and further indigenisation of the economy through the policy of import substitution. Policy measures, including importation quotas, were used to protect these industries from competition. We concluded that given the heavy government involvement in markets, it was perceived that there was no need for competition legislation and the Price Control Act retained relevance.[2299]

[2299] Chapter 5 par 5.2.2.

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When the East African Community broke up in 1977, Kenya lost the large East African market. To respond to the challenge this posed, import competition was allowed into the domestic market and the country began to implement an outward oriented industrial development strategy. At the heart of the strategy was promotion of manufactured exports. The absence of political will hampered meaningful progress. We established that the absence of a competition law was directly attributable to prevailing policy.[2300] Without robust markets, contemporary competition law was not a priority.

In the 1980s, the government re-committed to relying less on instruments of direct control and increasingly on competitiveness of the economy. However, the parastatals, long protected from competition and poorly managed, continued to present a challenge to this intention. A structural adjustment programme was implemented towards the end of the decade, leading to a reduction of government's direct involvement and intervention in the economy, and affirming greater reliance on market forces. With the government beginning to cede its grip on the economy to the private sector, it became incumbent to set up a mechanism to guard the market from unfair practices. The Restrictive Trade Practices, Monopolies and Price Control Act was passed at the end of 1988. Though the Act retained the elements of price control, controls on prices on manufactured goods reduced steadily till abolition in 1994.

The stated intention of the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 was to encourage competition in the economy by prohibiting restrictive trade practices and controlling monopolies and concentrations of economic power. A Monopolies and Prices Department was established under the control of a Commissioner who in turn was under the control of the Minister responsible for the Treasury. Ultimate decision making lay with the Minister in a manner similar to South Africa's Maintenance and Promotion of Competition Act of 1979. The Minister could, and did on occasion, disregard the Commissioner's advice or proceed without consulting. The definition of "merger" was restricted to horizontal mergers and a three pronged test comprising both competition and public interest concerns was applied.

[2300] Chapter 5 par 5.2.2.

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Though equipped to regulate markets and market conduct, the 1988 Act did not have the desired impact. A non-interventionist enforcement approach contributed to this scenario, driven by the small size of the domestic market and the government's preferred approach to retain a degree of control over markets. We found that the competition agency applied the Act in a manner that complied with the government's policy not differently from the South African and American experiences.[2301]

In 2003, the government began to implement a raft of economic and structural reforms elaborated in the Economic Recovery Strategy of that year. These were policy interventions to pull the economy out of recession and build a globally competitive and prosperous economy. Vision 2030, the Country's current economic blue print followed the Economic Recovery Strategy in 2007. With the shift from direct management of the economy to increased reliance on market dynamics came the need for a sound competition policy.

Review of competition policy was considered an essential part of the development agenda under Vision 2030. A modern competition law would contribute towards achievement of free markets and promotion of the private sector. It is from this impetus that the Competition Act 12 of 2010 came to be, in much the same way that departure from concentrated markets and ownership motivated South Africa's 1998 Competition Act.[2302]

From a combined reading of the preamble and objects section of the 2010 Competition Act, there must not only be protection of competition, but proactive promotion thereof. Of the eight intended ends set out at the objectives section of the Act, seven relate to efficiency of markets and one to the public interest concern of promotion of competitiveness of national firms. Differently from South Africa, public interest concerns are not included in the preamble of the Act.[2303] But similarly with South Africa, they are a prominent part of merger review.[2304] Viewed in the light of the preceding scenario in which the government was heavily engaged in markets, the Act prioritises efficiency and a

[2301] Chapter 2 par 2.4 and chapter 4 par 4.2.
[2302] Chapter 4 par 4.2.6.
[2303] Chapter 4 pars 4.2.6 and 4.3.5.
[2304] Chapter 5 pars 5.2.4 and 5.2.5.

