

**A COMPARATIVE STUDY ON THE PUBLIC INTEREST CONSIDERATIONS IN
THE SOUTH AFRICAN AND KENYAN MERGER REGIME**

by

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SUMMARY/ ABSTRACT

The South African and Kenyan competition policy and law recognise the importance of public interest as part of merger evaluation and hence provisions are made for these to be incorporated when mergers are considered. This study focusses on the public interest considerations in the context of merger regulation as applied in South Africa and compares these to the public interest considerations applied in Kenya's merger regime. In addition to the "traditional" competition assessment, the Competition Authorities in South Africa and Kenya are also required to assess the effect of the merger on certain public interest factors.

South Africa has a well-established merger regime, particularly in the application of public interest considerations which other jurisdictions may draw lessons from. Although certain key cases brought before the South African Competition Authorities have sparked a robust debate on the assessment standard for public interest issues, they have nonetheless laid down key principles in respect of public interest considerations and have provided a yardstick in the interpretation of public interest grounds in South African Competition Law. However, it is submitted that there is a need to strengthen the interpretation of public interest considerations in the South African merger as recommended in this study.

Kenya boasts a modern competition law and has joined many African jurisdictions like South Africa who have adopted public interest considerations in the regulation of their merger regimes. The Kenyan Competition law regime, similar to South Africa, incorporate aspects of macro-economic or wider public goals such the consideration of the impact of a merger on a particular industrial sector or region, employment, ability of small undertakings to gain access to or to be competitive and the ability of national industries to compete in international markets. However, as discussed in this study, the lack of transparency in the determination of mergers which manifests itself in the non-publication of the Authority's reasons for its merger decisions may pose a risk to the efficient regulation of mergers and significantly curtail the development of competition jurisprudence in Kenya.

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CHAPTER 1

INTRODUCTION

1 BACKGROUND TO THE STUDY

South Africa and Kenya share a common vision of improving the lives of their respective citizens by 2030. In South Africa, this vision is expressed in the National Development Plan (NDP), a long-term government policy that aims to eliminate poverty and reduce inequality by 2030. According to the plan, South Africa can realize these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.¹ Competition law is one of the tools that government aims to utilize in order to achieve this vision.²

The Competition Act 89 of 1998 aims to establish a regulatory system that also takes account of South Africa's socio-economic needs. The goals of the South African Competition Act extend beyond the traditional goals of promoting and maintaining competition through the regulation of anti-competitive behaviour and also encompass broader policy considerations in the form of public interest factors.³ Nzero points out that this feature in the South African Competition Law reflects South Africa's social and economic development and acknowledges the notion that the law derives its credibility from the environment in which it operates and hence it must not ignore the practical realities existing in such an environment.⁴ Dutz & Khemani⁵ observe that competition is not automatic and that, while competition reflects the business conduct of business enterprises, it is also influenced by the business environment or the

¹ National Development Plan, https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf, accessed on 2 May 2019, at 4.

² Competition Commission Strategic Plan 2015-2020, http://www.compcom.co.za/wp-content/uploads/2015/03/Strategic-Plan-2015-2020_Signed.pdf, accessed on 2 May 2019, at 5.

³ Nzero I "The implications of public interest considerations in the interpretation and application of failing-firm doctrine in South African merger analysis" (2017) 80 THRHR 602 at 603.

⁴ Ibid.

⁵ Mark Dutz & R Shyaman Khemani 'Competition Law and Policy Challenges in South Asia' (2007) World Bank available at

<http://documents1.worldbank.org/curated/en/216041468101344634/pdf/452810WP0Box334059B01PUBLIC1.pdf> accessed on 14 August 2020.

investment climate in which these enterprises operate, as well as “the legal and regulatory framework, barriers to entry and exit, and prevailing conditions in markets for labour, land, finance, infrastructure services, and other productive inputs”.⁶

It is worth noting that the South African Competition Act recognises that “apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans”.⁷ In order to correct this, the South African Competition Act envisages that an efficient, competitive economic environment, which strikes a balance between the interest of the workers, owners and consumers, will benefit all South Africans.⁸ This is done in order to *inter alia* provide all South Africans with an equal opportunity to participate fairly in the economy and to regulate the transfer of economic ownership in keeping with the public interest.⁹

Therefore, the purpose of the South African Competition 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.”¹⁰

⁶ Ibid at foreword.

⁷ Ibid Preamble of the South African Competition Act.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid section 2.

It is further important to note that the incorporation of public interest factors in competition legislation is not unique to South Africa. As Nzero points out, the incorporation of public interest factors in competition legislation is common in many developing countries' competition legislation that have adopted broader economic reform programs.¹¹ Kenya is one such country. In its 2030 vision, as embodied in a document titled *Kenya Vision 2030*, Kenya aims to create “a globally competitive and prosperous country with a high quality of life by 2030” and to transform Kenya into “a newly-industrialising, middle income country providing a high quality of life to all its citizens in a clean and secure environment”.¹² This vision cascades down to Kenya's competition law, the Competition Act 12 of 2010, which aims to “enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing unfair and misleading market conduct throughout Kenya, in order to:

- (a) increase efficiency in the production, distribution and supply of goods and services;
- (b) promote innovation;
- (c) maximize the efficient allocation of resources;
- (d) protect consumers;
- (e) create an environment conducive for investment, both foreign and local;
- (f) capture national obligations in competition matters with respect to regional integration initiatives;
- (g) bring national competition law, policy and practice in line with best international practices; and
- (h) promote the competitiveness of national undertakings in world markets.”¹³

This study focusses on the public interest considerations in the context of merger regulation as applied in South Africa and compares these to those public interest considerations applied in Kenya's merger regime. It is worth noting that, in the

¹¹ Nzero at 603.

¹² Government of Kenya, *Kenya Vision 2030: The Popular Version*, <http://vision2030.go.ke/inc/uploads/2018/05/Vision-2030-Popular-Version.pdf> at 1, accessed on 12 June 2019.

¹³ The Competition Act, 2010 (Act No. 12 of 2010) (the Kenya Competition Act).

determination of a proposed merger, both the South African and Kenyan Competition legislations enjoin their respective Competition Authorities to apply a competition test in order to assess whether a merger is likely to prevent or lessen competition in a particular market.¹⁴ In addition to the “traditional” competition assessment, the Competition Authorities in South Africa and Kenya are also required to assess the effect of the merger on certain public interest factors.¹⁵ In South Africa, there are five public interest factors that must be considered by the Competition Authorities when assessing merger, namely, a particular industrial sector or region;¹⁶ employment;¹⁷ 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;¹⁸ the ability of national industries to compete in international markets;¹⁹ and 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.²⁰

In Kenya, the Competition Authorities are required to, in addition to the consideration of the competition factors mentioned in the Competition Act, also consider the effect of the merger on the four public interest considerations, which are, a particular industrial sector or region, employment, the ability of small undertakings to gain access to or to be competitive in any market and the ability of national industries to compete in international markets.²¹

Although this study focuses on the overall public interest aspects of merger regulation in South Africa and Kenya, special attention will be given to employment as a public interest consideration in a merger determination. The focus on employment as a public interest consideration is motivated by the fact that employment concerns feature more prominently in merger cases before the Competition Authorities in both South Africa²² and Kenya²³ than the other public interest factors. This is largely attributed to the high unemployment rate in South Africa and Kenya and the overall state of both these

¹⁴ Section 12A of the South African Competition Act, Section 46(2) of the Kenyan Competition Act.

¹⁵ Ibid

¹⁶ Section 12A(3)(a) of the South African Competition Act.

¹⁷ Section 12A(3)(b) of the South African Competition Act.

¹⁸ Section 12A(3)(c) of the South African Competition Act.

¹⁹ Section 12A(3)(d) of the South African Competition Act.

²⁰ Section 12A(3)(e) of the South African Competition Act.

²¹ Section 46(2) of the Kenyan Competition Act.

²² Yongama Njisane 'The rise of Public Interest: Recent high profile mergers' (2011) at 2 to 3.

²³ Dolmas and Mostyn *the Dominance and Monopolies Review* 8th edition, The Law Reviews.

countries' economy.²⁴ Furthermore, it is submitted that the impact on employment is a common thread found in all the public interests considerations as any adverse effect by a merger on the other public interest considerations may ultimately lead to job losses in the relevant market and indirectly impact on employment as a public interest consideration. It is submitted that a comparative analysis of public interest considerations, with special attention to employment, in South Africa and Kenya may assist in getting a better understanding of the challenges presented in the application of the public interest considerations in merger reviews in both jurisdictions. It may also further assist in developing a better regulatory framework for the advancement and promotion of broader competition law objectives as articulated in the respective competition legislation.

2. HISTORICAL DEVELOPMENT OF COMPETITION LAW AND POLICY IN SOUTH AFRICA

2.1 The Regulation of Monopolistic Conditions Act, 1955

Modern competition law in South Africa originated from the United State of America.²⁵ In South Africa, the first comprehensive legislation that was dedicated to competition law was the Regulation of Monopolistic Conditions Act.²⁶ The 1955 Act came into effect on 1 January 1956 and mainly applied to monopolistic conditions.²⁷ A monopolistic condition was defined in the 1955 Act as “an agreement, arrangement or understanding, business practice or method of trading, act or omission and situation arising out of an activity which had a negative effect or was calculated to have a negative effect on:

- (a) prices charged;
- (b) the output or distribution of a commodity;
- (c) entry into or adaptability of a branch of trade; or
- (d) technical development of a market.”²⁸

²⁴ Competition Commission “Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998” Government Gazette No. 40039 dated 02 June 2016 (the Public Interest Guidelines) at 3, [Eliud Moyi](#) ‘Unemployment and underemployment in Kenya: a gender gap analysis’ July 2013, Economics E-Journal Volume 2 at 7, available at https://www.researchgate.net/publication/257303077_Unemployment_and_underemployment_in_Kenya_a_gender_gap_analysis accessed on 08 September 2020.

²⁵ Neuhoff at 7.

²⁶ Act 24 of 1955 (repealed) (the 1955 Act).

²⁷ Section 2 of the 1955 Act.

²⁸ Ibid.

As with most novel legislations, the 1955 Act came with challenges of its own. Some of the shortcomings identified in the 1955 Act were that it did not expressly deal with mergers.²⁹ In their observations, Sutherlands *et al* noted *inter alia* that the 1955 Act could not be applied to prevent mergers from taking place.³⁰ The authors further observed that the 1955 Act and the institutions that operated in terms of it achieved very little in the advancement of competition imperatives³¹ For instance, up to 1975, the Minister had ordered only eighteen investigations into suspected monopolistic conditions and very little came even from these cases.³² Furthermore, no person was ever convicted for anti-competitive conduct in contravention of the Act.³³

The ineffectiveness of the 1955 Act led to the appointment of a commission in August 1975 by the then President to investigate competition policy in South Africa.³⁴ The work of the Commission culminated in the *Report of the Commission of Inquiry into the Regulation of Monopolistic Conditions Act* published in 1978 (the Mouton Commission Report).³⁵ In its findings, the Mouton Commission *inter alia* noted that South Africa had a highly concentrated economy.

The Commission was particularly critical of the fact that making investigations dependant on the Minister's direction subjected enforcement to too much political influence.³⁶ The Commission also found that the Board's roles were in conflict noting that its chief role was to determine tariff levels to protect local business, while on the other hand having to challenge the conduct of those businesses.³⁷ The Commission advocated for a new competition body with more resources, ability to impose stronger penalties against violations of orders, and that the law to be extended cover mergers.³⁸ The Commission further recommended the adoption of a new institutional structure

²⁹ Sutherland P and Kemp K, Katharine *Competition Law of South Africa*, 2017, Service issue 21, LexisNexis, South Africa at 3-28.

³⁰ *Ibid*

³¹ *Ibid* at 3-30.

³² *Ibid*

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid*.

³⁶ OECD "Competition law and policy in South Africa" OECD Global Forum on Competition Peer Review (Paris 11 February 2003) at 13, accessed on 13 August 2020.

³⁷ *Ibid*.

³⁸ *Ibid*.

similar to the United Kingdom’s “tripartite” system of an oversight ministry, a separate “enforcement” body, and a more independent decision-making tribunal.³⁹

In its final analysis, the Commission proposed a new legislation which ultimately led to the promulgation of the Maintenance and Promotion of Competition Act.⁴⁰ The 1979 Act was assented to on 21 June 1979 and came into operation on 1 January 1980.

2.2 The Maintenance and Promotion of Competition Act, 1979

The 1979 Act allowed for the adjudication of Competition matters by the then Competition Board, which was appointed by the Minister of Trade and Industry and which could investigate matters at its own initiative.⁴¹ . In most respects, the 1979 Act was found to have resembled the 1955 Act.⁴² It is said that the 1979 Act did not contain any explicit prohibitions, that the Minister still retained the power to make decisions and issue orders and, although there was a special court established to hear appeals, no appeal was actually heard by this court.⁴³ It was further found that proceedings at the Competition Board were mostly informal and that, from the reports produced by the Board, only a few of these dealt with what actually gave rise to anti-competitive restraints, namely, the role of the state.⁴⁴ The constitution of the Competition Board was also linked to the government in that six of its positions were designated by the 1979 Act to be occupied by officials or nominees of other ministries.⁴⁵ Although the Minister had issued a regulation declaring certain practices to be *per se* unlawful, namely resale price maintenance, horizontal collusion and bid rigging, there were no prosecutions for contravention of these prohibitions, except for one negotiated guilty plea.⁴⁶

The aforementioned prohibitions were however carried over into the overhaul of competition policy that followed the change of South Africa’s government regime.⁴⁷

³⁹ Ibid.

⁴⁰ Act 96 of 1979 (repealed) (the 1979 Act).

⁴¹ Neuhoff at 7.

⁴² OECD South Africa at 13.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid at 14.

2.3 The Competition Act, 1998

The new political dispensation in 1994 recognised that business conduct that prevents the efficient and competitive functioning of the domestic economy needs to be regulated.⁴⁸ It was clear that the old system required an overhaul and that a credible competition enforcement regime in line with international best practice was necessary for a proper functioning economy.⁴⁹ The Government's objective was to develop a competition policy that would derive both the benefits of the competition policy and broader government development policies.⁵⁰ Government believed that, with proper alignment, competitiveness and development are mutually-supporting rather than contradictory objectives.⁵¹ As such, alignment could be achieved by firstly, aligning competition policy with industrial and trade policy in order to synchronise varying domestic and international development tools.⁵² Secondly, competition law could be aligned with government policies that addressed challenges that resulted from our legacy of economic distortions.⁵³ Accordingly, competition policy was viewed as a complementary tool to advance efforts to improve employment, support emerging entrepreneurs - particularly those from historically disadvantaged backgrounds, and complement consumer transparency.⁵⁴

After an extensive consultation process that included hearings, written submissions and representations made to Parliament, the South African Competition Act was passed and certain sections thereof became effective on 30 November 1998.⁵⁵ The South African Competition Act draws heavily from developed countries' experience and practice in the area. As a consequence, precedent in jurisdictions such as Canada, Australia and Europe have influenced its content, application and interpretation.⁵⁶

⁴⁸ Neuhoff at 7.

⁴⁹ *Ibid.*

⁵⁰ Hodge J, Sha'ista Goga & Tshepiso Moahloli "Public-interest provisions in the South African Competition Act: A critical review" Competition Policy, Law and Economics Conference 2009, <http://www.compcom.co.za/wp-content/uploads/2014/09/Public-Interest-Provisions14-August-2009-2.docx>, at 4 accessed on 14 May 2019.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Neuhoff at 7.

⁵⁶ *Ibid.*

3 HISTORICAL DEVELOPMENT OF COMPETITION LAW AND POLICY IN KENYA

3.1 The Price Control Act of 1956

Kenya attained independence from the British in 1963.⁵⁷ After independence, the Kenyan government began to strengthen its powers which led to a state with considerable force having concrete reality at every political, administrative as well as managerial level.⁵⁸ Government then realised that apart from political independence, there was a need to achieve economic sovereignty. Government consequently embarked upon a series of state interventions to increase its hold over the national economy. The use of price controls and consumer subsidies was seen as a form of social wage and as a mechanism of redistribution. The policy of price control was entrenched into the economic system of Kenya by the enactment of the Price Control Ordinance of 1956 later renamed the Price Control Act of 1956 and revised in 1972, which was the first law to regulate competition in Kenya.⁵⁹ The primary purpose of these laws was to protect consumers against price increases by regulating prices of basic commodities through stabilising the urban cost of living as a means of pacifying the urban working class⁶⁰.

3.2 The RTPMPC Act

By the early 1980s, the pressure of escalating prices created a need for enhancing price controls which led to the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, 1988 (the RTPMPC Act).⁶¹ The RTPMPC Act contained *inter alia* provisions relating to restrictive trade practices⁶², control of unwarranted concentrations of economic power,⁶³ the regulation of mergers and acquisitions⁶⁴ and price control provisions.⁶⁵

⁵⁷ United Nations Conference on Trade and Development (UNCTAD) “Voluntary Peer Review on Competition

Policy: Kenya” http://unctad.org/en/docs/ditccplp20056_en.pdf accessed on 30 May 2019 at 3 to 4.

⁵⁸ *Ibid.*

⁵⁹ Mudida, Robert; Ndiritu, Wagura & W Ross, Thomas “Kenya’s New Competition Policy Regime” (2015) 38 *World Competition* 437 at 439.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Part two of the RTPMPC Act.

⁶³ Part three of the RTPMPC Act.

⁶⁴ *Ibid.*

⁶⁵ Part four of the RTPMPC Act.

The review of mergers under the RTPMPC Act was found to be neither transparent nor subject to published timeframes and the reasons for not approving a merger were not communicated to the applicant.⁶⁶ The Commission created under the RTPMPC Act had a shortage of relevant skills and lacked adequate powers to obtain information from parties involved in or affected by the merger.⁶⁷ The penalties for implementing a merger without authorisation provided no deterrent and the RTPMPC Act did not provide for a threshold for mergers that required the Minister's authorisation.⁶⁸ All horizontal mergers were required to apply for the Minister's Authorisation order which placed a huge strain on the MPC's resources.⁶⁹

Following criticism of the RTPMPC Act by various market players, proposals for improving the existing laws were put forward. Sessional Paper 1 of 1986⁷⁰ and Sessional Paper 2 of 1996⁷¹ addressed some of the challenges by reiterating the need to promote competition through enforcement of anti-monopoly rules, thereby paving the way for the scraping of the price control regime in Kenya, moving away from a price control regime to a true market regime.⁷² This culminated in the enactment of the current Kenyan Competition Act in 2012.