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conducive environment for competitive firms. We established that, as with other jurisdictions, Kenya's competition law is shaped in a manner fitting the preferred policy direction.[2305]

As pointed out at Chapter 1, Kenya is an emerging economy.[2306] As such enforcement of its competition law must be suited to support the factors that contribute to economic take-off, chief among them open, vibrant markets.[2307] This necessitates encouragement of entrepreneurs' propensity to invest and removal of entry barriers. The drafters of the law expected that it would be enforced to engender those ends. In debate on the Competition Bill, it was stated that the intention was to pass legislation that would be a catalyst for increased competitiveness of firms, as well as prevention of abuse of markets by dominant players. Markets with many players were preferred and the success of the SME sector and increased competitiveness of domestic firms in global markets were expected outcomes.

Appeals from the decisions of the Authority lie with the Competition Tribunal. Since inception, the Tribunal has heard only four matters to conclusion, one on mergers, the other on restrictive trade practices.[2308] With regard to mergers, we attributed the low activity at the Tribunal to the fact that no merger has so far been declined by the Authority. The relevant appeal related to conditions imposed in an approved merger.[2309] Our conclusion was that the fact that all mergers, regardless of size, are from the beginning to the end entirely handled by the Authority, takes away the opportunity to have decisions reconsidered as happens with intermediate and large mergers in South Africa.[2310] Making the Tribunal a second tier would not only avail work for the Tribunal but more importantly would make possible creation, expansion and refinement of jurisprudence. Further research, weighing the pros and cons at length would lend more light to this matter.

Appeals from decisions of the Tribunal go to the High Court which is part of the judiciary in Kenya and is not a specialised tribunal for competition law. As established at Chapters

[2305] Chapter 2 par 2.4 and chapter 4 par 4.2.
[2306] Chapter 1 par 1.1.
[2307] Chapter 3 par 3.2.4.
[2308] Chapter 6 par 1.
[2309] Chapter 5.3.1
[2310] Chapter 4 par 4.3.2.

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2 and 5, competition law issues have over the years increased in complexity, leading to the opinion that antitrust may be too complicated for generalist judges.[2311] Mergers especially, are a highly specialised area and as seen in Chapter 3, their analysis is prone to uncertainty.[2312] In the formative stages of creating a competition culture, a risk arises that the law will be applied incorrectly in courts without the requisite expertise, which could negatively affect the ability of a competition agency to apply the law correctly in the future. Accordingly, we proposed that the law could be amended to create a specialised court in the manner of the Competition Appeal Court of South Africa. This is a matter that is best explored in further research.

All merger applications presented to the competition agency have been approved. While this is above the range of typical approval rates, our finding was that Kenya's competition enforcement is subject to the economic realities of many developing countries.[2313] Large, more efficient firms, often the product of mergers, are ideal for economic take-off. The agency has tended to approve large mergers while imposing conditions to mitigate their anticompetitive effects or negative impact on public interest concerns. We also concluded that the high approvals could be part of a policy to make a clean break with the past by giving private enterprises free rein to use strategies that increase their profitability.[2314]

Each undertaking to a proposed merger must notify the Authority. There is, however, no obligation to notify unions or employees of the merging firms, as is the case with South Africa.[2315] Similarly, the firms do not have to notify the relevant Minister as happens for intermediate or large merger proceedings in South Africa.[2316] The result is that as a matter of course, merger hearings are conducted without the involvement of objectors. As observed in Chapter 4, proceeding without the benefit of discovery, cross-examination or even just the mere presence of opponents, increases the chances of a favourable outcome for the applicants.[2317] We therefore recommended that a requirement to notify

[2311] Chapter 2 par 2.2.4 and chapter 5 par 5.2.4.
[2312] Chapter 3 par 3.3.1.
[2313] Chapter 3 3.2.4 and 3.3.2.
[2314] Chapter 5 pars 5.2.2. and 5.2.3
[2315] Chapter 4 par 4.3.2.
[2316] Chapter 4 par 4.3.2.
[2317] Chapter 4 par 4.3.3.

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stakeholders, at the very least employees or their unions, be included in the Act. Involvement of these parties would go to refine the outcome of merger analysis in Kenya.