4 CONSUMER WELFARE VS PUBLIC INTEREST

As indicated above, the South African Competition Act includes in its aim aspects of macro-economic or wider public interest goals such as the promotion of employment and the expansion of the ownership stakes of historically disadvantaged persons in the economy.⁷³ In the South African context, it is explicitly recognized that the actions of firms may also affect the broader goals of macro-economic and industrial policy such as:

⁶⁶ Mudida, Robert; Ndiritu, Wagura & W Ross, Thomas "Kenya's New Competition Policy Regime" (2015) 38 World Competition 437at 440.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Government of Kenya, Sessional Paper No. 1 of 1986, "On economic management for renewed growth". Nairobi.

⁷¹ Government of Kenya, Sessional Paper No. 2 of 1996 "Industrial Transformation to the year 2020". Nairobi.

⁷² Ibid.

⁷³ Neuhoff at 8.

- (a) The promotion of small and medium sized enterprises (SMEs);⁷⁴
- (b) Black economic empowerment (BEE) and capacity building through SMEs;⁷⁵
- (c) Interests of labour;⁷⁶ and
- (d) The ability of firms to compete in international markets.⁷⁷

The driving force behind the inclusion of public interest considerations in merger policy in South Africa was a need for economic redistributive justice.⁷⁸ The government of 1994 sought to level the economic grounds for all citizens in order to, *inter alia*, fulfil its economic and social obligations, particularly, towards the previously disadvantaged persons.⁷⁹

The introduction of public interest considerations in South Africa has sparked a robust debate regarding the appropriateness of these factors in the competition regime.⁸⁰ It is thus important to reflect on some of the views expressed in this regard. Boshoff *et al* raised a question as to whether Competition Authorities are the right institutions to balance consumer welfare and public interest considerations.⁸¹ The authors point out that Competition Authorities are not elected by the electorate with the mandate to decide on public policy issues and therefore government should rather determine public policy.⁸² They further argue that Competition Authorities may not be the right bodies to strike a balance between the competing considerations, as they may not possess the most effective means of achieving these objectives.⁸³ The authors criticize government's intervention in competition cases as arbitrary, ascribing this to uncertainty in government policy making and failures of sector regulating bodies.⁸⁴ They do however recognise an alternative view that competition law and its institutions are simply another tool of government used to achieve certain government objectives regarding public interest provisions.⁸⁵

⁷⁴ Section 2(e) of the South African Competition Act. See also Neuhoff at 8.

⁷⁵ Section 2(f) of the South African Competition Act. See also Neuhoff at 8.

⁷⁶ Section 2(c) of the South African Competition Act. See also Neuhoff at 8.

⁷⁷ Section 2(d) of the South Africa Competition Act. See also Neuhoff at 8.

⁷⁸ Yongama Njisane "The rise of Public Interest: Recent high profile mergers" (2011) at 2 to 3.

⁷⁹ *Ibid.*

⁸⁰ Boshoff, Dingley & Dingley "The economics of public interest provisions in South African competition policy" <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> (2012), accessed 12 June 2019, at 1.

⁸¹ *Ibid* at 3.

⁸² *Ibid.*

⁸³ *Ibid* at 4.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

Hantke-Domas notes that “[I]ntervention and control of the economy by governments is as old as the existence of human beings. The concept of public interest is as old as the political philosophy of government intervention”.⁸⁶ He views judicial interpretation of public interest as a limitation of the legal scope of government’s intervention in the economy, providing the judiciary with a rhetorical base for resolving questions of political economy.⁸⁷

Reekie criticises the inclusion of public interest considerations, stating that “[t]he scope for error, flexible interpretation, and subjectivity of judgment seems great. Prospective local or foreign investors could then well be deterred from takeover activity if there are to be unknown and unpredictable reactions by the new authorities. A brake on such activities could affect exports, corporate tax revenue, and hamper possible spin-off demand for the products of small and medium scale enterprises. A second problem with the definition of the ‘public interest’ is what it *includes*. The socio-economic objectives incorporate redistribution, labour interest and black economic empowerment. Relying on competition policy to achieve these objectives is inappropriate. There are more specific (and hence more effective) policies that can be used.”⁸⁸

The former chairperson of the SA Tribunal, David Lewis however expressed that he was “quite comfortable with the requirement that we must balance competition and public interest considerations”. He further noted that although:

‘[I]t makes for complex decision making...real politiek, at least, dictates that we do not insist on eliminating either the "political economy" or distributional objectives or "the pure economy" or allocative efficiency objectives. The trick is reconciling them in practice, and this in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of policy and regulation”.⁸⁹

⁸⁶ Hantke-Domas M “The public interest theory of regulation: non-existence or misinterpretation?” (2003) 15 *European Journal of Law and Economics* 165 at 166.

⁸⁷ *Ibid* at 187.

⁸⁸ Reekie W.D “The Competition Act, 1998: An economic perspective” (1999), 67(2) *South African Journal of Economics*, 258, at 283 to 284.

⁸⁹ Lewis, D, Presentation entitled 'The Political Economy of Antitrust', Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy (2001) October 25 & 26, at 4.

Nzero also comments on the inclusion of public interest consideration in the South African Competition Act, in particular in the context of merger regulation. He acknowledges the fact that the requirement of serving a notice of the merger on other parties besides the Competition Authorities in the context of the “failing-firm” doctrine⁹⁰ has the potential to prolong the merger process to such an extent that, by the time the merger is determined, the alleged failing firm may have already failed and the merger decision would not achieve its intended purpose of rescuing the failing firm.⁹¹ Nonetheless, the author contends that this situation cannot be addressed by removing the relevant merger provisions and he recognises that the inclusion of public interest provisions must be understood as a reflection of matters that impact on the South African society at large hence the authorities cannot ignore them.⁹²

Nzero further argues that, even if public interest considerations are removed from the competition statute, they are likely to appear elsewhere.⁹³ This is because the concerns that are intended to be addressed by public interest considerations, such as employment, greater spread of economic participation and industrial policy, are of a broader national interest and, as such, need to be considered by the Competition Authorities or in other forums.⁹⁴ Nzero is of the view that if these public interest concerns are removed from competition legislation and concentrated in other legislation, merging parties will be required to notify the competition authorities for purposes of competition assessment and then any other such authorities for purposes of assessing compliance with statutes.⁹⁵ Such multiple filing is, according to Nzero, not only expensive but is time-consuming, especially given the fact that time is of the essence and especially in cases involving a failing-firm where delays in determining the fate of a notified merger might result in the failure of the target firm and its subsequent exit from the market.⁹⁶ This means that even if the merger is to be approved, the merger might have failed to achieve its goal of ‘rescuing’ a failing firm.

⁹⁰ Section 12A(2)(g) provides that, when determining whether or not the merger is likely to substantially prevent or lessen competition, the Competition Authorities must take into account, where necessary, “whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail”. Nzero explains that the consideration of whether a business has failed or is likely to fail is, in the context of merger regulation, commonly referred to as the “failing firm doctrine”.

⁹¹ Nzero at 620.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

Accordingly, Nzero correctly concludes that, retaining the public interest provisions in competition law is not only a policy matter but also a logical one.⁹⁷

5 RESEARCH STATEMENT

The South African and Kenyan competition policy and law recognise the importance of public interest as part of merger evaluation and hence provisions are made for these to be incorporated when mergers are considered.⁹⁸ The former Chairperson of the Competition Tribunal, David Lewis, previously remarked on the importance of public interests considerations in developing countries and stated:

“I readily concede that public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries”.⁹⁹

Both South Africa and Kenya, as developing countries, have adopted public interest considerations similar to one another in their merger regimes. The aim of this dissertation is consequently to compare the role of public interest in merger regulation in South Africa with the role of public interest in merger regulation in Kenya, with special attention to employment, to determine what lessons, if any, these jurisdictions can take from each other and to inform further reform of their competition laws.

6 RESEARCH OBJECTIVES

The study will pursue the following research objectives:

(a) to interrogate and consider the role of public interest in merger regulation in South Africa;

⁹⁷ Ibid.

⁹⁸ Section 12A of the South Africa Competition Act and Section 46 of the Kenyan Competition Act.

⁹⁹ D. Lewis, *The role of Public Interest in Merger Evaluation*, International Competition Network, Merger Working Group Naples, September, 2002, at 2.

- (b) to interrogate and consider the role of public interest in merger regulation in Kenya;
- (c) to determine the lessons these countries can learn from each other and to make recommendations for reform of their competition laws based on such lessons.

7 RESEARCH METHODOLOGY

In this dissertation, a comparative analysis of the public interest considerations, with specific attention on employment, in the context of merger regulation in South Africa and Kenya is conducted. Both the South African and Kenyan competition regulatory frameworks are critically discussed and compared in order to highlight, similarities, differences strengths and weaknesses in both jurisdictions. This is done with reference to both countries' competition legislation, case law and guidelines published by both the South African and Kenyan Competition Authorities respectively.

8 LIMITATIONS TO THE STUDY

It should be noted that the Competition Authority of Kenya is responsible for the determination of all mergers in Kenya, irrespective of size.¹⁰⁰ The Kenyan Competition Tribunal's role in respect of mergers, is limited only to reviewing the decisions of the Authority.¹⁰¹ Although the Authority has, since its inception, adjudicated over a significant number of mergers,¹⁰² it has not published any reasons for its decisions and there is no legal duty placed upon the Authority by the Kenyan Competition Act or any other legislation to make publicly available the reasons for its decisions. As a result, there is a dearth of precedents or jurisprudence on the Authority's merger cases in Kenya.

Recently however, the Kenyan Competition Tribunal made its first ever ruling on 01 May 2020 in an application lodged by Telkom Kenya Ltd and Airtel Networks Kenya

¹⁰⁰ Section 46 of the Kenyan Competition Act.

¹⁰¹ Section 48 of the Kenyan Competition Act.

¹⁰² The Competition Authority of Kenya has handed a total of 752 merger notifications in the period between 2012/2013 to 2017/2018 financial years. Out of the 752 merger notifications, 121 transactions met the required merger threshold for mandatory notification and were assessed by the Authority. See the Competition Authority of Kenya's Annual Reports & Financial Statements for the Financial Year 2012/2018 to 2017/2018 <https://www.cak.go.ke/planning/annual-reports>, accessed on 07 September 2020.

Ltd for a review of the Authority's conditional approval of their proposed merger.¹⁰³ This judgment is fundamental as it touches on several key considerations for merger control in Kenya, including public interest aspects. Thankfully, the reasons for the Tribunal's decision in respect of the said merger have been published and will be discussed in detail in chapter 3 of this study. It is important to note that the Tribunal's decision in *Telkom Kenya Ltd Another v Competition Authority of Kenya*¹⁰⁴ is the only ruling made to date on merger assessment and therefore, a discussion of public interest considerations in respect of Kenya will rely mainly on the competition legislation and the Public Interest Guidelines issued by the Competition Authority of Kenya.

9 CHAPTER LAY-OUT

This study comprises of four chapters. Chapter one reflects upon the historical development of Competition law in South Africa and Kenya respectively. This Chapter further reflects on the rationale for the inclusion of public interest considerations in merger assessment and discusses the divergent views expressed by various persons on the subject matter. Lastly, this chapter outlines the scope and nature of the dissertation and the rationale for selection of the comparative jurisdiction.

Chapter two examines the regulatory framework that governs mergers in South Africa. It then reflects upon the competition authorities created in terms of the South African Competition Act and assesses the role of these authorities in the assessment of public interests considerations in the context of merger reviews. Chapter two further looks at the definition of a merger and discusses the different categories of mergers dealt with by South African Competition Act. Chapter two further analyses the review of mergers in South Africa and how public interest considerations are considered in the review of mergers by the competition authorities. This is done with reference to the relevant legislative provisions, case law and Guidelines issued by the Competition Commission. Lastly, Chapter two discusses the public interest remedies applied by the Competition Authorities in order to ameliorate the negative effects of mergers on public interest factors.

¹⁰³ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* Case No. CT/005/2020 (04 May 2020) <http://kenyalaw.org/caselaw/cases/view/194959/>, Accessed on 07 September 2020.

¹⁰⁴ *Ibid.*

Chapter three examines the regulatory framework that governs mergers in Kenya. It then reflects upon the competition authorities created in terms of the Kenyan Competition Act and assesses the role of these authorities in the assessment of public interests considerations in the context of merger reviews. Chapter three further looks at the definition of a merger and discusses the different categories of mergers dealt with by Kenyan Competition Act. It further looks at how mergers are assessed in Kenya generally and how public interest considerations are considered in the review of mergers by the competition authorities. This is done with reference to the relevant legislative provisions, case law and Guidelines issued by the Competition Authority. Lastly, a comparative analysis is conducted in order to draw similarities and differences between the South Africa and Kenyan public interests considerations and then conclusions are drawn.

Chapter four is a conclusion of the study and makes recommendations on reform of the South Africa and Kenyan Competition legislations respectively.

CHAPTER 2

PUBLIC INTEREST CONSIDERATIONS IN SOUTH AFRICA

1. INTRODUCTION

Chapter 3 of the South African Competition Act deals with merger control in South Africa. The rationale behind merger regulation in South Africa is said to be the prevention of the creation of anti-competitive market structures through mergers.¹⁰⁵ This is mainly because the transfer of control of businesses between firms may alter the structure of markets which may have dire consequences for competition in the relevant markets. Once established, it is considered difficult and disruptive to change market structures.¹⁰⁶ Ultimately, competition law is concerned with the creation, increase and abuse of market power.¹⁰⁷ One of the ways in which market power may be created or increased is through mergers hence competition authorities worldwide supervise mergers.¹⁰⁸ The South African Competition Act's objectives go beyond the traditional competition goals and encompass broader policy considerations unique to the countries' social and economic development in the form of the so-called "public interest" factors.¹⁰⁹ Section 12(A)(3) of the South African Competition Act contains a closed list of factors that Competition Authorities must take into account when assessing the public interest aspects of mergers. Notably, public interest considerations feature more prominently in merger proceedings than in any other competition matters.¹¹⁰ In particular, section 12A of the South Africa Competition Act provides that:

"(1) [w]henever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and if it appears that the merger is likely to substantially prevent or lessen competition, then determine—

¹⁰⁵ Sutherland and Kemp, Katharin *Competition Law of South Africa* (2017) LexisNexis, South Africa, at para 8.1.

¹⁰⁶ *Ibid.*

¹⁰⁷ Neuhoff at 26. Market power is defined in section 1 of the South African Competition Act as the power of a firm to control prices, exclude competition or behave to an appreciable extent independently of its competitors, customers or suppliers.

¹⁰⁸ *Ibid.*

¹⁰⁹ Nzero at 603.

¹¹⁰ *Ibid* at 604.

“(a) 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; and

(b) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

(1A) Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).”

There are five public interest grounds enumerated in subsection (3) of section 12A which the competition authorities must evaluate when assessing mergers in South Africa, namely the effect of a merger on a particular industrial sector or region;¹¹¹ employment;¹¹² the ability of small and medium businesses or firms controlled by historically disadvantaged persons to effectively enter into, participate in or expand within the market;¹¹³ the ability of national industries to compete in national markets;¹¹⁴ and the protection 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.¹¹⁵

It is important to note that section 12A of the South African Competition Act was recently amended by section 9 of the Competition Amendment Act¹¹⁶ which came into effect on 12 July 2019.¹¹⁷ In terms of the Memorandum on the Objects of the Competition Amendment Bill,¹¹⁸ the primary objective for recent amendment of the South African Competition Act was to address the high levels of economic concentration and the skewed ownership profile of the economy by *inter alia* strengthening or clarifying the provisions of the South African Competition Act relating

¹¹¹ Section 12A(3)(a) of the South African Competition Act.

¹¹² Section 12A(3)(b) of the South African Competition Act.

¹¹³ Section 12A(3)(c) of the South African Competition Act.

¹¹⁴ Section 12A(3)(d) of the South African Competition Act.

¹¹⁵ Section 12A(3)(e) of the South African Competition Act.

¹¹⁶ Act No 18 of 2018.

¹¹⁷ Proclamation No. 46 of 2019 Government Gazette 42578 dated 12 July 2019.

¹¹⁸ 2018. As introduced in the National Assembly (proposed section 75); explanatory summary of Bill and prior notice of its introduction published in Government Gazette No. 41756 of 5 July 2018.

to mergers.¹¹⁹ For purposes of this study, there are three significant amendments of section 12A of the South African Competition Act which bear mentioning herein. The first significant amendment concern section 12A(1), in terms of which the Legislature sought to clarify the application of both the competition and public interest test in the assessment of a merger.¹²⁰ In this regard, it is prescribed that the Competition Commission and Tribunal must still analyse the public interest issues relating to the merger irrespective of the conclusion reached in the prior competition enquiry in order to ensure that, where a merger results in negative public interest outcomes, it is either prohibited or approved with conditions.¹²¹ This amendment is said to give better effect to the jurisprudence and to the initial meaning of section 12A(1), which essentially means that the amendment was effected to confirm the well-established interpretation of section 12A(1) already adopted by the Competition Authorities in the determination of mergers in South Africa.¹²²

The second pertinent amendment is the inclusion of medium businesses in the consideration of the public interest factor listed in subsection (3)(c), which previously only made reference to small businesses and firms controlled or owned by historically disadvantaged persons.¹²³ Furthermore, provision is made for the Competition Authorities to assess, not only these firms' (SMEs and HDIs) ability to enter markets, but to also to "participate in" and to "expand" within these markets as well.¹²⁴

The third significant amendment for purposes of this study is the addition of a new and fifth public interest consideration, namely, "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".¹²⁵ In terms second and third amendment articulated herein, the Legislature sought to explicitly create a public interest ground in merger control that deal with ownership, control and the support of SMEs and HDIs as well as the ownership in firms by workers.¹²⁶ These amendments were further informed by the need for a continued and accelerated transformation of

¹¹⁹ Memorandum on the Objects of the Competition Amendment Bill, 2018 at 22.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Section 9(e) of the Competition Amendment Act, 2018 (Act No 18 of 2018).

¹²⁴ Section 12A(3)(c) of the South African Competition Act.

¹²⁵ Sub-paragraph (e) of the Section 12A(3) of the South African Competition Act, added by section 9(f) of the Competition Amendment Act, 2018 (Act No 18 of 2018).

¹²⁶ Memorandum on the Objects of the Competition Amendment Bill, 2018 at 26.

the ownership profile of the economy not only to redress historic discrimination and exclusion, but also as part of a sound policy for economic development.¹²⁷ They further seek to advance the objective for inclusive growth and the harnessing of the skills, talents and productivity of all South Africans to ensure a dynamic and successful long-term growth path for the economy.¹²⁸

2. COMPETITION REGULATORY AUTHORITIES OF SOUTH AFRICA

The South African Competition Act makes provision for the establishment of three competitions institutions tasked to enforce and implement the provisions of the South Africa Competition Act, namely, the Competition Commission (The Commission), the Competition Tribunal (the Tribunal) and the Competition Appeal Court (the CAC). These three institutions function independently and together make up South Africa's competition authority.