Substantive analysis is conducted under section 46(2) of the 2010 Competition Act. The Act does not exclusively sanction any competitive effects test; neither the substantial lessening of competition-test, nor the market dominance test. The Authority may base its determination on any criteria which it considers relevant including a list of eight set out in the section. The first of these, in section 46(2)(a), relates to the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade, alluding to the substantial lessening of competition-test. The next, in section 46(2)(b), refers to the extent to which the proposed merger would be likely to result in an undertaking acquiring or strengthening a dominant position in a market, effectively the dominance test. Each provision is a separate consideration.

While at Chapter 2 we found that there is no general consensus concerning overall superiority of either test, many jurisdictions have changed and others are moving their standard for analysis from dominance and hybrid tests to a pure substantial lessening of competition-standard.[2318] South Africa applies the substantial lessening of competition-test.[2319] As indicated earlier, Whish and Bailey advise that any fitting system of merger control must set a substantive test.[2320] We recommend that Kenya move to a clear test for the sake of certainty as well as to enable the agency, the Tribunal and courts to rely on international decisions. Given that the agency's Merger Guidelines are already partial to the substantial lessening of competition-test, we further recommend that the Act be amended and sections 46(2)(a) and (b) be collapsed into a clear substantial lessening of competition -test.

The eight factors set out in section 46(2) are not tiered in any particular order of progression or priority. Analysis may start at any point and move in any direction as long as it remains within the confines of the section. In contrast, as seen in Chapter 4, South Africa's 1998 Competition Act, in section 12(A), provides levels of analysis.[2321] This is

[2318] Chapter 2 par 2.2.4.
[2319] Chapter 4 par 4.3.3.1.
[2320] Whish & Bailey (2018) at chapter 5 par 5.3.2.
[2321] Chapter 4 pars 4.3.2 and 4.3.3.

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the common practice.[2322] Our finding was that incorporation of a systematic progression will inculcate consistency, predictability and the simplicity, which at Chapter 3, we found developing country enforcement is encouraged to adopt.[2323] We recommend that the Act be amended accordingly.

The third criterion in section 46(2) is consideration of the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment likely to result from acquisition of or enhancement of a dominant position in a market. In the absence of a clarification in the Guidelines, we took it that reasonably, the provision was intended as a catch-all for any benefits that do not qualify as efficiency considered at section 46(2)(h) of the Act. We also noted that the section is limited to mergers that create or strengthen dominance. As it is, the provision is too broad, creating an area of uncertainty and we recommend that the Act be amended to remove the provision.

The list of public interest considerations in section 46(2) is open, unlike in South Africa's 1998 Competition Act.[2324] Four considerations are listed and discretion over what else is appropriate for inclusion is left to the competition agency which applies a flexible standard. The concerns of impact of a merger on the poor, encouraging plurality, diversity and local production, and salvaging of dormant or failing firms, are additional considerations under the Merger Guidelines. While the open nature of the Act gives the agency the ability to adjust merger analysis to fit the country's landscape, we found a need for caution as exercised in South Africa and recommend an amendment to close the provision. We recommend an amendment to the Act to restrict public interest concerns to the four passed by parliament and the three so far added into the Merger Guidelines by the agency.

The Merger Guidelines divide merger analysis into a competition test and a public interest test. The competition test is conducted first followed by the public interest test. The merger market is delineated using the SSNIP Test. We found a difference between how South

[2322] Chapter 2 par 2.2.4.
[2323] Chapter 3 par 3.3.2.
[2324] Chapter 4 par 4.3.5.