2.1 The Competition Commission

The Commission is the investigative and prosecutorial agency established in terms of the South African Competition Act as a juristic person having jurisdiction throughout the Republic.¹²⁹ The Commission consist of a Commissioner and one or more deputy commissioners appointed by the Minister of Trade, Industry, and Competition (previously called Minister of trade and Industry)¹³⁰ in terms of the South African Competition Act.¹³¹ The functions of the Commission are outlined in the South African Competition Act and include, investigating mergers, considering and making decisions on intermediate and small mergers, investigating and referring complaints of prohibited practices to the Competition Tribunal, conducting market inquiries, considering applications for exemptions.¹³² In practice, the Commission is divided into seven divisions, each of which focuses on certain of the Commission's functions. These divisions are mergers and acquisitions, cartels, enforcement and exemptions,

¹²⁷ Memorandum of objects: Competition Amendment Bill, 2017 at 14.

¹²⁸ Ibid.

¹²⁹ Section 19(1) of the South African Competition Act.

¹³⁰ On 29 May 2019, President Cyril Ramaphosa announced the appointment of a reconfigured national executive following the general elections held on 08 May 2019. In terms of this reconfiguration, the Department of Trade and Industry and the Economic Development Department merged to form the Department of Trade, Industry and Competition under the executive authority of the Minister of Trade, Industry and Competition. <http://www.thepresidency.gov.za/press-statements/president-ramaphosa-announces-reconfigured-departments>, accessed on 10 September 2020.

¹³¹ Section 19(2) of the South African Competition Act.

¹³² Section 21 of the South African Competition Act.

advocacy and stakeholder relations, policy and research, legal services and corporate services.¹³³ The Commission operates in terms the Rules for the Conduct of Proceedings in the Competition Commission.¹³⁴ It is worth noting that the decisions of the Commission are subject to an appeal or a review by the Tribunal and the Competition Appeal Court.¹³⁵

2.2 The Competition Tribunal

The South African Competition Tribunal is established in terms of the South African Competition Act as juristic person having jurisdiction throughout the Republic.¹³⁶ The Tribunal consists of a chairperson and a minimum of three but not exceeding fourteen other members appointed by the President on a full or part time basis on the recommendation of the Minister of Trade, Industry and Competition.¹³⁷

The Tribunal is responsible *inter alia* for assessing and adjudicating upon large mergers which are referred to it by the Competition Commission;¹³⁸ hearing appeals or reviewing any decision of the Commission that may be referred to it, including the hearing of applications by the parties to a merger for the consideration of small or intermediate mergers that have either been conditionally approved or prohibited by the Competition Commission;¹³⁹ assessing and adjudicating complaints regarding any conduct prohibited under the South African Competition Act to determine whether the prohibited conduct has occurred and if so, impose an appropriate remedy;¹⁴⁰ and making any ruling or order necessary or incidental to the performance of its functions in terms of the South African Competition Act.¹⁴¹

2.3 The Competition Appeal Court

The Competition Appeal Court of South Africa (the CAC) is established in terms of the South African Competition Act as a court of record having jurisdiction throughout the Republic.¹⁴² The CAC consists of a minimum of three Judges who are appointed by

¹³³ Sutherland and Kemp at 11.3.1.

¹³⁴ <http://www.compcom.co.za/the-competition-commission-rules/> accessed on 05 September 2020.

¹³⁵ Section 27(1)(c) and Section 37(1) of the South African Competition Act.

¹³⁶ Section 26(1) of the South African Competition Act.

¹³⁷ Section 26(2) of the South Africa Competition Act.

¹³⁸ Section 16(2)(a) of the South African Competition Act.

¹³⁹ Section 16(1) of the South African Competition Act.

¹⁴⁰ Section 27(1)(a) of the South African Competition Act.

¹⁴¹ Section 22 of the South African Competition Act.

¹⁴² Section 36(1) of the South African Competition Act.

the President on the advice of the Judicial Services Commission, each of whom must be a judge of the High Court.¹⁴³ The status of the CAC is similar to that of the High Court and the CAC may perform *inter alia* the following functions, reviewing any decision of the Tribunal; and considering an appeal of the decisions of the Tribunal in respect of interlocutory and final nature.¹⁴⁴

The CAC may give any judgment or make any order including an order confirming, amending or setting aside a decision of the Tribunal or refer a matter back to the Competition Tribunal for a further hearing on any appropriate terms.¹⁴⁵

3. OVERVIEW OF MERGER REGULATION IN SOUTH AFRICA

3.1 What is a merger

A merger occurs “when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm”.¹⁴⁶ As pointed out by Neuhoff, the definition of a merger contains two important elements, namely the acquisition of control and the interest, right or entity acquired must constitute a business or part of business.¹⁴⁷

For purposes of merger regulation, a merger only occurs where control has been established in a way that influences the merging firms’ behaviour on the market.¹⁴⁸ Control, for purposes of the South African Competition Act, is established if a person owns more than 50% of the shares of the firm; is entitled to vote or control a majority of the votes at a general meeting of the firm; is able to appoint or to reject the appointment of a majority of the directors of a firm; is a holding company and the firm is a subsidiary of that company; in case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint or change the majority of trustees; in the case of a close corporation, owns or controls the majority of members’ interest or votes in the close corporation; or can materially influence the policy of the firm in a way similar to a person who can exercise an element of control referred to above.¹⁴⁹

¹⁴³ Section 37(3) of the South African Competition Act.

¹⁴⁴ Section 37(1) of the South African Competition Act.

¹⁴⁵ Section 37(1) of the South African Competition Act.

¹⁴⁶ Section 12(1) of the South African Competition Act.

¹⁴⁷ Neuhoff at 310.

¹⁴⁸ Nzero at 608.

¹⁴⁹ Section 12(2) of the South African Competition Act.

3.2 Types of mergers

The South African Competition Act regulates three types of mergers, namely: horizontal, vertical and conglomerate mergers.¹⁵⁰ A horizontal merger involves firms which are competitors operating at the same level of supply chain selling substitutable products in the same geographic area.¹⁵¹ It is said that horizontal mergers usually give rise to more serious competition law concerns than the other types of mergers because they involve the removal of one competitor by another, thereby reducing the number of competitors in the market and increasing the market share and concentration of the merged entity and reducing customer choice.¹⁵²

A vertical merger concerns the integration of firms in a vertical relationship at different levels of the supply chain for a particular product such as a merger between a manufacturer and a retailer.¹⁵³ The main concern with vertical mergers is that input or customer foreclosure may occur post-merger.¹⁵⁴ In terms of input foreclosure, a supplier of a particular input may, after acquiring one of its customers, engage in “self-dealing” by diverting its supply to the acquired entity only and thereby denying competitors of the acquired customer the said input or supplying same on a discriminatory basis.¹⁵⁵ In terms of customer foreclosure, the customer may, post-merger, source all or a substantial part of its inputs from its own vertically integrated upstream division causing a reduction in competition in the upstream market as other input suppliers may not have a sufficient customer base to justify their participation in the market.¹⁵⁶

A third type of merger, a conglomerate merger, concern all types of mergers that are neither horizontal nor vertical in nature.¹⁵⁷ Ordinarily, this type of mergers does not raise competition concerns, as it does not involve the integration of competitors or of suppliers and its customers. The main concern that may arise from a conglomerate merger is the so-called “portfolio effect” whereby merging firms supply complementary

¹⁵⁰ Neuhoff at 235.

¹⁵¹ Ibid at 237

¹⁵² Ibid.

¹⁵³ Ibid at 236.

¹⁵⁴ Ibid at 241.

¹⁵⁵ Ibid.

¹⁵⁶ Neuhoff at 241.

¹⁵⁷ Ibid at page 236.

products, which may facilitate tying or bundling¹⁵⁸ which may restrict customer choice.¹⁵⁹

3.3 Categories of mergers and notification

Pre-merger notification, as required in terms of the South African Competition Act, is regarded as an effective method of merger notification as it enables the Competition Authorities to scrutinize as many transactions as possible and assess their likely effect on the market structure affected by the merger.¹⁶⁰ Notification is also considered less expensive and practical, as Competition Authorities are not expected to hunt transactions down and attempt to undo them once it is established that these transactions are anti-competitive.¹⁶¹ Provision is also made in terms of the South African Competition Act for the Minister of Trade, Industry and Competition and organized labour to be notified of a merger in order to participate in the merger proceedings and to make representations on any public interest aspects in the merger before the Competition Authorities.¹⁶²

Oxenham *et al*¹⁶³ recognize that intervention in mergers proceedings before the Competition Authorities is a well-established phenomenon in South Africa but they express a concern that reasons for intervention may often not be competition-related and further that intervention may be used to achieve ulterior motives.¹⁶⁴ The Authors further express a view that intervention in mergers may lead to delays in finalising merger determinations by the Competition Authorities, the increase of merger costs for the merging parties and the deterrence of foreign direct investment, with no tangible benefit to consumer welfare.¹⁶⁵

¹⁵⁸ Tying or bundling refers to a strategy of selling goods or services subject on the condition that the buyer should purchase separate goods or services that are not related to the object of the sale, or forcing a buyer to accept a condition that is unrelated to the contract. See Sutherland and Kemp at 10-97 to 10-98, Neuhoff at 157. This type of conduct is described as an exclusionary act in terms of section 8 of the South African Competition Act to the extent that it prevents a competitor from entering into, or expanding within a market. Tying or bundling constitutes a prohibited conduct in terms of section 8(1)(d)(iii) of the South African Competition Act if found to be perpetuated by a “dominant” firm.

¹⁵⁹ Ibid at 242.

¹⁶⁰ Nzero at 607. See also *Bromor Foods (Pty) Ltd and National Brands Ltd (19/LM/Feb00)* [2000] ZACT 13 (14 April 2000).
at paras 35-36.

¹⁶¹ Ibid.

¹⁶² Section 13A, Section 14A and Section 18(1) of the South African Competition Act.

¹⁶³ Oxenham, J. Stargard, A. and Currie, M. “Developments in South African Merger Control – Ministerial Interventionism and the impact on timing and certainty” (2016).

¹⁶⁴ Ibid at 12.

¹⁶⁵ Ibid.

The Authors therefore caution the Competition Authorities to guard against the use of intervention mechanism by third parties in merger control as “a means of negotiating leverage on extraneous issues, wielded by would-be interveners against merging parties”.¹⁶⁶ It is however acknowledged by these authors that the Competition Authorities’ are alive to the risks presented by third party intervention in mergers as previously expressed by the former Chairman of the Competition Tribunal, David Lewis, when he stated that: “As the Commission’s investigatory prowess has improved, the utility of permissive intervention has decreased and its dangers have increased concomitantly. The danger is not so much that interveners, particularly those who are competitors, will provide self-interested information and analyses, but rather that they will use intervention as a mechanism for delaying and obstructing transactions in which time is often extremely costly. Recent years have been marked by interventions that have not contributed an iota of useful insight to the adjudicators, but have simply served to harass their competitors.”¹⁶⁷

The South African Competition Act classifies mergers into three categories, namely: a small, intermediate and large merger. A small merger is one that does not meet the criteria of an intermediate or large merger.¹⁶⁸ A merger constitutes an intermediate merger if the combined annual turnover or assets, whichever is greater, of the acquiring firms and target firms in, into or from South Africa is R600 million or more; and the annual turnover or assets ,whichever is greater, of the target firm in, into or from South Africa is R190 million.¹⁶⁹

A large merger is constituted when the combined annual turnover or assets, whichever is the greater, of the acquiring firms and target firms in, into or from South Africa is R6.6 billion or more; and the annual turnover or assets ,whichever is greater, of the target firm in, into or from South Africa is R190 million.¹⁷⁰ Small mergers ordinarily do not raise competition concerns and can be implemented without prior notification, unless the Commission requires notification.¹⁷¹ A party to an intermediate or a large

¹⁶⁶ Ibid.

¹⁶⁷ D Lewis “Enforcing Competition Rules in South Africa: Thieves at the Dinner Table” (2012), Edward Elgar Publishing Limited and International Development Research Centre (eds.)

¹⁶⁸ Section 1(4) of the South African Competition Act read with Merger Thresholds in terms of the Competition Act No. 89 of 1998, Government Gazette No. 41124 dated 15 September 2017, at paras 2 and 3.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Section 13(1) of the South African Competition Act.

merger is required to notify the Commission regarding the proposed merger and may not implement the merger until it has been approved, with or without conditions, by the Commission or the Tribunal.¹⁷²

Parties to a merger may be liable to a considerable administrative fine if they fail to notify the merger as required in terms of the South African Competition Act, proceeded to implement a merger without the Competition Authorities' approval or contrary to conditions imposed by the Competition Authorities or contrary to the Competition Authorities decision to prohibit the merger.¹⁷³ Furthermore, the Tribunal is empowered to order divestiture¹⁷⁴ as a remedy for implementing a merger without notification.¹⁷⁵ Divestiture is characterised as a structural remedy,¹⁷⁶ and is often considered to be cheaper, less time consuming and less complex to formulate than behavioural remedies.¹⁷⁷ Motta points out that one of the advantages of divestiture as a competition remedy is that it is easier to administer compared to behavioural remedies to as it requires minimal ongoing supervision.¹⁷⁸

4 ASSESSMENT OF MERGERS IN SOUTH AFRICA

The South African Competition Act's approach to merger determination envisages a three-pronged analysis of mergers.¹⁷⁹ In the *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied*

¹⁷² Section 13A of the Competition Act.

¹⁷³ Section 59(1)(d) of the Competition Act.

¹⁷⁴ Section 60(1) of the South African Competition Act empowers the Tribunal to order a party who has implemented a merger in contravention of Chapter 3, to sell any shares, interest or other assets it has acquired pursuant to the merger; or to declare void any provision of an agreement to which the merger was subject.

¹⁷⁵ Section 60(1) of the South African Competition Act.

¹⁷⁶The International Competition Network (ICN) Merger Remedies Guide (2016) defines structural remedies as "one-time remedies intended to maintain or restore competitive structure of the market". Typically, structural remedies involve the sale of one or more business, certain physical assets or other rights. See ICN (2016) "Merger Remedies Guide" 8 https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/05/MWG_RemediesGuide.pdf

¹⁷⁷Behavioural remedies are defined as ongoing remedies that are designed to alter or curb the future conduct of merging firms. By contrast to structural remedies, behavioural remedies do not restructure firms, they allow integration subject to specific operating conditions. They are intended to change firm's behaviour to encourage competition through imposing conditions or prohibitions on behaviour that prevent the merged firm from undermining competition. See ICN (2016) "Merger Remedies Guide" 8.

¹⁷⁸ Motta (2005) "Competition Policy: Theory and Practice" Cambridge University Press, 2004 4.

¹⁷⁹ Section 12A of the South African Competition Act.

*Workers Union (SACCAWU) v Wal-Mart Stores Inc*¹⁸⁰ the CAC stated that "the provisions of s 12A envisage three separate but interrelated inquiries, namely

1. Whether or not the merger is likely to substantially prevent or lessen competition¹⁸¹;
2. If the result of this inquiry is in the affirmative, whether technological, efficiency or other pro-competitive gains¹⁸² will trump the initial conclusion so reached in stage 1 together, with the further consideration based on substantial public interest grounds, which in turn, could justify permitting or refusing the merger; and
3. Notwithstanding the outcome of the enquiries in 1 or 2, the determination of whether the merger can or cannot be justified on substantial public interest grounds"¹⁸³

It is submitted that the aforementioned formulation of section 12A, as enunciated by the CAC prior to recent amendment to the South African Competition Act, is still applicable even post these statutory amendments. As discussed in paragraph 1 above, the amendment of section 12A(1) was intended to give better effect to the well-established jurisprudence and to the initial meaning of section 12A(1). Furthermore, it is worth noting that the Background Note on the Competition Amendment Bill, 2017¹⁸⁴ clearly states that the amendment to section 12A "reflects the settled, established position in South African case law that the competition and public interest test for the approval of a merger are equal in status. This confirms the legislative intention that the merger must be justified on both competition and public interest grounds to be approved". Accordingly, it appears that the Legislature sought to bring about certainty and to confirm the well-established interpretation of section 12A adopted by the Competition Authorities over the years in the determination of mergers in South Africa.

The third leg of merger enquiry, which entails a consideration of the public interest factors, is a focal point of this dissertation and will be considered in more detail below, with specific attention employment. We first briefly discuss the first two stages of the

¹⁸⁰ (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

¹⁸¹ See *infra* at 4.1 for a brief discussion on this aspect.

¹⁸² See *infra* at 4.2 for a brief discussion on this aspect.

¹⁸³ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at para 12.

¹⁸⁴ Draft Competition Amendment Bill, 2017, published in the Government Gazette No 41294 Notice No. 1345.

merger analysis in order to provide context to the discussion on public interest considerations as applied in South Africa.

4.1 Substantial Prevention or lessening of competition

In the first stage of a merger enquiry in South Africa, the Competition Authorities are required to, as indicated in paragraph 4 above, first determine whether or not the merger is likely to substantially prevent or lessen competition by assessing the strength of competition in the relevant market and the probability that the firms in a market will behave competitively or co-operatively after the merger.¹⁸⁵ This assessment is conducted by taking into account any relevant factor including, the actual and the potential level of import competition in the market; the ease of entry into the market including tariff and regulatory barriers; the level and trends of competition, and history of collusion, in the market; the degree of countervailing power¹⁸⁶ in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; 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 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 the Competition Commission.¹⁸⁷

Nzero notes that the aforesaid enquiry is a predictive one as appears from the use of the word “likely” and does not imply a conclusive determination on the effects of a merger.¹⁸⁸ However, it is worth noting that such a prediction must not be arrived at using unsubstantiated speculation.¹⁸⁹

¹⁸⁵ Section 12A(1) and (2) of the South African Competition Act.

¹⁸⁶ Countervailing power, in the context of competition, is described as “the power of customers to negotiate trading terms suppliers”. Customers usually have countervailing power if they themselves are large and they have alternatives available to them. See Neuhoff at 255; *Daun et Cie AG/Kolosus Holdings Ltd* Case 10/LM/Mar03 at 114 to 115; *Bucket Full (Pty) Ltd v Cartons And Labels Business of Nampak Products Ltd* (018457) [2014] ZACT 52 (6 August 2014) at 15 to 16.