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African and Kenyan Authorities approach market definition. With the former, the SSNIP Test is rarely directly applied and when used, is given a South African relevant effect.[2325] While demand-side substitution customarily counts for more under SSNIP, weight is given to supply side substitution and particularly when the question of entry barriers is relevant. For Kenya, demand substitutability is more valued and the market may be defined based only on assessment of the demand side of the market. Supply side substitutability is applied only when its consequences are thought to be effective and immediate. The SSNIP Test requires complex economic analysis which, as established in Chapter 3, makes it difficult to execute for many developing jurisdictions that often lack the necessary resources.[2326]

As established at Chapter 3, market definition is one of the areas developing country merger regimes are encouraged to operate a more flexible lens than is usual in advanced jurisdictions.[2327] This enables them to accommodate the market definition most felicitous for inclusive development.[2328] Our conclusion was that adopting the strict version of the SSNIP as applied in Western jurisdictions is not ideal for Kenya. Furthermore, given that Kenya's economic landscape is much closer to that of South Africa than it is to the advanced jurisdictions that apply the SSNIP test extensively, we recommend that this approach be reconsidered. However, we found greater flexibility in consideration of product characteristics and intended use in limiting the field of possible substitutes in a manner similar to South African merger analysis where Authorities refuse to be bound to rigid interpretations of relevant markets and give due weight to views of market participants and is commendable.[2329]

The thesis identified cases where market broad definitions in merger analysis have led to approvals that have the ultimate effect of entrenching dominance in the relevant markets. The developing country's agency must be wary of creating dominant players and unduly concentrating markets.[2330] The drafters of the Act were desirous that the country move

[2325] Chapter 4 par 4.3.1.
[2326] Chapter 3 par 3.2.3.
[2327] Chapter 3 3.3.2.
[2328] Chapter 3 par 3.3.2.
[2329] Chapter 4 par 4.3.3.
[2330] Chapter 3 par 3.3.2.

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away from monopolistic markets towards increased rivalry. We recommend that caution be exercised in analysis to avoid moving markets in the opposite direction.

The Herfindahl-Hirschman Index is applied to assess market concentration. A qualitative enquiry is added for a more comprehensive assessment. The approach applied is broad with attention to mergers that enhance concentration and promote dominance in a manner similar to South Africa's analysis.[2331] Dynamic markets are preferred, which abides by the recommendation for developing countries established at Chapter 3.[2332] The number of undertakings is the starting point. The history of market shares over a period of time is considered as a more informative and therefore reliable, indicator of market power than fixed shares at the particular time of the merger. Unilateral effects are assumed to be more likely where a merger results in an undertaking with a large market share or where the market is already concentrated. This adheres closely with the spirit of the Act as expressed in debate over the Bill.[2333]

As with South Africa, mergers creating firms with large market shares are approved in markets with ease of entry and where size is necessary for innovation.[2334] However, we found some of these instances to raise concern. Developing countries are advised to be wary of creating firms with dominance.[2335] We recommend a stricter approach where the firm to be created is dominant. Gal recommends that national competition agencies adopt an approach that gives more weight to long-term dynamic considerations.[2336] Merger analyst must be wary of even small reductions in competition.

In measuring possible reduction of competition in the identified market, analysis is stricter in markets with few undertakings, which makes coordination and collusion easier, or where control of an important facility remains in the hands of a single player. A condition may be imposed to require the merged entity to keep the facility open to competing firms

[2331] Chapter 4 par 4.3.3.
[2332] Chapter 4 par 4.3.3.
[2333] Chapter 5 par 5.2.4.
[2334] Chapter 4 par 4.3.3.
[2335] Chapter 3 par 3,3.2.
[2336] Gal in chapter par 3.3.2.

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to protect them from being locked out of the market. We found this to be appropriate since it protects market rivalry.

Approval is more likely in markets with ease of entry. An application in a market where significant barriers to entry exist may be approved if satisfactory reasons are tendered. The agency has approved such mergers subject to remedial conditions such as orders for divestiture. Barriers to entry are of special concern in developing countries.[2337] The objects of section 3 of the 2010 Competition Act sets out opening up markets and creating an environment conducive for investment as expected outcomes of enforcement. We found the approach applied by the agency to be appropriate but recommend that greater attention be paid to the history of the market under consideration to establish trends in entry and exit.

With regard to the presence or otherwise of countervailing power, we found an erroneous assumption in the Kenyan Merger Guidelines that big firms will push back against exercise of market power. As established in Chapter 4, the reality is that powerful firms will often in fact not exercise countervailing power if they are able to pass on price increases to their customers.[2338] That said, as with South Africa, countervailing power will not count in favour of approval unless it is shown that it will be applied not only to benefit the buyer itself but also small and medium sized entities that may not have sufficient countervailing power. This approach is appropriate and suited to the jurisdiction. The concern for SMEs is especially apt given, as established earlier, that they play a pivotal role in driving growth of the Kenyan economy.[2339]

Barriers such as import tariffs, distribution costs as well as the capacity of importers to increase imports without needing to invest in new physical assets, are taken into account in the same manner as they are in South Africa.[2340] The extent to which a merger makes coordination possible, or strengthens existing collusion, will be considered and characteristics of the market, such as structural features and past behavior of

[2337] Chapter 5 par 5.2.4.
[2338] Chapter 4 par 4.3.3.5.
[2339] Chapter 5 par 5.2.5 and chapter 3 pars 3.2.4 and 3.3.2.
[2340] Chapter 4 par 4.3.3.2.

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undertakings, are relevant in that assessment. The fewer the competitors in a market, the easier it is to coordinate. Such markets are closely scrutinized.

The approach of the Kenyan agency to vertical mergers is the same as that under the South African regime where Authorities employ a more permissive approach.[2341] Concern is more with regard to industries that are opening up to competition or are expected to do so in the foreseeable future, in keeping with the section 3 object of enforcement that aims to create an environment conducive for investment. Foreclosure is the main concern pertaining to conglomerate mergers. Recognition is given to their efficiency enhancing attributes.[2342] We found the approach to vertical and conglomerate mergers to be appropriate both for the country as a developing economy and with reference to the goals of the Act.

Under the Act, efficiency is not a defence but rather an attribute that could weigh in favour of approval. On the other hand, the Merger Guidelines contain paragraphs wherein efficiency is a defence and others where it is a consideration alongside the other factors listed in section 46(2). In actual enforcement, efficiency gains are treated as a consideration in assessment of a merger's impact on competition, not a defence to an anticompetitive finding. As established in Chapter 2, efficiency can be either integrated as part of the competition analysis or as a defence, or both.[2343] No one modality is necessarily correct or appropriate. However, as we established in Chapter 4, it is more common to have efficiencies examined as part of the competition findings, as is the case with South Africa.[2344] Since Kenya's legislation and enforcement are already within the mainstream, we found a need to align the Merger Guidelines with the Act for consistency. We recommend that the contradictory paragraphs of the Guidelines be expunged.

The approach to merger efficiencies by the Kenyan agency is largely acceptable for a developing country as well as consistent with the goals of the legislation. A more efficient economy is a priority and the preamble and objects section require that enforcement engenders increased efficiency in the production, distribution and supply of goods and

[2341] Chapter 4 par 4.3.37.
[2342] Chapter 2 par 2.2.3.
[2343] Chapter 2 par 2.2.4.
[2344] Chapter 4 par 4.3.4.

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services, promotes innovation and maximises efficient allocation of resources. That said, we found that the healthy scepticism of South African Authorities to efficiency claims is well advised.[2345] As established in Chapters 2 and 4, there is need for caution against quick approval of apparently efficient mergers.[2346] An easy pass on account of efficiency benefits may let in foreign rivals who are able to exploit the advantage of greater financial muscle to progressively push smaller local firms to the periphery of the market. As established in Chapter 3, competitiveness of domestic firms should guide merger enforcement in developing countries.[2347]

Kenya's Competition Act is silent on the matter of failing firms. The Merger Guidelines provide for the failing firm doctrine and also list the fact that a party to a merger is a failing firm as a public interest consideration. We found the presence of a failing firm in a transaction to work in favour of approval, sometimes with the effect of creating dominance.[2348] Imminent failure of a firm should not save a merger which raises competition concerns that weigh more than the loss from the departure of the failing firm. This is the standard adopted by South Africa.[2349] While the developing country merger regime should at all costs seek to keep assets and capital within the market as well as protect jobs, the presence of a failing firm in a transaction should not guarantee approval at the risk of exposing the relevant market to anticompetitive outcomes. We recommend that the agency review its approach and apply a stricter standard.