¹⁸⁷ Section 12A(2) of the South African Competition Act. It is worth noting that the factors listed in subparagraphs (i) to (k) have recently been inserted by section 9 of the Competition Amendment Act, 2018 (Act No 18 of 2018) which came into effect, in part, on 12 July 2019 in terms of Proclamation 46 of 2019 published in the Government Gazette dated 12 July 2019.

¹⁸⁸ Nzero at 608; See also *Schuman Sasol and Price’s Dealite (Pty) Ltd* 10/CAC/Aug01 at 22.

¹⁸⁹ *Ibid.*

4.2 Technological, efficiency or other Pro-Competitive gains

If the assessment in 4.1 above results in a conclusion that the merger is likely to substantially prevent or lessen competition, the Competition Authorities must then evaluate whether there are any technological, efficiency or other pro-competitive gains that will trump the initial conclusion reached in the initial enquiry.¹⁹⁰ Parties claiming efficiency gains need to demonstrate that the said gains are likely, timely and sufficient to offset a substantial prevention or lessening of competition.¹⁹¹ The merging parties bear the burden of demonstrating that efficiency claims are quantifiable, verifiable by reasonable means and are a direct consequence of the merger under consideration.¹⁹² These can be in a form of cost savings associated with integrating new activities within the merged firm or transferring knowledge between merging parties, savings in fixed cost, improvements in product quality etc.¹⁹³

As mentioned above, irrespective of the conclusion reached in the first and second enquiry of a merger analysis, the Competition Authorities must determine whether the merger can or cannot be justified on substantial public interest grounds. In practical terms, this means that if Competition Authorities reach a conclusion, during the first stage of merger assessment, that a merger is likely to result in a substantial lessening or preventing of competition in the relevant market, the merger may still be approved if it is found to have a positive effect on public interest grounds. Equally, if the conclusion on the competition test indicates that the merger is likely not to result in the substantial lessening or preventing of competition in the relevant market, it may still be prohibited if it will have a negative effect on public interest grounds. In what follows, we will consider the application of public interest considerations in the assessment of mergers in South Africa.

5 PUBLIC INTEREST CONSIDERATIONS IN SOUTH AFRICA

5.1 Overview

The third stage of a merger analysis entails an evaluation of whether a merger can or cannot be justified on public interest grounds.¹⁹⁴ This implies that a perfectly pro-

¹⁹⁰ Section 12A(1)(a) of the South African Competition Act.

¹⁹¹ *Pioneer Hi-bred International Inc and Another v Competition Commission and Another* (113/CAC/NOV11) [2012] ZACAC 3 (28 May 2012) at 36.

¹⁹² *Ibid.*

¹⁹³ Neuhoff at 270 to 271.

¹⁹⁴ Section 12A(1)(a)(ii) and 12A(1)(b) of the South African Competition Act

competitive merger may be prohibited on public interest grounds and an otherwise anti-competitive merge may be approved on public interest considerations.¹⁹⁵ It is however worth noting that, to date, no merger has been prohibited in South Africa by the Competition Authorities solely on public interest grounds. Although many pro-competitive mergers have been found to raise negative public interest effects, the Competition Authorities nonetheless found in these cases that any negative public interest effect could be remedied by imposing certain conditions in order to ameliorate the negative effect of the merger on public interest aspects and, as a result, approved those mergers subject to certain conditions.¹⁹⁶ Sutherland and Kemp also observed that it unlikely that Competition Authorities would prohibit a merger that is not anti-competitive, or approve a merger that is anti-competitive, on public interest grounds.¹⁹⁷

The CAC has held that Competition Authorities must carry out the public interest analysis irrespective of the outcome of the enquiries in stage one or two of the merger determination.¹⁹⁸ As alluded to in paragraph 1 above, in terms of this enquiry, the Commission or the Tribunal must consider the effect that the merger will have on:

- (a) a particular industrial sector or region;¹⁹⁹
- (b) employment;²⁰⁰
- (c) the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market ability;²⁰¹

¹⁹⁵ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (19 March 2003) at para 214; *Industrial Development Corporation of South Africa Ltd and Anglo-American Holdings Ltd* (45/LM/Jun02) [2002] ZACT 74 (24 December 2002) at para 22; *Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation* (intervening) (46/LM/Jun02) [2003] ZACT 45 (4 September 2003); *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13 (22 February 2002) pars 37; *Metropolitan Holdings Ltd and Momentum Group Ltd* [2010] 2 CPLR 337 (CT) par 66; *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012) 2 par 11.

¹⁹⁶ Please see infra at 5.5 for a detailed discussion on public interest remedies.

¹⁹⁷ Sutherland and Kemp at 10-123.

¹⁹⁸ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 14.

¹⁹⁹ Section 12A(3)(a) of the South African Competition Act.

²⁰⁰ Section 12A(3)(b) of the South African Competition Act.

²⁰¹ Section 12A(3)(c) of the South African Competition Act.

- (d) the ability of national industries to compete in international markets;²⁰² and
- (e) the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.

The aforementioned public interest grounds are a mixture of social (employment), economic (small business competitiveness), political (empowerment of previously disadvantaged persons) and industrial policy (enhancing of industries' competitiveness) and are an extension of government's broader policy objectives.²⁰³

5.2 Assessment of public interest grounds in South African mergers

5.2.1 What test is applied in the public interest inquiry?

In *The Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*²⁰⁴, the CAC noted that the South African Competition Act does not provide guidance on what weight is to be placed on the public interest grounds set out in section 12A(3) nor does it allude to the relationship between the traditional competition questions contained in section 12A and the specific public interest grounds.²⁰⁵ The CAC, however, recognized the fact that section 12A required that the public interest grounds must be substantial, meant that the weight afforded to these grounds must be considerable if a Competition Authority is to refuse the merger.²⁰⁶ In this regard, the CAC found that the evidence presented to the Competition Authorities become crucial as to the proper judicial engagement with the range of enquires envisaged in section 12A.²⁰⁷

²⁰² S 12A(3) of the South African Competition Act.

²⁰³ Nzero at 610. See also Lewis "South African Competition Law: Origins, content and impact" in Dhall (ed) *Competition Law today: Concepts, issues and the law in practice* (2007) 340 at 350; OECD "Competition law and policy in South Africa" OECD Global Forum on Competition Peer Review (Paris 11 February 2003) 7.

²⁰⁴ (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

²⁰⁵ Ibid at 113.

²⁰⁶ Ibid.

²⁰⁷ Ibid at 115.

In *Harmony Gold Mining Company Limited and Goldfields Limited*,²⁰⁸ the Tribunal explained its approach to these public interest factors as follows:

“[t]his prioritisation of the competition inquiry explains the use of the word justification in the public interest test. The public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence, section 12 A makes use of the term “justified” in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion.”

5.2.2 *Burden of proof*

It is important to note that once a substantial and a negative effect on one of the public interest factors has been established, then the evidential burden shifts to the merging parties to prove that those negative effect are outweighed by other positive public interest factors.²⁰⁹ The Tribunal has held that this is not an unfair burden, given the fact that it is only the merging parties that can answer this question.²¹⁰

5.2.3 *Balancing various public interest factors*

In *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd*,²¹¹ the Tribunal was confronted with a situation wherein the merging and opposing parties relied on different public interest grounds in support and against the merger respectively. On the one hand, the merging parties relied on sub-paragraphs (a) – the effect of the merger on industrial sector or region and (d) – the ability of national industries to compete in international markets - to justify the merger,²¹² whereas on

²⁰⁸ CT case 93/LM/Nov 04 at para 56. The CAC cited this approach with approval in *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*, at 14.

²⁰⁹ *Metropolitan Holdings Ltd and Momentum Group Ltd* at 68.

²¹⁰ *Ibid* at 69.

²¹¹ 08/LM/Feb02 19/03/2003.

²¹² *Ibid* at 212.

the other hand, the unions raised employment as a ground in support of prohibiting the merger.²¹³ Thus, the Tribunal was pulled in opposite directions in respect of the public interest enquiry.²¹⁴ Interestingly, the Tribunal observed that the South African Competition Act expressly catered for this contradiction.²¹⁵ The Tribunal noted that, just as the legislation may allow public interest grounds to resurrect a merger that will inflict harm on competition, it also contemplates a situation where a public interest ground may justify the prohibition of a merger even if a merger does not have an anti-competitive effect.²¹⁶

The Tribunal then proceeded to outline an approach in addressing the aforementioned contradiction.²¹⁷ In the first place, the Tribunal explained that each public interest ground asserted should be viewed in isolation to determine if it is substantial. If so, and if more than one ground exists which contradicts the other(s) then it has to be determined, first, if they can be reconciled. and, if not, then the Competition Authorities must balance them and come to a net conclusion. Observing that subsection 12A(1)(b) states that “..otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)” the Tribunal found that this language is consistent with both a “balancing approach and a reconciliation approach”.²¹⁸

The Tribunal noted that in most cases, the balancing will be unnecessary. This is because a contradiction can be of two-fold in nature, “[o]ne is when the opposite interests collide head on, like two medieval knights in a jousting contest where only one can emerge as the victor and continue his course. This is where we are faced with a stark choice of whether to prohibit or to approve. The other situation is where the opposite interests avoid one another like two vehicles bypassing each other in opposite directions on a dual lane road. They pass one another without affecting their respective opposite courses. In this case, unless we find that the employment grounds justify prohibition, the unions’ public interest and those of the parties do not collide -

²¹³ Ibid at 213.

²¹⁴ Ibid.

²¹⁵ Ibid at 214.

²¹⁶ Ibid.

²¹⁷ Ibid at 217.

²¹⁸ Ibid at 219

hence we have no jousting contest and the opposing interests can travel past one another on the road in their separate lanes.”²¹⁹

In what follows we analyse employment as one of the five public interest considerations which must be assessed by the Competition Authorities when determining whether a merger can or cannot be justified on public interest grounds. The analysis of employment is done with reference to some of the seminal cases that have been brought before Competition Authorities in respect of employment. Thereafter, we consider and discuss the Guidelines published by the Competition Commission on 02 June 2016²²⁰ on public interest considerations in the context of merger review and analyse how the Commission sought to bring about certainty in the interpretation of the public interest provisions in the context of merger reviews in South Africa. The discussion on the Public Interest Guidelines will also be done with a specific focus on employment.

5.3 Employment

Employment, as a public interest consideration, features more prominently in merger cases before the Competition Authorities than the other public interest factors.²²¹ This is largely attributed to the high unemployment rate in South Africa and the overall state of the South African Economy.²²² As indicated above,²²³ the Competition Commission and the Tribunal are required to assess the likely effect of the merger on *inter alia* employment. Notably, beyond requiring that public interest grounds be “*substantial*” before they qualify for assessment, the South African Competition Act does not provide any criteria as a yardstick for the assessment of these public interest grounds, including employment.²²⁴ This broad articulation of the public interest merger provisions often left the Competition Authorities in South Africa to grapple with finding the correct legal formulation applicable to the assessment of public interest aspects,

²¹⁹ Ibid at 221 to 222.

²²⁰ Competition Commission “Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998” Government Gazette No. 40039 dated 02 June 2016 (the Public Interest Guidelines).

²²¹ Yongama Njisane 'The rise of Public Interest: Recent high profile mergers' (2011) at 2 to 3.

²²² Public Interest Guidelines at 3.

²²³ Supra at 5.1.

²²⁴ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* at 236.

including employment, which often resulted in the inconsistent interpretation and application of the public interest considerations and protracted merger proceedings.²²⁵

We now hereunder examine how the Competition Authorities have grappled with the assessment of employment as a public interest consideration in merger cases brought before them.

5.3.1 *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd*²²⁶

As mentioned above,²²⁷ one of the public interest considerations raised as a ground to prohibit the merger between Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd was employment. The unions opposing the merger contended that the job losses occasioned by the merger were so great that they would have an adverse effect on employment, which justified the prohibition of the merger.²²⁸

On the other hand, the merging parties argued that the effect on actual employment was minimal. They submitted that out of the total 5828 jobs at both firms, a total of 1882 jobs were lost and out of this number, only 1414 were actual terminations, with the rest being vacant posts.²²⁹ Out of the 1414 actual terminations, 630 were voluntary retirements and 621 were voluntary retrenchments. The remaining 164 were said to be forced retrenchments.²³⁰ The merging parties contended that the effect on employment should only take into account the 164 forced retrenchments and that this number does not, in the context of the overall merger, constitute a substantial public interest ground justifying the prohibition of the merger.²³¹

The unions, however, disagreed with the above argument and contended that those employees who took voluntary packages should still be taken into account on the basis that the said employees accepted the voluntary packages because they believed that they did not have any choice.²³² The unions therefore argued that the merger should

²²⁵ See as an example the divergent interpretation of Section 12A(30) by the Competition Authorities in *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc.*

²²⁶ 08/LM/Feb02 19/03/2003.

²²⁷ Supra at 5.2.3.

²²⁸ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* at 213.

²²⁹ Ibid at 227.

²³⁰ Ibid at 226 to 227.

²³¹ Ibid at 230.

²³² Ibid at 231.

be prohibited on this basis or alternatively, the retrenched employees should be given a more generous package.

With regard to the alternative prayer mentioned above, the Tribunal found that imposing such a condition did not fall within its mandate as, relying on its earlier decision in *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*,²³³ considered its jurisdiction in the area of employment as secondary in nature and found that another appropriate body had made a determination on the fairness of the retrenchment packages.²³⁴ Regarding the prohibition of the merger, the Tribunal observed that it is a requirement in terms of the South African Competition Act that a public interest ground must be substantial before qualifying for assessment.²³⁵ Relying on this provision, the Tribunal held that the test is not the number of jobs lost but the substantial effect on employment. The Tribunal then found that job retrenchment packages can ameliorate the negative effect on employment and not simply job retention.²³⁶ On this basis the Tribunal found that the reasonableness of the retrenchments packages had already been determined by another appropriate specialised body in favour of the merging parties and accordingly found no reason to impose any further positions in respect of employment.²³⁷

5.3.2 *Harmony Gold Mining Company Limited and Gold Fields Limited*²³⁸

In this case, the Tribunal considered *inter alia* a question on whether the parties supporting the merger are required in terms of section 12A of the South African Competition Act to demonstrate affirmatively that the merger is in the public interest.²³⁹ The above merger concerned a hostile take-over by Harmony Gold Mining Company Limited of Gold Fields Limited. The target firm, Gold Fields, sought to have the merger prohibited on both the competition and public interest grounds.²⁴⁰ Gold Fields had argued that, even if a merger raises no competition concerns and no negative public interest issues, it must still be prohibited if there is no evidence that the merger will

²³³ (66/LM/Oct01) [2002] ZACT 13 (22 February 2002).

²³⁴ *Ibid* at 232 to 234.

²³⁵ *Ibid* at 236.

²³⁶ *Ibid* at 242.

²³⁷ *Ibid* at 243.

²³⁸ (93/LM/Nov04) [2005] ZACT 29 (18 May 2005)

²³⁹ *Ibid* at 34.

²⁴⁰ *Ibid* at 16 and 31.

have a positive effect on public interest factors.²⁴¹ According to Gold Fields, the wording in Section 12A(a)(ii) and (b) which requires the Commission or the Tribunal to determine “*whether the merger can or cannot be justified on substantial public interest grounds*” (own underlining) means that, not only does one has to determine whether the merger ‘cannot’ be justified on public interest grounds, but must also prove the existence of a positive impact on the public interest.²⁴² Therefore, according to Gold Fields’ interpretation, the absence of a negative public interest does not end the Tribunal’s task. It must then make a “can” finding, which translated, means a finding that the merger benefits the public interest.²⁴³

The Tribunal however rejected the aforesaid interpretation, remarking that “[n]either logic, the manner in which section 12A is constructed or sensible public policy, support this interpretation”²⁴⁴. The Tribunal instead found that, on proper construction of section 12A, a merger that does not raise any competition concerns and negative public interest concerns should be permitted.²⁴⁵

Notably, one of the public interest factors implicated in the merger was employment. In this regard, the Competition Commission had, in its recommendation, concluded that the “*proposed transaction raises serious concerns with respect to job losses.*”²⁴⁶ Although Harmony’s evidence was that the merger was unlikely to have an adverse effect on employment, it was nonetheless willing to give an undertaking that the job losses be limited to 1500 of the so-called ‘supervisory positions’.²⁴⁷ The Commission was of the view that, if the undertaking was made a condition of the approval of the merger, this would obviate the public interest concerns.²⁴⁸ The Tribunal accepted this recommendation however, it imposed a cap on retrenchment on 1000 instead of the 1500 that was recommended by the Commission, further that the job loss should be restricted to managerial and supervisory positions. The Tribunal further sought to

²⁴¹ Ibid at 33.

²⁴² Ibid.

²⁴³ Ibid at 48.

²⁴⁴ Ibid at 49.

²⁴⁵ Ibid at 60.

²⁴⁶ Ibid at 76.

²⁴⁷ Ibid at 77.

²⁴⁸ Ibid.

protect contract employees by declaring that they be treated as employees of the merged entity for the purposes of its order.²⁴⁹

5.3.3 *Metropolitan Holdings Ltd and Momentum Group Ltd*²⁵⁰

The proposed transaction between Metropolitan Holdings Ltd and Momentum Group Ltd gave rise to one public interest concern only, namely, the effect of the merger on employment.²⁵¹ The merging parties declared a possible loss of about 1000 jobs.²⁵² The merging parties did not consider this figure to be substantial but nonetheless agreed with the Commission to certain conditions which were intended to ameliorate the effect of the retrenchments.²⁵³ The unions opposing the merger contended that the merger should be prohibited on the basis that the merging parties were unable to justify the retrenchments.²⁵⁴

The Tribunal held that, if on the facts of a particular case, employment loss is of a considerable magnitude and the prospects of re-employment for a substantial portion of the affected class are limited, then this would be presumed to have a substantial adverse effect on the public interest and an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made.²⁵⁵ The Tribunal considered this not an unfair burden given that the merging parties are the only ones who can answer this question.²⁵⁶

In order to discharge this evidential burden once a *prima facie* case has been established, the Tribunal held that the merging parties must prove, firstly, that a rational process has been followed to arrive at the determination of the number of jobs to be lost and, secondly, that the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss.²⁵⁷ In this regard, the Tribunal noted that the structure of section 12A implies that pure private efficiency gains are only taken into account as countervailing a loss to

²⁴⁹ Ibid at 76.

²⁵⁰ [2010] 2 CPLR 337 (CT)

²⁵¹ *Metropolitan Holdings Ltd and Momentum Group Ltd* at 61.

²⁵² Ibid.

²⁵³ Ibid at 62.

²⁵⁴ Ibid at 63.