Section 46(2) of the 2010 Competition Act which provides considerations in merger analysis, including the public interest ones, is not a closed list as with South Africa.[2350] Given the contentious nature of the inclusion of non-competition concerns in merger analysis as highlighted in Chapters 2 and 4, we found a need for an amendment to close the provision as recommended above.[2351] The closed list can be re-opened if and when necessary following judicious and rigorous reflection.

[2345] Chapter 4 par 4.3.4.
[2346] Chapter 2 pars 2.2.3 and 2.2.4 and chapter 4 par 4.2.4.
[2347] Chapter 3 par 3.3.2.
[2348] Chapter 5 par 5.3.3
[2349] Chapter 4 par 4.3.3.
[2350] Chapter 4 par 4.3.5.
[2351] Chapter 2 par 2.2.3 and chapter 4 par 4.2.6.

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As already indicated above, there is no obligation to notify non-parties to a merger.[2352] We consider that proving injury on public interest concerns by a merger should be the business of those that the merger impacts negatively. This is the scheme applied in South Africa.[2353] On this account, we recommend that the law be amended to make possible participation by intervenors.

Mergers that are likely to create employment will be looked upon positively. This is different from the South African situation where what is relevant is the negative impact of a merger on employment.[2354] Employment should also be considered as a positive issue. Any employment condition or combination of conditions may be imposed as long as these are rational, proportionate, enforceable and time bound. Though a wide range of remedial conditions are available in the Guidelines, the agency prefers requirements for retention of staff post-merger, especially the vulnerable lower cadre employees. The Guidelines give an array of nine possible conditions, six of which relate to employment and we recommend that the Authority extend its analysis to also apply to the other five. Merger applications involving small and medium enterprises are fast tracked in order to enhance their capacity to penetrate markets, offer credible competition and enhance employment. It is recommended that the interests of small businesses guide enforcement in developing countries and we found the Authority's approach to be appropriate.[2355] The Authority will consider stability of individual industrial sectors to ensure stability and economic growth.

Mergers in sectors which have a high impact on the poor and the vulnerable, such as those involving supply of utilities will be subject to "in-depth scrutiny". We found this to adhere well with the guidance by Fox and Gal as alluded to in Chapter 3.[2356] For mergers in the media industry, the Authority will consider the strength and competitiveness of media firms indigenous to Kenya and the spread in ownership or control of media businesses in order to encourage plurality, diversity and local production.

[2352] Chapter par 5.2.1.
[2353] Chapter 4 par 4.3.5.
[2354] Chapter 4 par 4.3.5.
[2355] Chapter 3 par 3.3.2.
[2356] Gal and Fox at chapter 3 3.32.

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This thesis established that overall, Kenya's competition law enforcement is conducted in a manner that fits its jurisdictional context while at the same time keeping an eye on the benefits of integration with global markets. The competition agency considers its role as that of pursuing efficient markets for sustainable economic development and building a pro-business environment for sustainable growth and development. The resultant enforcement framework is a balancing act of accommodating efficiency benefits of mergers without allowing mergers that would hurt still fragile markets. Mergers that bear a promise of increased efficiency are likely to receive approval. Often, these are transactions that create bigger firms, considered to be significant contributors to rapid economic growth. Consequently, the merger analysis regime bears much similarity to the economic welfare focused Chicago approach.

We established further that though Kenya's merger regulation is largely non-interventionist, the unique challenges of the developing country's economic circumstances are secured through integration of public interest concerns in decision making. The concerns of employment, sustainability of small players and impact of mergers on the poor are given prominence, with the result of a scheme that is directly and particularly relevant for the Kenyan context. Competition enforcement in Kenya has two commitments, each of which is indispensable. On one hand, protection of free markets for robust economic growth, and on the other hand, inclusive development and distribution related outcomes. To the agency and rightly so, Kenya's competition law enforcement must be contextualized. Focus must be on the immediate challenges of removing skewed distribution of wealth, power and opportunity; reducing severe poverty; and creating robust inclusive development.

We have not found a major reason for faulting the agency's approach when placed against the expectation upon a developing country and the stated goals in the Act. The variances with South Africa and with the ideal standards for a developing country are minimal, but they do exist. Our recommendations on how to progress to a more optimal scheme are summarised below.

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6.6 RECOMMENDATIONS FOR REFORM

This study identified some shortcoming in Kenya's merger analysis which we found to be attributable to first, the applied enforcement scheme and second, to limitations in the relevant legislative instrument. We believe that the proposals that follow will if implemented, increase the utility of Kenya's merger regime to the jurisdiction. The proposals are divided into two as follows:

a. Recommended changes to the scheme of analysis for effective enforcement
b. Suggested amendments to the Competition Act of 2010

6.6.1 Developing Effective Enforcement

The following are our proposals for shifting towards a more effective enforcement strategy to achieve inclusive economic development:

6.6.1.1. Efficiency Considerations

A more cautious approach should be adopted in consideration of efficiency arguments. The agency should avoid easy approval on grounds of efficiency. The effect of bigger more efficient firms should not supersede the competitiveness of domestic firms.

The paragraphs in the Merger Guidelines wherein efficiency is framed as defence should be expunged to bring the Guidelines into line with the provisions of the Act and actual practice where efficiency is treated as a consideration in assessment of a merger's impact on competition. This will enhance consistency and clarity.

6.6.1.2 Failing Firms

A more stringent standard should be applied in analysing mergers involving failing firms. The presence of a failing firm in a transaction should not assure easy approval. This will reduce the risk of exposing the market to anticompetitive outcomes.

6.6.1.3 Market Concentration

Analysis where markets are already concentrated should be strict. An approach focused on forestalling creation of dominant firms and preventing unjustifiable further concentration of markets should be applied.

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An approach that gives more weight to long-term dynamic considerations and less to protecting competition *per se* should be adopted where the undertaking to be created is dominant. Merger analysts must be wary of even small reductions in competition.

6.6.1.4 Market Definition

Application of the SSNIP Test should be adjusted to give an effect relevant to the country. Greater weight should be given to the supply side of markets than is the current practice. Analysis for market definition should be flexible enough to accommodate the ends of inclusive development.

Caution should be exercised to avoid broad market definitions that create dominant players and unduly concentrate a market. The market definition settled on should be one most supportive of increasing rivalry.

6.6.1.5 Ease of entry

The history of the market under consideration should be taken into account. The trends in not only entry but also exit, should inform decision making.

6.6.1.6 Merger Hearings

Adjudication hearings should be open to the public and merger decisions published. The reasoning behind the decision should form part of the publication. This will create awareness on the workings of the competition agency and inculcate a competition culture.

6.6.1.7 Countervailing Power

The assumption that big firms will push back against exercise of market power should be abandoned. More caution should be exercised when countervailing power is used as an argument in support of approval of a merger application.

6.6.1.8 Remedies

The competition agency should expand the range of remedies it imposes to mitigate harm to public interest concerns beyond the two frequently applied ones.

6.6.2 Amendment to the Competition Act for effective merger analysis

We propose the following amendments to the Competition Act 2010:

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6.6.2.1 Analytical Progression

An amendment to section 46(2) to introduce an analytical progression in merger analysis and instil consistency, predictability and simplicity. The Merger Guidelines divide analysis into a competition test and a public interest test with the former being conducted first in a separate assessment. The Act should be amended to incorporate both.

6.6.2.2 Competition Test

An amendment collapsing sections 46(2)(a) and (b) into one section and making the substantial lessening of competition-test the substantive competition test. This will give certainty and predictability as well as enable the agency, Tribunal and courts to rely on international decisions.