²⁵⁵ Ibid at 69.

²⁵⁶ Ibid.

²⁵⁷ Ibid at 70.

competition but not to public interest grounds.²⁵⁸ This was based on the fact that the South Africa Competition Act requires that a merger which has been justified on efficiency grounds should still be evaluated on the public interest grounds.²⁵⁹

The Tribunal found that other possible public interest justifications, which need not be limited to those specifically mentioned in section 12A(3), may for an example be that the merger is required to save a failing firm;²⁶⁰ to remain competitive by lowering costs to be equally as efficient as the merging parties' rivals and only the merger can bring about these savings through the contemplated employment reduction; will lead to lower prices for consumers because of the merged firm's lower cost base and that this lower cost base can only be achieved by the contemplated employment reduction.²⁶¹

After assessing evidence submitted by the merging parties, the Tribunal found that the merging parties failed to discharge the evidential burden of showing a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary.²⁶² The Tribunal further found that the merging parties have not successfully raised any public interest that would justify the job loss.²⁶³ Consequently, the Tribunal held that the merger led to an adverse effect on the public interest on employment²⁶⁴ and which could not be justified on substantial public interest grounds.²⁶⁵ Nonetheless, the Tribunal held that the adverse effect on employment could be remedied by appropriate conditions and therefore found no reason to prohibit the merger.²⁶⁶

5.3.4 *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*²⁶⁷

The above transaction involved a proposed merger between the largest retailer in the world, Wal-Mart Stores Inc (Wal-mart) and Massmart Holdings Limited (Massmart, a

²⁵⁸ Ibid 72.

²⁵⁹ Ibid.

²⁶⁰ See supra fn 89 regarding the description of the concept of "the failing firm"

²⁶¹ Ibid at 77.

²⁶² Ibid at 92.

²⁶³ Ibid at 100

²⁶⁴ Ibid at 101

²⁶⁵ Ibid at 118

²⁶⁶ Ibid.

²⁶⁷ (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

local wholesaler and retailer of grocery products, liquor and general merchandise. It was common cause during the proceedings before the Tribunal, and subsequently before the CAC on appeal, that the merger did not raise any competition concerns on the basis that Wal-mart did not compete with Massmart in South Africa.²⁶⁸ Therefore, the Tribunal had accordingly found that the transaction did not prevent or lessen competition in any market in which Massmart operated.²⁶⁹ Three groups comprising of certain trade unions, Government Ministries as well the South African Small Medium and Micro Enterprises Forum intervened in the proceedings and sought to have the merger prohibited on certain public interest grounds.²⁷⁰

The primary argument raised by the intervening parties pertained to the effect the merger would have on imports into South Africa, and the concern that the merger would result in a shift of domestic procurement from local producers towards foreign low-cost producers located in Asia.²⁷¹ Consequently, it was argued that this shifting of sourcing would lead to job losses, the closure of small and medium sized South African businesses, and the stifling of domestic industries overall.²⁷² Having analysed the evidence presented by parties, the Tribunal ruled that the possible job losses had to be weight up against the interest of consumers in lower prices and job creation at Massmart.²⁷³ Therefore, the Tribunal found that, since the beneficiaries of these low prices were mostly low income consumers who did not have means of support of their own, the public interest in lower prices was equally compelling.²⁷⁴ On appeal by the intervening parties to the CAC on this aspect, CAC held that “*[T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized businesses in particular.*”²⁷⁵

²⁶⁸ Ibid at 10.

²⁶⁹ Ibid.

²⁷⁰ Ibid at 3.

²⁷¹ Ibid at 22.

²⁷² Ibid.

²⁷³ Ibid at 23.

²⁷⁴ Ibid at 23.

²⁷⁵ Ibid at 158.

Although the CAC recognised that the Wal-mart's coordinated global purchasing operation would lead to imports of consumer goods and ultimately harm local producers, which harm would exceed the benefits of cheaper products for local consumers, the CAC nonetheless held that this did not justify the prohibition of the merger and accordingly approved the merger subject to certain conditions including the placing a moratorium on retrenchment for a period of 2 years.²⁷⁶

The other significant issue raised in this matter was the dismissal of 503 employees that had been dismissed by Massmart prior to the merger.²⁷⁷ The unions contended that these employees had been retrenched in anticipation to the merger.²⁷⁸ Consequently, the unions sought a reinstatement of all the affected employees, alternatively, that these employees be given first preference when employment opportunities arose within Massmart²⁷⁹. The Tribunal had however found that, on the basis of the evidence presented, these retrenchments took place before the transaction was concluded and could therefore not be linked the merger.²⁸⁰ The CAC however disagreed with the Tribunal's finding on this aspect and ruled that the fact that retrenchments took place prior to the merger does not automatically imply that they are not merger specific.²⁸¹ The CAC pointed out that a retrenchment that occurs shortly before the merger is consummated may be closely linked to the merger to warrant a demand that the merging parties must justify their merger decision.²⁸² Accordingly, the CAC found that the retrenchment of 503 employees was, on evidence presented, merger-specific and ordered the reinstatement of these employees.²⁸³

5.3.5 *Tegeta Exploration and Resources (Pty) Ltd v Optimum Coal Mine (Pty) Ltd (in business rescue) and Others*²⁸⁴

The above merger involved the acquisition of various firms controlled directly by Optimum Coal Holdings (Pty) Ltd ("the target group") by Tegeta Exploration and Resources (Ply) Ltd ("Tegeta"). The Tribunal had found that the merger did not raise

²⁷⁶ Ibid at 164 and 2.1 of the order.

²⁷⁷ Ibid at 18

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ Ibid at 19.

²⁸¹ Ibid at 140.

²⁸² Ibid.

²⁸³ Ibid at 2.1.2 of the order.

²⁸⁴ (LM212Jan16) [2016] ZACT 30 (12 April 2016).

any competition concerns²⁸⁵ and therefore proceeded to evaluate the effect of the merger on public interest, specifically employment. The Target Group employed about 3 055 people, 1920 of which were contractors.²⁸⁶ It was also common cause that two of the target firms were in financial distress because of the uncertainty of the contracts they had with Eskom.²⁸⁷ Although the Commission and merging parties had initially agreed on a condition to place a moratorium on merger specific retrenchments, it however transpired during the hearing that the Commission and the merging parties differed in their interpretation of the condition, particularly on what the term “merger-specific” entailed.²⁸⁸ For the merging parties “merger-specific” meant only merger-created redundancies.²⁸⁹ On the other hand, the Commission’s interpretation of the term also covered retrenchments arising due to a change in business policy at the mine.²⁹⁰

Consequently, the Commission and one of the unions, UASA, advocated for a blanket ban for a three year on all retrenchments. The justification for this was that the merging parties had not conducted a rational process to identify the necessity for retrenchments and therefore, all post-merger requirements should be considered to be merger-specific.²⁹¹ The merging parties argued that it was difficult for them determine whether retrenchments would be necessary due to the uncertainty on whether certain contracts with Eskom would be renewed. The argument was therefore that if retrenchments became necessary, they would be operational, rather than merger specific as this would depend on the viability of the mines in terms of the Eskom contracts and not the merger.²⁹²

The Tribunal agreed with the merging parties’ interpretation on the abovementioned aspect and ruled that the public interest concerns under the South African Competition Act are limited to merger specific concerns and hence the distinction with those that

²⁸⁵ Ibid at 13.

²⁸⁶ Ibid at 16.

²⁸⁷ Ibid.

²⁸⁸ Ibid at 17 and 18.

²⁸⁹ Ibid at 18.

²⁹⁰ Ibid.

²⁹¹ Ibid at 20.

²⁹² Ibid at 21.

are independent of the merger for which the term “operational” is the preserve of labour law.²⁹³

Accordingly, the Tribunal approved the merger subject to the condition placing a moratorium on merger-specific retrenchments for a period of one year.²⁹⁴

5.3.6 Conclusion

The abovementioned cases have contributed to the development of a wealth of jurisprudence on the assessment of public interest considerations, specifically employment, in the context of merger regulation in South Africa. This wealth of jurisprudence has, to a significant degree, brought about legal certainty in the area of merger regulation in terms of the South African Competition Act. The above cases further demonstrate that, although the Competition Authorities recognise the importance of the role of public interest considerations in merger regulation, they will however not readily prohibit a merger transaction solely on the basis of a negative finding on the effect on public interest and instead opt to impose conditions that would ameliorate the negative effects on public interest factors.

5.4 Guidelines on the Assessment of Public Interest Provisions

On 02 June 2016 the Commission issued Guidelines²⁹⁵ on the assessment of public interest provisions which aim to shed light into the approach that the Commission is likely to follow when evaluating public interest factors in mergers and the nature of information that the Commission may require from the parties.²⁹⁶ The Public interest Guidelines were prompted by certain key cases that were brought before the Competition Authorities which sparked a debate on the assessment standard for public interest issues.²⁹⁷ The Public Interest Guidelines recognise that, whilst the CAC and the Tribunal have given valuable guidance in certain areas of public interest considerations, there is still a large area in respect of the law which remains

²⁹³ Ibid at 22.

²⁹⁴ Ibid at 24.

²⁹⁵ Competition Commission “Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998” Government Gazette No. 40039 dated 02 June 2016 (the Public Interest Guidelines). Section 79(1) of the South African Competition Act empowers the Commission to issue guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the South African Competition Act.

²⁹⁶ Public Interest Guidelines at 1.2.

²⁹⁷ Ibid at 3.4.

undeveloped.²⁹⁸ From its evaluation of previous mergers, the Commission has observed that parties to merger proceedings often provide insufficient information relating to public interest considerations which causes the Commission not to be able to take an informed decision in mergers.²⁹⁹

It is however worth noting that the Public Interest Guidelines are not binding.³⁰⁰ However, in terms of the recent amendment to the South African Competition Act which came into effect on 12 July 2019,³⁰¹ any person must, when interpreting or applying the South African Competition Act, take the Public Interest Guidelines into account.³⁰² In terms of the Public Interest Guidelines, two approaches are adopted in the assessment of public interest considerations. Firstly, a general approach is applied to each of the public interest grounds. The second approach concerns an assessment of each of the of the public interest considerations.³⁰³ We will first discuss the general approach to the analysis of the public interest considerations as envisaged in terms of the Public Interest Guidelines.

5.4.1 General Approach to Public Interest Considerations

In terms of the general approach, the Commission first determines the likely effect of the merger on the public interest grounds and whether such effect, if any, is merger specific.³⁰⁴ In terms of the Public Interest Guidelines, a merger-specific public interest effect is essentially one that is caused by, or results from, the merger. If the Commission establishes an effect on public interest, then the Commission will determine whether such an effect is substantial. If the effect is found to be substantial, the Commission will then, in respect of a negative competition finding (anti-competitive merger), consider any likely positive effects to justify the approval of the merger. In a case involving a positive competition finding, the Commission will determine whether the negative effect on public interest can be justified which may result in the approval of the merger, with or without conditions. In the final step, the Commission will consider possible remedies to address any substantial negative public interest effect.³⁰⁵

²⁹⁸ Public Interest Guidelines at 3.4.

²⁹⁹ Ibid at 3.5.

³⁰⁰ Section 79(4) of the South African Competition Act.

³⁰¹ Section 40(4) of the Competition Amendment Act, 2018 (Act No. 18 of 2018).

³⁰² Section 79(4) of the South African Competition Act.

³⁰³ Public Interest Guidelines at 6.

³⁰⁴ Public Interest Guidelines at 7.

³⁰⁵ Ibid.

In what follows below, we focus on employment as a public interest consideration in the assessment of mergers in order to indicate the Commission's approach thereto with reference to the Public Interest Guidelines.

5.4.2 Employment

5.4.2.1 Step 1

As mentioned above,³⁰⁶ employment features more prominently in merger cases than all the other public interest considerations.³⁰⁷ In this section, we discuss the Commission's approach to employment as set out in the Public Interest Guidelines. It is worth noting that the Commission will, as a matter of course, follow the general approach articulated above in the review of employment as a public interest consideration in merger review.³⁰⁸ The first step in terms of the Public Interest Guidelines, concerns a determination of the likely effect of the merger on employment.³⁰⁹ In this regard, the Commission requires the merging parties to declare all potential retrenchments that are being considered irrespective of whether they deem these to arise from the merger or due operational reasons.³¹⁰ Here, the Commission will primarily focus on the direct effect on employment within the firms of the merging parties. In determining this effect, the Commission will consider, *inter alia*, the overall nature of the transaction, including the extent to which the merging parties' activities overlap and any duplication created, the rationale of the transaction and the parties' intention regarding employment and the target business as well any plans to create further opportunities within the merged entity.³¹¹

As a secondary consideration, the Commission will consider the indirect effect of the merger on the general level of employment in a particular industrial sector or region. In assessing this effect, the Commission will consider the likely impact of the merger on the level of employment post-merger which may arise as a result of, the creation or loss of job opportunities, duplications, cost-cutting measures, cancellation of supply/distribution arrangements, and/or relocation of offices, plants and facilities.³¹²

³⁰⁶ Supra at 5.3.

³⁰⁷ Yongama Njisane 'The rise of Public Interest: Recent high profile mergers' (2011) at 2 to 3.

³⁰⁸ Public interest Guidelines at 13.

³⁰⁹ Public interest Guidelines at 5.1.1.

³¹⁰ Public interest Guidelines at 8.1.1.

³¹¹ Ibid.

³¹² Ibid.

5.4.2.2 Step 2: Is it merger specific?

If the effect on employment is established, the Commission will thereafter determine if such effect is merger specific.³¹³ In general, the Commission will accept those retrenchments or employment opportunities declared by the merging parties to arise from the merger, as being merger specific. In a case where the merging parties claim that retrenchment are not merger related, the Commission will assess this claim in order to verify the accuracy thereof.³¹⁴ The merging parties are also required to inform the Commission of any retrenchments proposed or initiated in terms of the Labour Relations Act³¹⁵. In general, when assessing whether retrenchments or employment creation is merger specific, the Commission will consider whether the proposed employment effects are connected to the intentions, incentives, policies, rationale and decisions of the acquiring firm.³¹⁶ The Commission will also consider the counterfactual³¹⁷ and whether the retrenchments or employment creation would have occurred anyway absent the merger.³¹⁸

5.4.2.3 Step 3: Determining whether the likely effect on employment is substantial. The Commission will, when conducting the substantiality assessment, take into account *inter alia* the number of employees affected; the affected employees' skills levels; the likelihood of the employees obtaining alternative employment in the short term; the nature and the unemployment rate in the sector, including whether the sector employs largely unskilled employees; whether the sector is an emerging sector which would suggest future employment opportunities; and the predominant nature of employment by the acquiring firm for example, whether the parties employ seasonal or permanent employees.³¹⁹

The Commission may exclude management employees from the affected number of employees should it be of the view that these employees have alternative employment

³¹³ Ibid at 8.1.2.

³¹⁴ Ibid.

³¹⁵ Act No. 66 of 1995; Ibid.

³¹⁶ SA Guidelines at 8.1.2.

³¹⁷ In merger cases, the competition authorities often have to compare the position if the merger were to proceed with the position pre-merger. Sutherland and Kemp describe the former as the factual and the latter "the counterfactual", both of which have to be considered prospectively. See Sutherland and Kemp at 10-4.

³¹⁸ Ibid.

³¹⁹ Ibid.

prospects in the short term.³²⁰ It is noteworthy that in *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*, the CAC considered the issue of substantiality within the context of employment and the effect of local procurement.³²¹ Noting that the South African Competition Act does not provide guidance on what weight is to be placed on public interest grounds nor to the relationship between the traditional competition questions contained in section 12A and the specific public interest grounds,³²² the CAC nonetheless recognized that the fact that the public interest grounds have to be substantial meant that the weight afforded to these grounds must be considerable if a Competition Authority is to refuse the merger.³²³ In this regard, the CAC held that evidence presented to the Competition Authorities become crucial as to the proper judicial engagement with the range of enquires envisaged in section 12A.³²⁴ Consequently, the CAC found that the evidence presented could not justify the conclusion that the public interest considerations raised by the intervening parties would so trump the benefits, which would flow to consumers to sustain a decision that the merger should be prohibited.³²⁵

5.4.2.4 Step 4: Considering possible arguments in justification of the approval of the merger

The Public Interest Guidelines provide further that the Commission will afford the merging parties with an opportunity to substantiate any positive effects or to submit arguments to justify any substantial negative effects arising from the merger on employment.³²⁶ In this regard, the Commission will consider whether the merging parties followed a rational process in arriving at the determination of the number of jobs to be shed and whether the job losses are justified by an equally weighty and countervailing public interest. The Commission will also consider whether the merging

³²⁰ Ibid.

³²¹ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 118 to 121.

³²² Ibid at 113.

³²³ Ibid.

³²⁴ Ibid at 115.

³²⁵ Ibid at 120.

³²⁶ Public Interest Guidelines at 8.1.4.

parties have given the Commission and the employees full and complete information to enable them to consult fully on all issues.³²⁷

The parties will, in terms of the Public Interest Guidelines, have to comply with all the above mentioned requirements in order for the Commission to accept their submissions as justifying the negative effect arising from the merger.³²⁸ Where the merging parties submit a public interest justification for the job losses, the Commission may accept, as a public interest justification for the job losses, that the merger is required to save a failing firm; that the merger is required because the firms will not be competitive unless they can lower their costs to be as efficient as their competitors and these can only be attained by employment reduction through the merger; or that the merger will lead to lower prices for consumers because of the merged entity's lower cost base and this lower cost base can only come about or is materially dependent upon the proposed employment reduction.

5.4.2.5 Step 5: Determining the appropriate remedy to address the identified effect on employment

The Public Interest Guidelines provide that the Commission will consider the appropriate remedy on a case by case basis.³²⁹ The Commission may consider the following remedies:

- (a) capping the number of job losses;
- (b) staggering the number of job losses over a period of time;
- (c) placing a moratorium on job losses for a period of time;
- (d) providing funding to reskill affected employees in order to improve their prospects of obtaining alternative employment within a short period of time;
- (e) providing counselling and guidance on applying for alternative employment;
- (f) obliging the parties to re-employ or give preference to affected employees should positions become available; and
- (g) creating jobs as proposed by the merging parties.³³⁰

³²⁷ Ibid.

³²⁸ Ibid.

³²⁹ Ibid at 8.1.5

³³⁰ Ibid at 8.1.5.

5.4.3 Conclusion

It is submitted that the Public Interest Guidelines provide useful, rational and sound information on the criteria applied by the Competition Commission when assessing public interest considerations in the context of merger regulation. The detailed nature of the Public Interest Guidelines may assist to limit delays and costs in finalising merger determinations by the Competition Authorities as parties involved in a merger transaction will have a better insight in respect of the information required by the Commission in respect of employment aspects and will therefore be better prepared and well equipped to deal with issues arising from the merger proceedings. This is important because the South Africa Competition Act which, beyond requiring that public interest grounds be “*substantial*” before they qualify for assessment, does not provide any criteria as a yardstick for the assessment of these public interest grounds, unlike with competition test, where the criteria is enumerated in section 12A(2). Therefore, The Public Interest Guidelines go a long way in promoting consistency and transparency in the application of the public interest merger provisions.

It is however worth noting that the Public Interest Guidelines are not binding and therefore do not have the force of law. This lack of legal force may render the Public Interest Guidelines less useful and susceptible to a debate as to whether the provisions contained therein truly reflect correctly on the public interest considerations as contemplated by the South African Competition Act. This concern may however be ameliorated by the fact that the Public Interest Guidelines must be taken into account by any person interpreting the South African Competition Act.³³¹

It is submitted however, that the best way to achieve a significant degree of legal certainty in the application of public interest provisions, is to give legal effect to the Public Interest Guidelines by translating them into Regulations and therefore giving them the force of law. This will render them binding upon any person interpreting the South African Competition Act, including all the Competition Authorities, and will thus enhance efficiency, cost-effectiveness, transparency and speed in the determination of mergers in South Africa.

³³¹ Section 79(4) of the South African Competition Act.

5.5 Public Interest remedies

Remedies are used by competition agencies to address and prevent the harm to the competitive process that may arise from a merger.³³² “They allow for the approval of mergers that would otherwise have been prohibited, by eliminating the risks that a given transaction may pose to competition”.³³³ As such, they serve an important role in the merger review process, and “their careful crafting is of the utmost importance to the competition agencies carrying out the review”.³³⁴

The South African Competition Authorities may, after evaluation of a merger, approve the merger, approve the merger subject to conditions or prohibit the merger.³³⁵ It is worth noting that a conclusion that a merger cannot be justified on substantial public interest grounds does to immediately imply that such merger should be prohibited.³³⁶

The Tribunal has held that the public interest conditions must be merger specific.³³⁷ In *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd*³³⁸, the Tribunal found that a condition sought to cap Edcon’s purchases of imports in order to ameliorate the effect on job loss was wholly unsuitable on the basis that, firstly, such a condition goes to the very heart of anti-trust’s concern with the welfare of consumers and would be an advantage to competitors.³³⁹ Secondly, the concern of cheaper imports was held as not merger specific since cheaper imports could not be cured by imposing a merger condition on a single firm as the issue is “a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments”.³⁴⁰

The Competition Authorities will examine whether the adverse effect on public interest can or cannot be remedied by appropriate conditions.³⁴¹ In *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*,

³³² OECD “Remedies in Merger Cases” 2011, <http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf> accessed on 14 July 2019 at 11.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Sections 13(5)(b), 14(1)(b) and 14A(1)(b) of the South African Competition Act.

³³⁶ *Metropolitan Holdings Ltd and Momentum Group Ltd* at 118.

³³⁷ *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd* Case No: 21/LM/Mar05 para 31.

³³⁸ Ibid.

³³⁹ Ibid at para 30.

³⁴⁰ Ibid at para 30.

³⁴¹ Ibid. *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 121.

the CAC criticized the Tribunal's readily acceptance of the merging parties' proposed remedy without any sustained engagement as to how the remedy would operate, whether the committed amount was excessive or too little and further, what effect the proposal would have in dealing with the concern that post-merger, there would be some substitution of local procurement for input.³⁴² The merging parties had proposed, as a remedy, a commitment to spending R100 million for the establishment of a supplier development fund for local suppliers and SMMEs.³⁴³ The CAC observed that a key issue with regard to the effect of the merger on SMMEs turns on an understanding of the development of global value chains, viewed within the broader context of economic globalization.

In summary, the CAC found that Walmart's coordinated global purchasing operation and superior infrastructure for exploiting global value chains will result in the importation of consumer goods, would harm domestic producers, which harm exceeded the benefits of cheaper products for local consumers.³⁴⁴ However the CAC held that this finding cannot, on the basis of the available evidence, justify the prohibition of the merger, however, it also does not justify a blanket approval of the merger.³⁴⁵ On the basis of the lack of evidence led on the appropriate remedy, the CAC ordered that a committee comprising of experts be formed to investigate and produce a report which would allow the court to develop an investment remedy which is both rational, justifiable in the context of the challenges which the South Africa economy is confronted with as a result of the merger and the legitimate concerns which follow from the provisions of section 12A(1) read with (3), in particular the future of small and medium sized producers.³⁴⁶

6 CONCLUSION

In this chapter, it was demonstrated that the South African competition regime provides an elaborate jurisprudence in the application of public interest considerations in competition law, specifically in merger regulation. Despite some shortcomings, the

³⁴² *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 147 to 148.

³⁴³ *Ibid.*

³⁴⁴ *Ibid* at 164.

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid.*

three-pronged merger assessment in South Africa provides a clear direction in terms which the Competition Authorities are to approach public interest considerations.

The public interest grounds assessed in the third leg of merger analysis are a mixture of social (employment), economic (small business competitiveness), political (empowerment of previously disadvantaged persons) and industrial policy (enhancing of industries' competitiveness) and are an extension of government's broader policy objectives. Furthermore, the inclusion of public interest considerations in competition law imply that a perfectly pro-competitive merger may be prohibited on public interest grounds and an anti-competitive merger may be approved on public interest considerations.³⁴⁷ However, as previously mentioned,³⁴⁸ no merger has been prohibited to date by the Competition Authorities in South Africa solely on public interest grounds and therefore, it is very unlikely that that this scenario will materialise.

Although certain key cases brought before the South African Competition Authorities have sparked a robust debate on the assessment standard for public interest considerations, they have nonetheless laid down key principles in certain areas of public interest considerations and have provided a useful yardstick in the interpretation of public interest considerations in South African Competition Law.

The Public Interest Guidelines issued by the Commission on the assessment of public interest grounds provide a comprehensive guide on the approach adopted by the Commission in assessing public interest consideration. However, as previously mentioned,³⁴⁹ the Public Interest Guidelines are not binding but the recent amendments to the South African Competition Act makes it mandatory for anyone who interprets or applies the South African Competition Act to take the Public Interest Guidelines into account. Although the Public Interest Guidelines provide a comprehensive step by step approach to public interest consideration in respect of each public interest grounds, it is submitted that the best way to achieve a significant

³⁴⁷ *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 19/03/2003 at para 214; *Industrial Development Corporation of South Africa Ltd and Anglo American Holdings* 45/LM/Jun02 and 46/LM/Jun02 of 23/10/2002 at para 22; *Anglo American Holdings Ltd and Kumba Resources Ltd* 46/LM/Jun02 at pars 137 to 139; *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* 66/LM/Oct01 pars 3738; *Metropolitan Holdings Ltd and Momentum Group Ltd* [2010] 2CPLR 337 (CT) at para 66; *Minister of Economic Development v Competition Tribunal* 110/CAC/Jul11 09/03/2012 at para 11.

³⁴⁸ *Supra* at 5.1.

³⁴⁹ *Supra* at 5.4.4.

degree of legal certainty in the application of public interest provisions, is to give legal effect to the Public Interest Guidelines by translating them into Regulations and therefore giving them the force of law. This will render them binding upon any person interpreting the South African Competition Act, including all the Competition Authorities, and will thus enhance efficiency, cost-effectiveness, transparency and speed in the determination of mergers in South Africa. It has been nonetheless demonstrated in this chapter that South Africa has a well-established merger regime, particularly in the application of public interest considerations which other jurisdictions may draw lessons from.

CHAPTER 3

PUBLIC INTEREST CONSIDERATIONS IN KENYA

1. INTRODUCTION

The Kenyan Competition Act enjoins the Competition Authority (the Authority) to consider public interest factors when making a determination in relation to a proposed merger.³⁵⁰ The Authority is required to apply both the competition and public interest tests in determining whether a merger should be approved, declined or approved with conditions.³⁵¹ Although, as pointed out in Chapter 1,³⁵² the Authority has since its inception adjudicated over a significant number of mergers,³⁵³ the reasons for its merger decisions are not published and therefore not publicly available. Furthermore, the Kenyan Competition Act does not place any legal duty upon the Authority to make publicly available the reasons for its decisions.³⁵⁴ As a result, there is a dearth of precedents or jurisprudence in Kenya in respect of the Authority's merger decisions which fundamentally limits the scope of this study. Therefore, a discussion on public interest considerations in the context of the merger regulation in this chapter will be based mainly on the competition legislation and the Public Interest Guidelines issued by the Competition Authority of Kenya.

In order to give context to the public interest considerations in Kenya, it is important to first to provide an overview of the provisions regulating mergers in Kenya.

³⁵⁰ Section 46(2) of the Kenyan Competition Act.

³⁵¹ Section 46(1) and (2) of the Kenyan Competition Act.

³⁵² Supra at 8.

³⁵³ The Competition Authority of Kenya has handled a total of 752 merger notifications in the period between 2012/2013 to 2017/2018 financial years. Out of the 752 merger notifications, 121 transactions met the required merger threshold for mandatory notification and were assessed by the Authority. See the Competition Authority of Kenya's Annual Reports & Financial Statements for the Financial Year 2012/2018 to 2017/2018 <https://www.cak.go.ke/planning/annual-reports>, accessed on 07 September 2020.

³⁵⁴ The only obligation placed upon the Authority in terms of Section 46(6)(a) of the Kenyan Competition Act is to publish its determination of the merger in the Gazette. Section 46(6)(b) requires the Authority to issue written reasons for its determination if it prohibits or conditionally approves a proposed merger or if it is requested to do so by any party to the merger, however, there is no obligation placed upon the Authority to publish these reasons.

2 THE COMPETITION REGULATORY AUTHORITIES OF KENYA

There are two competition specialist institutions established for the enforcement of the Kenyan Competition Act in Kenya, namely, the Competition Authority and the Competition Tribunal.

2.1 The Competition Authority

The Authority is established as an independent body corporate to perform its functions independently and impartially without fear or favour.³⁵⁵ The Authority consist of the ten members which are a non-executive Chairman appointed by the Minister; a Permanent Secretary in the Ministry for the time being responsible for finance or his representative; the Attorney-General or his representative; the Director-General appointed under section 12; and five other members appointed by the Minister with the necessary expertise in competition and consumer welfare matters.³⁵⁶

The Authority has a wide range of responsibilities under the Kenyan Competition Act which include promoting and enforcing compliance with the Act; investigating complaints regarding any contravention of the Kenyan Competition Act; promoting public knowledge and awareness of the provisions of the Kenyan Competition Act; and issuing guidelines on pertinent aspects of Kenyan Competition Act.³⁵⁷ The Authority is also responsible for conducting inquiries, studies and research into competition related matters; investigating impediments to competition, and advising the government on matters relating to competition and consumer welfare.³⁵⁸

The Authority has the power to investigate, adjudicate and decide upon all mergers in Kenya regardless of size whereas the Kenyan Tribunal retains the power to review the Authority's decisions on appeal.³⁵⁹

³⁵⁵ Section 7 of the Kenyan Competition Act.

³⁵⁶ Section 10 of the Kenyan Competition Act.

³⁵⁷ Section 9 of the Kenyan Competition Act.

³⁵⁸ Section 9 of the Kenyan Competition Act.

³⁵⁹ Section 44, 45 and 46 of the Kenyan Competition Act. In South Africa, the Commission adjudicates and decides over small mergers whereas the SA Tribunal determines and decides upon large mergers.

2.2 The Competition Tribunal of Kenya

The Competition Tribunal of Kenya is established in terms of the Kenyan Competition Act and consists of a chairman who is an advocate and at least two but not more than four other members appointed by Kenya's Minister of Finance.³⁶⁰ The latter is empowered in terms of the Kenyan Competition Act to make Rules prescribing the procedure for lodging appeals to the Kenyan Tribunal, the place and the time at which the Tribunal's sittings should be held and providing for ancillary matters.³⁶¹

The Kenyan Tribunal's function is mainly to hear appeals emanating from the Authority and it does not sit as an adjudication body of first instance.³⁶² In its determination of any appeal, the Kenyan Tribunal may confirm, modify or reverse the order appealed against or any part thereof.³⁶³ Furthermore, the Tribunal may refer a matter back to the Authority for reconsideration, either generally or in respect of any specified matters to which the appeal relates.³⁶⁴ Where an appeal is against a determination of a merger by the Authority, the merger may not be proceeded with until the appeal is finalised.³⁶⁵

It is worth noting that the Kenyan Competition Tribunal has made its first ever ruling only on 01 May 2020, ten years after the promulgation of the Kenyan Competition Act. The said ruling pertains to an application lodged by Telkom Kenya Ltd and Airtel Networks Kenya Ltd for a review of the Authority's conditional approval of their proposed merger.³⁶⁶ This judgment is fundamental as it touches on several key considerations for merger control in Kenya, including public interest aspects. Thankfully, the reasons for the Tribunal's decision in respect of the said merger have been published and offers a glimpse into the adjudication process undertaken by Kenya's competition authorities. The Tribunal's decision will be discussed in detail later on in this chapter.

It is important to note that the Tribunal's decision in *Telkom Kenya Ltd and Another v Competition Authority of Kenya*³⁶⁷ is the only ruling made to date in respect of a merger

³⁶⁰ Section 71(1) and (2) of the Kenyan Competition Act.

³⁶¹ Section 71(6) of the Kenyan Competition Act.

³⁶² Section 71(5) of the Kenyan Competition Act.

³⁶³ Section 74(3) of the Kenyan Competition Act.

³⁶⁴ Section 75(1) of the Kenyan Competition Act.

³⁶⁵ Section 76(2) of the Kenyan Competition Act.

³⁶⁶ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* Case No. CT/005/2020 (04 May 2020) <http://kenyalaw.org/caselaw/cases/view/194959/>, Accessed on 07 September 2020.

³⁶⁷ *Ibid.*

determination in Kenya. The reason for the Tribunal's inactivity may be attributed to the fact there hasn't been any merger prohibited by the Authority to date. Notably, all mergers considered by Authority to date have either been exempted from merger assessment or approved with or without conditions.³⁶⁸ Another factor that may contribute the Tribunal's inactivity may be the fact that the Kenyan Competition Act does not make provision for interested parties to be notified of a proposed merger to afford them an opportunity to intervene in merger proceedings in order to raise any concerns affecting them which may arise from merger. Furthermore, as mentioned, the Tribunal role in terms of the Kenyan Competition Act is only limited to reviewing the decisions of the Authority and does not make any determination of mergers at first instance, which may add to the reasons of the Tribunal's inactivity.

It is worth noting that any appeal against the decision of the Tribunal is made to the High Court and must be lodged within thirty days after the date the Tribunal's judgment.³⁶⁹ The decision of the High Court in respect of competition matters is final.³⁷⁰ Notably, the High Court is an ordinary court of law and, unlike the Authority and the Tribunal, it is not a specialist body created to adjudicate exclusively over competition matters. A study conducted by the Organisation for Economic Co-operation and Development ("the OECD") into the resolution of competition cases by specialised and generalist courts notes that the decisions of a competition authority are, as demonstrated by international experience, often subject to the review of courts.³⁷¹ As observed by the OECD, each jurisdiction follows a different path with regard the court's merger review, and the court carrying out this review may be of general or specialised jurisdiction.³⁷² Although the OECD notes that the fact that a court is a generalist does not necessarily mean that it does not retain extensive

³⁶⁸ Competition Authority of Kenya: *The Competition Authority of Kenya: Annual Report 2012/2013* at 19; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2013/2014* at 19; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report 2014/2015* at 21; Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2015/2016* at 21; Competition Authority of Kenya *Competition Authority Of Kenya: Annual Report & Financial Statements 2016/2017* at Appendix V; Competition Authority of Kenya *The Competition Authority of Kenya: Annual Report & Financial Statements for the Financial Year 2017/2018* at Appendix V.

³⁶⁹ Section 49(2) of the Kenyan Competition Act.

³⁷⁰ *Ibid.*

³⁷¹ OECD (2016) "The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences" at 43 available at <http://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf> accessed on 26 September 2020.

³⁷² *Ibid.*

knowledge and experience on the substantive issues of economics and competition law, it however acknowledges that such expertise may rest with a particular judge, its staff and/or external experts or it may be developed through reviewing a large number of the competition authority's decisions, particularly if decisions are of the same nature.³⁷³ On this basis, we recommend that, even though a review of the Tribunal decisions is made to an ordinary high court, it is imperative that that the judge(s) adjudicating over competition matters, specifically mergers, should at least possess relevant knowledge and expertise in competition matters.

It is well recognised that the benefits of the adjudication of competition matters by specialised courts are significant and include greater efficiency, enhanced uniformity and quality decisions.³⁷⁴ These benefits may come about through specialised procedures, staff and specialised judges who are well versed in the subject matter, resulting in more efficient processes.³⁷⁵ They may also arise from specialised courts dealing with exclusive jurisdiction over particular areas of the law, thereby enhancing greater predictability and confidence in the courts, due to greater expertise and experience in applying the law to the facts properly.³⁷⁶

3. MERGER REGULATION IN KENYA

3.1 Definition of a merger in Kenya

Merger provisions are found in Part 4 of the Kenyan Competition Act. For purposes of Part 4, a merger “occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking”.³⁷⁷ An “undertaking” is defined as “any business intended to be carried on for gain or reward by a person, a partnership or a trust in the production, supply or distribution of goods or provision of any service and includes a trade association.”³⁷⁸ A merger contemplated in terms of section 41(1) of the Kenyan Competition Act may be achieved in various ways including the purchase or lease of shares, acquisition of an interest in a section of the business of an undertaking; the purchase of assets of

³⁷³ Ibid.

³⁷⁴ Ibid at 57

³⁷⁵ Ibid.

³⁷⁶ Ibid.

³⁷⁷ Section 41 of the Kenyan Competition Act.