6.6.2.3 Benefits from mergers

An amendment to delete section 46(2)(c). The section whose effect is indicated as applicable to mergers that create or strengthen dominance is too broad, creating an area of uncertainty.

6.6.2.4 Public Interest

An amendment to section 46(2) to add the three public interest considerations already applied by the agency under the Merger Guidelines and a further amendment to the section to close the list of public interest considerations. The contentious nature of inclusion of public interest concerns into competition law requires limitation of what qualifies.

6.6.2.5 Participation of Intervenors

Amendment to section 43 to required notification of mergers to employees and unions. Proving injury to public interest concerns by a merger is best made the responsibility of those that the merger impacts negatively.

6.6.2.6 Sections 43 and 46(2) after amendment

Sections 43 and 46(2) in their current format are set out at Chapter 5.[2357] After the proposed amendments, the sections shall read as below:

43. Notice to be given to Authority of proposed merger

[2357] "For the text of section 46(2) in its current format see Chapter 5 at par 5.3.2.

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Section 43

(1) Where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.

(1A) Each of the undertakings involved in a proposed merger notified to the Authority shall each provide a copy of the notice contemplated in subsection (1) to-

(a) any registered trade union that represents a substantial number of its employees; or

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

(2) The Authority may, within thirty days of the date of receipt of the notification under subsection (1), request such further information in writing from any one or more of the undertakings concerned.

46. Determination of proposed merger

Section 46

(1) In making a determination in relation to a proposed merger, the Authority may either -

(a) give approval for the implementation of the merger;

(b) decline to give approval for the implementation of the merger; or

(c) give approval for the implementation of the merger with conditions.

(2) When required to consider a proposed merger, the Authority shall initially determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the factors set out in subsection (3) and subsequent to that, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (4).

(3) The Authority may base its determination whether or not the merger is likely to substantially prevent or lessen competition on any criteria which it considers relevant to the circumstances involved in the proposed merger, including—

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(a) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market;
(b) the extent to which the proposed merger would be likely to restrict trade or the provision of any service or to endanger the continuity of supplies or services;
(c) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets;
(d) the ease of entry into the market;
(e) the level and trends of concentration in the market; and
(f) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail.

(4) The Authority shall base its determination whether or not a merger can or cannot be justified on public interest on the following criteria;
(a) the extent to which the proposed merger would be likely to affect a particular industrial sector or region;
(b) the extent to which the proposed merger would be likely to affect employment;
(c) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market;
(d) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets;
(e) the extent to which the proposed merger would be likely to affect sectors which have a high impact on the poor and the vulnerable; and
(f) the extent to which the proposed merger would be likely to affect the strength and competitiveness of media firms indigenous to Kenya.

6.7 TOPICS FOR FURTHER RESEARCH
The fact that all mergers, regardless of size, are from the beginning to the end purely the mandate of the Authority, takes away the opportunity to have decisions reconsidered. In

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addition, it limits creation, expansion and refinement of jurisprudence. Further research, weighing the pros and cons of use of the Tribunal as a second tier to consider determinations of the competition agency, would lend more light to this matter.

Appeals from decisions of the Competition Tribunal go to the High Court of Kenya which is part of the judiciary and not a specialised tribunal for competition law. Since competition law issues have over the years increased in complexity, it may well be that competition law with its economic angle is too complicated for generalist judges. Mergers especially are a highly specialised area and their analysis is prone to uncertainty. Further research exploring the matter to establish the wisdom or otherwise of establishing a specialised competition appeal court would be useful.

Kenya's Competition Act is conventional, save for the inclusion of a handful of consumer protection provisions in its framework. Those in favour of this hybrid nature of the law argue that it takes advantage of the synergies between the two areas of policy. Those against argue that the integrations are typically driven by political and budgetary considerations and fail to take into account the significant differences in the substance and implementation of competition law and consumer law. Research into the utility or otherwise of the combination of competition and consumer protection provisions in the Competition Act would guide on whether to maintain the status quo or seek to separate them.

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