³⁷⁸ Section 2 of the Kenyan Competition Act.

the other undertaking; the acquisition of a controlling interest in a section of a business; the acquisition of an undertaking under receivership by another undertaking; the acquisition of the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya; and the vertical integration or amalgamation, take over or any other combination with the other undertaking.³⁷⁹

3.2 Notification of a merger

The Kenyan Competition Act requires each party to the merger to notify the Authority in writing regarding a proposed merger.³⁸⁰ The Authority is empowered to set a threshold for any merger to be excluded from the Act.³⁸¹ In this regard the Authority has issued Guidelines³⁸² which exempts certain transactions from the notification requirement.³⁸³ The Kenyan Competition Act prohibits the implementation of a merger without the approval of the Authority.³⁸⁴ The effect of implementing a merger without the Authority's approval is that such a merger will not have any legal effect and the agreement between the merging parties is unenforceable.³⁸⁵

Furthermore, the implementation of a merger without the Authority's approval constitutes an offence and a person guilty of such contravention is liable, upon conviction, to imprisonment or a fine.³⁸⁶ The Authority may also impose a penalty of any amount not exceeding ten percent of the undertaking(s)' previous year's gross annual turnover in Kenya.³⁸⁷ Until recently, the Kenyan Competition Act did not contain provisions that exclude any category of mergers from the obligation to notify. Thus, all

³⁷⁹ Section 41(2) of the Kenyan Competition Act.

³⁸⁰ Section 43(1) of the Kenyan Competition Act

³⁸¹ Section 42(1) of the Kenyan Competition Act.

³⁸² Competition Authority of Kenya "Consolidated Guidelines on the Substantive Assessment of mergers under the Competition Act", <https://www.cak.go.ke/sites/default/files/guidelines/Consolidated%20Merger%20Guidelines.pdf>, accessed 22 June 2019.

³⁸³ Ibid. These include any acquisition of less than 25 % of voting shares where the acquisition is less than 25 %; any acquisition of further voting securities by an undertaking which already holds more than 50% of the shares unless the acquisition is a transfer of joint control to sole control; any acquisition of assets which are acquired solely as an investment or in the ordinary course of business, not leading to control of the acquired undertaking; any transaction involving parent or holding company and its subsidiary or otherwise already vertically integrated company where the companies previously function as one undertaking operating under prior unified control; Any mergers where the combined turnover or assets of the merging parties is between one hundred million shillings and one billion shillings; Undertakings in the carbon based mineral exploration and prospecting sectors.

³⁸⁴ Section 42(2) of the Kenyan Competition Act.

³⁸⁵ Section 42(3) of the Kenya's Competition Act.

³⁸⁶ Section 42(4) of the Kenya's Competition Act.

³⁸⁷ Section 42(2)(6) of the Kenya Competition Act.

mergers were notifiable irrespective of size or scale. This factor was considered to place a huge drain on the resources of the Authority and created a considerable expense on the merging parties in the vast majority of the merger cases that do not necessary raise any competition concerns.³⁸⁸

Kenya has now published new Competition Rules which came into force on 6 December 2019.³⁸⁹ In terms of these Rules, certain categories of merger transactions are excluded from the notification requirement. These include transactions that occur wholly or entirely outside of Kenya with no local connection or where the combined annual turnover or value of assets of the merging parties in Kenya is KES 500 million or less.³⁹⁰

Notably, the Kenyan Competition Act does not make provision for interested parties to be notified of a proposed merger to afford them an opportunity to intervene in merger proceedings in order to raise any concerns affecting them, including public interest concerns, which may arise as a result of the merger. Section 46(3) of the Kenyan Competition Act however provides that the Authority may refer a proposed merger to an investigator to investigate and submit a report to the Authority with regard to the merger criteria set out subsection (2). The investigator as so appointed is only obliged to inform the parties to the merger transaction of the said referral and there is no provision to notify any other interested parties such as employees of the merging firms or any person who may have an interest in the matter.³⁹¹ Interestingly, Section 46(5) provides that any person, including a person who is not a party in the proposed merger, may voluntarily submit any document, affidavit, statement or other relevant information in respect of a proposed merger to an investigator or the Authority. What is not clear is how such a person would come to know of the proposed merger if the Kenyan Competition Act does not provide for a notification of the merger to interested parties. It is therefore recommended that a provision be made in the Kenyan Competition Act to notify interested parties of the proposed merger and to afford them an opportunity

³⁸⁸ Mudida, Robert; Ndiritu, S.Wagura & W. Ross, Thomas. 'Kenya's New Competition Policy Regime'. *World Competition* 38, no. 3 (2015), 437 at 456.

³⁸⁹ The Competition (General) Rules, 2019 available at <https://www.cak.go.ke/sites/default/files/2020-03/The%20Competition%20%28General%29%20Rules%2C%202019.pdf>, accessed on 25 September 2020.

³⁹⁰ *Ibid* at 925.

³⁹¹ Section 46(3) of the Kenyan Competition Act.

to participate in merger proceeding in order to make submissions on any aspects of the merger, including public interest considerations, which may raise concerns.

The Authority is required to consider and make a determination on the proposed merger within sixty days after receipt of the notification or receipt of the additional information requested by the Authority in terms of the Kenyan Competition Act.³⁹² It may decide to hold a hearing conference in relation to the proposed merger if it deems appropriate to do so.³⁹³

3.3 Merger Assessment in Kenya

The determination of a merger in Kenya is done in terms of section 46 of the Kenyan Competition Act. In making a determination in respect of a merger, the Authority may approve a merger, with or without conditions or it may prohibit a merger.³⁹⁴ When analysing a merger the Kenyan Competition Act provides that “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 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;

³⁹² Section 44 of the Kenyan Competition Act.

³⁹³ Section 45 of the Kenyan Competition Act.

³⁹⁴ Section 46(1) of the Kenyan Competition Act.

- (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.”³⁹⁵

What is immediately noteworthy from the above provisions is that the competition factors are listed together with the public interest grounds in the same set of criteria. The competition factors are those listed on (a) to (c) and (h), and the public interest considerations are listed on (d) to (g). It is further worth noting that the eight competition and public interest factors enumerated in section 46(2)(a) to (h) are non-exhaustive as the Kenyan Competition Act provides that the Authority may base its determination of a merger on ‘any criteria’ which the Authority considers relevant to the circumstances of each case.³⁹⁶ This means that Authority may consider other public interest factors (and competition factors) beyond those listed in section 46(2)(d) to (g) which the Authority “considers relevant to the circumstances involved in the proposed merger”. The Kenyan Competition Act does not define the term “public interest” and does not provide guidance nor set any parameters on what other factors may be considered as “public interest’ considerations for purposes of merger determination by the Authority.

It is further worth noting that the eight competition and public interest factors listed in section 46(2) are not arranged in any particular order of progression or priority and there is no indication on what weight must be accorded to each consideration by the Authority. Beyond requiring that the Authority may consider these factors when analysing a proposed merger, the Kenyan Competition Act does not provide any criteria as a yardstick for the assessment of both the competition and public interest grounds. This broad articulation of the merger provisions leaves the Authority to

³⁹⁵ Section 46(2) of the Kenyan Competition Act.

³⁹⁶ Section 46(2) of the Kenyan Competition Act.

grapple with finding the correct legal formulation applicable to the assessment of public interests aspects, including employment, which may often result in the inconsistent interpretation and application of the public interest considerations and protracted merger proceedings. It is submitted that this criteria render the application of merger assessment provisions vague and uncertain in that they confer upon the Authority unfettered power to impose ‘any criteria’ in the assessment of mergers, including public interest factors.

As pointed out in chapter 1³⁹⁷ the mere inclusion of public interest considerations in merger regulation has sparked a robust debate as to the appropriateness of these considerations in competition law. One of the major concerns raised against the inclusion of public interest considerations is lack of transparency in their application which may deter foreign investment and defeat the very objectives that the Kenyan Competition Act seeks to achieve. For instance, in his criticism of the inclusion of public interest considerations in merger regulation, Reekie observed that “[t]he scope for error, flexible interpretation, and subjectivity of judgment seems great. Prospective local or foreign investors could then well be deterred from takeover activity if there are to be unknown and unpredictable reactions by the new authorities. A brake on such activities could affect exports, corporate tax revenue, and hamper possible spin-off demand for the products of small and medium scale enterprises. A second problem with the definition of the ‘public interest’ is what it *includes*. The socio-economic objectives incorporate redistribution, labour interest and black economic empowerment. Relying on competition policy to achieve these objectives is inappropriate. There are more specific (and hence more effective) policies that can be used.”³⁹⁸

Smith and Swan also point out the danger of the broad interpretation of public interests aspects remarking that these may cause harm to the very public interest factors that competition policy was intended to serve.³⁹⁹ Although these Authors acknowledge that public interest factors considerations play a significant role in developing economies,

³⁹⁷ Para 4 of Chapter 1.

³⁹⁸ Reekie W.D “The Competition Act, 1998: An economic perspective” (1999), 67(2) *South African Journal of Economics*, 258, at 284

³⁹⁹ P Smith & A Swan “Africa: Public Interest Factors in Competition Decisions” (2014) *Global Competition Review, The African and Middle Eastern Antitrust Review 2014* at 1.

they caution that there should be sufficient safeguards against the abuse of the public interest provisions.⁴⁰⁰

It is therefore submitted that, with regard to Kenya, the concerns raised by the authors indicated above are given credence by the vague and wide discretion afforded to the Authority in the determination of a merger. First and Fox accept that public interest considerations constitute a major part of merger regulation in many countries and recommend that nations should strengthen the capacity of their competition institutions to address the challenges often presented in the assessment of public interests consideration which include ambiguity, uncertainty, lack of transparency, lack of due process and lack of legitimacy. The Authors recommend that this could be done by informing parties and stakeholders of the specific public interest concerns and providing a forum and judicial process to vet the concerns and solutions responsive to them.⁴⁰¹ The International Competition Network (“ICN”) recognises the principles of consistency and transparency as the most important principles to a good merger control regime.⁴⁰² We agree with the sentiments expressed by these authors regarding the need for transparency, certainty and unambiguity regarding the consideration of public interest factors and thus recommend that the Kenyan Competition Act should define the parameters of the Authority’s powers in relation to the assessment of a proposed merger by either defining the term “public interest” with greater precision or confining the consideration of public interest aspects to a defined closed list of these factors in order to enhance and promote transparency, consistency and certainty in merger regulation.

As pointed out above, the Kenyan Competition Act does not provide direction regarding the role of public interest grounds in the assessment of mergers in Kenya. It is therefore unclear what role these factors play in merger assessment and to what extent they impact upon a decision whether or not to refuse the merger or approve it,

⁴⁰⁰ Ibid at 3.

⁴⁰¹ : H First and E Fox “Philadelphia National Bank, Globalization, and the Public Interest” (2015) *Antitrust Law Journal* Vol 80 at 351.

⁴⁰² ICN “Recommended Practices for Merger Notification and Review Procedures”, accessible at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> accessed on 27 September 2020. One of the key objectives of the ICN is to “build consensus and convergence towards sound competition policy principles across the global antitrust community”. Notably, the Competition Authority of Kenya is one of the member of the ICN.

with or without conditions. The Authority has however issued Guidelines⁴⁰³ in terms of the Kenyan Competition Act⁴⁰⁴ on the substantive merger assessment in order to assist with the interpretation of merger provisions, including the interpretation of public interest grounds. In what follows, we examine the provisions of these Guidelines to assess whether they assist in addressing any of the difficulties pointed out above.

3.4 Guidelines on the Substantive Assessment of Mergers under the Competition Act of Kenya

3.4.1 Purpose of the Kenyan Guidelines

The purpose of the Kenyan Guidelines is to provide businesses and legal practitioners with information on how the Authority interprets and applies merger provisions in the assessment and analysis of mergers in Kenya.⁴⁰⁵ It however worth noting that the Kenyan Guidelines are not binding and do not have the force of law.⁴⁰⁶ The Authority recognises that the Kenyan Competition Act requires it to apply both the Competition and public interest test in determining whether the merger should be approved, declined or approved with conditions.⁴⁰⁷ The Authority sets about achieving this by using a balancing approach in assessing the competition test and the public interest test while ensuring that the principle of merger specificity is maintained.⁴⁰⁸

3.4.2 Approach to public interest assessment

Section 4 of the Kenyan Guidelines deal with merger analysis. In terms of the Guidelines, the Authority subjects mergers to two main review processes, namely, the competition assessment and the public interest assessment.⁴⁰⁹ Under the competition assessment, the Authority reviews the transaction to see whether it is likely to lead to

⁴⁰³ Competition Authority of Kenya “Consolidated Guidelines on the Substantive Assessment of mergers under the Competition Act”, <https://www.cak.go.ke/sites/default/files/guidelines/Consolidated%20Merger%20Guidelines.pdf>, accessed on 22 June 2019, (the Kenya Guidelines).

⁴⁰⁴ Section 93 of the Kenya Competition Act deals with the Rules and empowers Kenya’s Minister of Finance to make Rules generally for the better carrying into effect the provision of the Kenya’s Competition Act. It is doubtful whether this provision is appropriate for the issuing of the Guidelines by the Competition Authority of Kenya as it is specifically deals with Rules. The guidelines are not in itself binding whereas Rules are generally considered binding and therefore this raises a question as to whether this provision is appropriate for issuing of guidelines under the circumstances.

⁴⁰⁵ Kenyan Guidelines at 2.

⁴⁰⁶ Ibid.

⁴⁰⁷ Kenyan Guidelines at 4.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid at para 41.

a “substantial” lessening of competition which may arise from unilateral or coordinated effects.⁴¹⁰ The foregoing test is said to be informed by Section 3(g) of the Kenyan Competition Act which contemplates bringing Kenyan competition law in line with international best practice.⁴¹¹ The Guidelines provide that the public interest assessment uses a separate but complementary assessment to the competition assessment and allows the Authority to ascertain whether an otherwise anti-competitive or pro-competitive merger will conflict with certain government policies, for example, employment stability and the protection and encouragement of the growth of small businesses.⁴¹²

In terms of the Guidelines, the Authority conducts a public interest assessment regardless of the outcome of the competition assessment.⁴¹³ The Authority applies a balancing approach in assessing the public interest test and the competition test while ensuring that the principle of merger specificity is maintained.⁴¹⁴ The primary objective for the Authority’s exercise of its powers in this context is to determine whether a merger raises public interest issues.⁴¹⁵ The Guidelines provide that, unless the facts demonstrate that a specific merger raises public interest concern, the Authority will have no reason to prevent the merger.⁴¹⁶ First, the Authority conducts a competition test to establish whether or not the merger is likely to prevent or lessen competition in the market post the merger. Then the Authority assesses whether or not the merger will have a “substantial” negative effect on public interest.⁴¹⁷ Accordingly, a merger that does not raise concerns about its competitive effect can be prohibited on public interest grounds and an anti-competitive merger can be allowed on public interest grounds.⁴¹⁸

3.4.3 Approach in dealing with conflicting public interest factors

The Authority recognises that there may be instances when a merger may implicate multiple public interest factors with conflicting or contradictory outcomes (i.e. negative

⁴¹⁰ Ibid.

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Ibid at para 217.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

⁴¹⁸ Ibid at para 218.

and positive impact).⁴¹⁹ For example, a merger may assist in promoting growth of a business allowing the domestic company to become more internationally competitive but may also result in loss of employment. In such an instance, the Guidelines provide that the Authority will assess each public interest ground asserted in isolation to see if the merger will have a substantial or significant negative effect on the public interest; and if more than one ground exists which contradicts the others, the Authority will assess whether the various issues can be reconciled. If they cannot be reconciled, the Authority will employ a balancing approach, balancing the public interest factors, and come to a net conclusion.⁴²⁰

Generally, in any case involving a public interest assessment, the Authority will consider evidence of the relevant negative impact to any of the public interest factors set out under the Kenyan Competition Act.⁴²¹ Once a *prima facie* case has been established, the evidential burden then shifts to the notifying parties to justify any negative impacts to the public interest factor under consideration.⁴²² Any arguments on justification must demonstrate a rational connection between the advantages advanced by the merging parties and the negative impact on public interests.⁴²³ The Authority will then conduct a net balancing assessment to arrive at a conclusion.⁴²⁴

3.4.4 *The Authority's approach to Employment* public interest considerations.

Section 46 of the Kenya Competition Act requires the Authority to consider the likely effect of the merger on employment. In terms of the Kenyan Guidelines, the Authority will assess the track record of the merging firms in relation to labour related issues.⁴²⁵ An example provided in this regard is if the acquiring firm is known to have less regard to rights of employees.⁴²⁶ Any justification of the negative effect on the merger must be based on a reason that is public in nature to offset the public interest in preserving jobs as a result of the merger.⁴²⁷ Once the Authority has established a *prima facie* case for substantial job losses, the evidential burden shifts to the merging parties to

⁴¹⁹ Ibid at 219.

⁴²⁰ Ibid.

⁴²¹ Ibid at 219.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Kenyan Guidelines at 221.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

justify the job losses. The merging parties must demonstrate that there is a rational connection between the reason for the employment reduction and the number of jobs proposed to be shed.⁴²⁸ The public interest in preventing job losses is balanced against the countervailing public interest justifying the job loss. The merging parties would further need to demonstrate how the proposed number of job losses figures were calculated and the link thereof to claimed post-merger public efficiencies.⁴²⁹

3.4.5 Remedies

The Kenyan Guidelines provide guidance on the applicable remedies applied by the Authority in respect of both the competition test and the Public interest test. The Authority may prescribe certain conditions where a merger has been found to raise competition and/or public interest concerns.⁴³⁰ The Authority may prescribe a mix of structural and behavioural conditions to address any detriment posed by an anti-competitive merger.⁴³¹ With regard to public interest remedies, the Authority's focus is on the stability of individual industrial sectors.⁴³²

An interesting element of the public interest remedies applied by the Authority is the consideration for encouraging "plurality, diversity and local production".⁴³³ In this regard, the Authority considers whether any intended merger, over and above the competition test, affects the strength and competitiveness of media businesses indigenous to Kenya; the extent to which ownership or control of the media businesses in Kenya is spread amongst individuals and other firms; and the extent to which the diversity of the local content is reflected through the activities of the various media businesses. This is aimed at supporting local production, hence increased employment, especially for the youth.⁴³⁴

The Authority also recognises that certain remedies may be costly to impose, implement and/or monitor. Remedies are therefore considered on a case-by-case basis. Depending on the case, the Authority can use any of or a combination of remedies to address any adverse effect on public interest factors, including requiring

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid at para 227.

⁴³¹ Ibid at para 233.

⁴³² Ibid at 238.

⁴³³ Ibid at 240.

⁴³⁴ Ibid.

the merged entity to set up a development fund to ensure that a particular industry or local sector continue to compete; imposing a moratorium on job losses for a defined period of time; requiring the redeployment of staff; re-skilling and training employees for alternative employment; requiring the merged entity to comply with existing labour agreement, acknowledging existing unions and formulating new agreements that protect the interests of employees; and requiring the merged entity to comply with a stipulated timeline to implement any prescribed conditions.⁴³⁵

3.5 Challenges with the Kenyan Guidelines

As previously mentioned, the Kenyan Guidelines are not binding and do not have the force of law.⁴³⁶ It therefore remains to be seen whether the guidance provided by the Authority for the assessment of mergers, including the consideration of public interest facts, is consistent with the wording and scheme of the merger provisions of the Kenyan Competition Act. We have found some inconsistencies with regard to the provisions of the Kenyan Guidelines which we discuss below.

Firstly, we have found that the Kenyan Guidelines envisage an application of two separate tests to merger review, being the competition test and the public interest test.⁴³⁷ The Guidelines provide that the public interest assessment uses a separate but complementary assessment to the competition assessment. It is submitted that this interpretation is not consistent with the wording and the scheme of merger provision found in section 46 of the Kenyan Competition Act. As pointed out in 3.3.1 above, the eight competition and public interest factors listed in section 46(2) are not arranged in any particular order of progression or priority and there is no indication on what weight must be accorded to each consideration by the Authority. Beyond requiring that the Authority may consider these factors when analysing a proposed merger, the Kenyan Competition Act does not provide any criteria as a yardstick for the assessment of both the competition and public interest grounds. Although the provisions of the Kenyan Guidelines are borrowed from the South African merger jurisprudence, it is submitted that they are not aligned to the main provisions of the Kenyan Act and are therefore unsuitable in aiding interpretation of the merger provisions.

⁴³⁵ Ibid at para 245.

⁴³⁶ Supra at 3.4.1.

⁴³⁷ Ibid at para 41.

Secondly, we have found that the Guidelines also prescribe requirements that are not contained in the Act. As pointed out in 3.4.2 above, the Guidelines contemplate that, under both the competition and public interest assessment, the Authority reviews the transaction to see whether it is likely to lead to a “substantial” lessening of competition and/or a “substantial” negative impact on the public interest considerations. The foregoing test is said to be informed by Section 3(g) of the Kenyan Competition Act which contemplates bringing Kenyan competition law in line with international best practice. However, section 46 of the Kenyan Competition Act does not prescribe the element of “substantiality” with regard to the consideration of the competition and public interest grounds. It is therefore submitted that the provisions of the Kenyan Guidelines in this regard may be *ultra vires* the Kenyan Competition Act as they are not informed by the main provisions of the Act.

It is worth noting that the Kenyan Guidelines are not binding and are not intended to substitute the merger provisions under Part 4 of the Kenyan Competition Act. Therefore, these Guidelines are devoid of any legal force and will not apply in any merger assessment if they are found to be inconsistent with the provisions of the Kenyan Competition Act.

4. CASE LAW

We now look at some of the merger cases determined by the Authority and the Tribunal wherein the public interest factors, specifically employment, were considered. As previously mentioned,⁴³⁸ the reasons for the Authority’s merger decision are not published and therefore not publicly available. Therefore, the discussion in respect of the Authority’s decisions is limited to the information made available by the Authority on its website.

4.1 *CAK decision on proposed acquisition by KCB Group PLC of up to 100% of the ordinary shares of National bank of Kenya Limited*⁴³⁹

The above merger involved the acquisition of National Bank of Kenya (NBK) by KCB Group PLC (KCB). The Authority approved the proposed transaction on condition that

⁴³⁸ Supra at 1.

⁴³⁹ <http://www.cak.go.ke/sites/default/files/2019-09/CAK%20Decision%20on%20Proposed%20Acquisition%20of%20100%25%20of%20the%20Ordinary%20Shares%20of%20National%20Bank%20of%20Kenya%20Limited%20by%20KCB%20Group%20PLC.pdf>, accessed on 20 October 2019.

90% of the merged entity's employees will be retained for a period of eighteen (18) months from conclusion of the merger.⁴⁴⁰ The Authority noted that the proposed merger was likely to result in negative public interest.⁴⁴¹ It was specifically anticipated that the merger would result in a duplication of certain roles which was likely to lead to loss of employment.⁴⁴²

The merging firms had indicated that they had, separately, been undertaking organizational restructuring over the past three years, which led to job losses. At the time, KCB had 4835 employees while NBK has 1356 staff.⁴⁴³ In order to strike a balance between addressing the public interest concerns and accommodating the strategic intent of the merging parties, the Authority was of the view that granting a conditional approval to the proposed transaction would be appropriate.⁴⁴⁴ Accordingly, the Authority approved the proposed merger on condition that 90% of the merged entity's employees will be retained for a period of 18 months from the conclusion of the merger.

4.2 *CAK decision on the proposed merger between Commercial Bank of Africa Limited and NIC Group PLC*⁴⁴⁵

In the merger between Commercial Bank of Africa Limited and NIC Group PLC, the Authority approved the proposed merger with conditions.⁴⁴⁶ The Authority noted that the merged entity would have a staff compliment of 1872 and consequently approved the merger on condition that none of these employees are declared redundant for a period of 12 months from the date of closing of the transaction in Kenya.⁴⁴⁷ The decision was informed by the parties' submission that no branch closure is anticipated except in locations where there are overlaps.⁴⁴⁸

⁴⁴⁰ Ibid at para 1.

⁴⁴¹ Ibid at para 31

⁴⁴² Ibid.

⁴⁴³ Ibid at para 32.

⁴⁴⁴ Ibid at para 33.

⁴⁴⁵ [http://www.cak.go.ke/sites/default/files/2019-](http://www.cak.go.ke/sites/default/files/2019-06/CAK_Ddecision_on_Proposed_Merger_between_Commercial_Bank_of_Africa_Limited_and_NIC_Group_Plc%20%281%29.pdf)

[06/CAK_Ddecision_on_Proposed_Merger_between_Commercial_Bank_of_Africa_Limited_and_NIC_Group_Plc%20%281%29.pdf](http://www.cak.go.ke/sites/default/files/2019-06/CAK_Ddecision_on_Proposed_Merger_between_Commercial_Bank_of_Africa_Limited_and_NIC_Group_Plc%20%281%29.pdf), accessed on 20 October 2019.

⁴⁴⁶ Ibid at para 1.

⁴⁴⁷ Ibid at para 20.

⁴⁴⁸ Ibid at para 21.

4.3 *CAK decision on the acquisition of 100% of the business and assets of Desbro (kenya) Limited by Brenntang (holding) B.V or its nominee*⁴⁴⁹

In the acquisition of Desbro (kenya) Limited by Brenntang (holding) B.V, the Authority approved the merger with conditions.⁴⁵⁰ The Authority found that proposed transaction was likely to impact on employment since the target firm's 80 employees were likely to lose their jobs.⁴⁵¹ The approval was granted on condition that Brenntang retains the 80 employees of the target's business post-merger for a period of one year.⁴⁵²

It worth noting that, in all the above cases, the Authority it is not known how the Authority arrived at the conclusions reached therein and whether there was any consideration of whether the effect of the merger on employment was causally related to the merger, and therefore merger-specific. Furthermore, it is not known whether the Authority had conducted an analysis on whether the effect on employment was so substantial to warrant the conditions so imposed on the merging firm.

4.4 *Telkom Kenya Ltd and Another v Competition Authority of Kenya*⁴⁵³

As previously mentioned,⁴⁵⁴ the above ruling is the first ever judgment and the only ruling made by the Tribunal to date since its establishment in 2017. Unlike with the Authority, the reasons for the Tribunal's decision are thankfully made available in this judgment and are discussed hereunder. In terms of the above merger, Airtel Networks Kenya Limited (Airtel) sought to acquire the mobile operations, enterprise and carrier services business of Telkom Kenya Limited. Both the merging undertakings are telecommunications operators in Kenya who provide mobile telecommunication connectivity and a variety of telecom services.⁴⁵⁵ The merging undertakings had filed a notification of the merger with the Authority on 09 May 2019.⁴⁵⁶ On 31 October 2019 the Authority made a determination approving the merger subject to eight conditions, seven of which pertained to competition concerns and one condition related to a public

⁴⁴⁹ http://www.cak.go.ke/sites/default/files/2019-06/CAK_Ddecision_on_Acquisition_of_Desbro_Kenya_Limited_by_Brenntang_Holding_B.V.pdf, accessed on 20 October 2019.

⁴⁵⁰ Ibid at para 1.

⁴⁵¹ Ibid at para 14.

⁴⁵² Ibid at para 15.

⁴⁵³ *Telkom Kenya Ltd Another v Competition Authority of Kenya* Case No. CT/005/2020 (04 May 2020) <http://kenyalaw.org/caselaw/cases/view/194959/>, Accessed on 07 September 2020.

⁴⁵⁴ At para 2.2 above.

⁴⁵⁵ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* at 1 and 2.

⁴⁵⁶ Ibid at 4.

interest concern in respect of employment.⁴⁵⁷ With regard to the public interest aspect, the Authority imposed a condition placing a moratorium on retrenchments upon the merging undertakings for a period of two years.⁴⁵⁸ In this regard, the Authority had made a determination that “[t]he merged entity shall ensure that at least three hundred and forty nine (349) of the six hundred and seventy four (674) employees of the target are retained as follows:

- a) 120 employees by the merged entity for a period of two (2) years from the date of the implementation of the merger;
- b) 114 employees by Telkom Kenya Limited for a period of two years from the date of the implementation of the merger; and
- c) 115 employees to be absorbed by the network partners of the merged entity”.

The merging parties were however dissatisfied with the conditions imposed by the Authority and sought to engage the latter to reconsider the said conditions prior to the publication of the determination in the Kenyan Gazette, the Authority’s website or in the media.⁴⁵⁹ In response, the Authority informed the merging parties that the Authority had become *functus officio* in respect of the matter once the merger was approved and subsequently gazetted its determination dated 31 October 2019 on 13 December 2019.⁴⁶⁰ Aggrieved by the Authority’s determination, the merging firms appealed to the Tribunal seeking an order reviewing *inter alia* “[c]ondition 7 imposed by the Competition Authority of Kenya in its Notice of Determination of the Appellants’ proposed transaction gazetted on 13th December, 2019 in relation to the retention period of employees of the target be reviewed and amended from two (2) years to twelve (12) months”.⁴⁶¹

One of the primary arguments raised by the merging before the Tribunal was that the conditions imposed by the Authority were problematic and would render the merger untenable in an environment where the merging undertakings competed with a

⁴⁵⁷ Ibid at 7.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid at 10.

⁴⁶⁰ Ibid at 11 & 12.

⁴⁶¹ Ibid at 13.

“dominant”⁴⁶² market leader.⁴⁶³ The merging parties further submitted that the Authority had not provided written reasons for its decision contained in the Notice of Determination dated 31 October 2019.⁴⁶⁴

Notably, Although the merging parties contended that the Authority’s Merger Guidelines have no basis in law on the basis that these guidelines have not gone through a statutory process and that the Authority had no rational basis for relying on them in imposing the impugned conditions,⁴⁶⁵ the Tribunal however did not address this argument in its judgment which means that the Authority’s’ Merger Guidelines are yet to tested through Kenyan judiciary proceedings.

With regard to the condition requiring the merging parties to retain all employees for a period of two years, the merging parties argued that the Authority had not provided any justifiable reasons for locking the employees for two years purportedly on public interest considerations.⁴⁶⁶ The merging parties argued that the two year retention period was unreasonable as it did not take into account the circumstances that would lead to a voluntary exit or termination of an employee following the laid down procedures under the Kenyan employment legislation.⁴⁶⁷ The merging parties contended that the time should be reduced to twelve months instead of the two years imposed by the Authority.⁴⁶⁸ They further argued that the employment condition was discriminatory and unconstitutional as, according to the merging undertakings, the Authority ordinarily imposed a twelve month restrictive condition as observed by the merging parties with regard to the Authorities previous merger determinations.⁴⁶⁹

On the other hand, the Authority submitted before the Tribunal that, upon receipt of the merger notification, it commenced analysing of the merger in accordance with Part

⁴⁶² A “dominant undertaking” is defined in section 23 of the Kenyan Competition Act as undertaking which provides or controls one-half or more of the total goods or services which are produced, supplied or distributed in Kenya or which, though not dominant, controls at least forty percent but not more than fifty percent of the market share unless it can prove that it does not have market power; or controls less than forty percent of the market share but has market power. Section 2 of the Kenyan Act defines “market power” as “the power of a firm to control prices, to exclude competition or to behave to an appreciable extent, independently of its competitors, customers or suppliers.”

⁴⁶³ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* at 24.

⁴⁶⁴ *Ibid* at 22.

⁴⁶⁵ *Ibid* at 23.

⁴⁶⁶ *Ibid* at 30.

⁴⁶⁷ *Ibid*.

⁴⁶⁸ *Ibid* at 166.

⁴⁶⁹ *Ibid*.

IV of the Kenyan Competition Act, and was further guided by the Consolidated Guidelines on the substantive Assessment of Mergers.⁴⁷⁰ In regard to imposition of the conditions, the Authority argued that it had acted within its powers as conferred to it by the Kenyan Competition Act, and that the merging parties were given sufficient time to comment on the said conditions prior to the Authority's final determination.⁴⁷¹ With regard to the employment condition, the Authority argued that it is mandated in terms of section 46(2) of the Kenyan Competition Act to ensure that the merger does not cause unconscionable loss of employment, and that the merging parties had acknowledged that employment ought to be protected in the merger.⁴⁷² The Authority further argued that the period of two years imposed and the number of employees stated was based on facts before it.⁴⁷³ The Authority submitted that the condition on retention of employees is determined on a case to case basis.⁴⁷⁴ It contended that the specialized nature of the employment at Telkom and the fact that there would only be two telecommunication companies in the country post-merger is what informed their decision.⁴⁷⁵ Furthermore, the Authority submitted that it had considered the merging undertakings' submission to Authority to the effect that they would require two years post-merger to break even.⁴⁷⁶

The Tribunal held that, in determining the matter, it has to establish whether each of the eight conditions imposed by the Authority, including the employment public interest condition, are aimed at enhancing the welfare of the people of Kenya; promoting and protection efficient competition in the market, specifically the telecommunications industry and preventing unfair and misleading conduct throughout Kenya as espoused in section 3 of the Kenyan Competition Act.⁴⁷⁷

The Tribunal further held that, in determining the impact of a merger on employment, it is important to consider and assess each case in light of its circumstances.⁴⁷⁸ In this regard, the Tribunal drew guidance from the South African case of *Harmony Gold*

⁴⁷⁰ Ibid at 36.

⁴⁷¹ Ibid at 40.

⁴⁷² Ibid at 49.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid at 167.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid at 64.

⁴⁷⁸ Ibid at 168.

*Mining Company Limited and Gold Fields Limited (reasons)*⁴⁷⁹ wherein the South African Competition Tribunal had indicated that the effect of a merger on employment is to be determined and evaluated on a case by case basis.⁴⁸⁰

The Tribunal further held that the circumstances of the case before it demanded that it look at the market structure of the telecommunications sector and found that the contention made by the merging parties that the condition is discriminatory lacked merit on the basis of Tribunal's finding that, in matters concerning employment and mergers, each case is to be considered under its unique circumstances.⁴⁸¹ Thus the Tribunal found that, unless the merging parties can show that the alleged differentiation "is *unreasonable or arbitrary and created for an illegitimate or surreptitious purpose*" then the differentiation cannot be said to be discriminatory.⁴⁸²

The Tribunal further held that the ability of the employees who have lost their jobs to get employment post-merger was a critical factor to consider in a merger for any Competition Authority.⁴⁸³ In this regard, the Tribunal's referred to the South African Competition Tribunal's case of *Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd / Newco and Langeberg Foods International Ashton Canning Company (Pty) Ltd*⁴⁸⁴ wherein it was held that "[g]iven that this large number of workers will, post-merger, have their employment possibilities seriously reduced and that they are not likely to gain employment elsewhere, we find that the merger will have a substantially negative effect on employment and hence the public interest."⁴⁸⁵

In the case before them, the Tribunal noted that the telecommunications market in Kenya post the merger will only have two market players, namely, the merged entity and Safaricom PLC and that it would take a considerable period of time for the market to re-adjust itself in order to absorb the employees back to the market.⁴⁸⁶ Therefore considering that post-merger, there will only be two market players, and that it will take a period of two years for the Appellants' merged undertaking to break even, the

⁴⁷⁹ (93/LM/Nov04) [2005] ZACT 29 (18 May 2005).

⁴⁸⁰ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* at 168.

⁴⁸¹ *Ibid* at 169.

⁴⁸² *Ibid*.

⁴⁸³ *Ibid* at 170.

⁴⁸⁴ (46/LM/May05) [2005] ZACT 82 (23 November 2005).

⁴⁸⁵ *Ibid* at 143.

⁴⁸⁶ *Telkom Kenya Ltd and Another v Competition Authority of Kenya* at 172.

Tribunal found that for the next two years the telecommunication market would be highly constrained and the sector will not be at a good position to employ the employees who lose their jobs.⁴⁸⁷ On this basis the Tribunal found no basis to interfere in the decision of the Authority with regard to condition in respect of job retention within the merged entity.⁴⁸⁸

Although the scope of the Tribunal's mandate in the above case was limited to the consideration of the appropriateness of the conditions imposed by the Authority and thus the Tribunal did not embark upon an analysis on whether the proposed merger raised any competition and public interest issues, it is nonetheless submitted that the principles developed in the judgment are fundamental in the regulation of mergers in Kenya. However, even though the judgment has provided key principles for the assessment of public interest consideration in respect of employment, there is still a large area of the public interest jurisprudence in the context of merger regulation that remains uncertain in Kenya as many aspects of the public interest consideration analysis did not form part of the issues before the Tribunal for consideration. It is nonetheless submitted that although the courts and other quasi-judicial forums play a fundamental role in developing jurisprudence and setting down seminal precedents, their role is limited to interpreting and applying the law and not to create it. Therefore, it is recommended that the challenges with Kenya's public interest considerations identified in this chapter will be best resolved through a process of legislative reform in order to address loopholes, inconsistencies and ambiguities identified herein.

4. CONCLUSION

Kenya boasts a modern competition law and has joined many African jurisdictions who have adopted public interest considerations in the regulation of their merger regimes. The establishment of the two specialist institutions in terms of the Kenyan Competition Act for the regulation and enforcement of competition laws serves to enhance an effective and efficient regulation of competition law especially given the highly specialised nature of this area of law. However, the lack of transparency in the determination of mergers which manifests itself by the non-publication of the Authority's reasons for its merger decisions may pose a risk to the efficient regulation

⁴⁸⁷ Ibid at 173.

⁴⁸⁸ Ibid.

of mergers in Kenya. This may be compounded by the non-notification of a merger to interested parties in order to afford them an opportunity to raise any the public interest issues which may serve to ensure that the Authority adequately assesses these considerations and makes a well-informed decision by taking into account all relevant information pertaining to the public interest considerations in merger regimes.

As indicated in this Chapter, the Kenyan Competition Authorities are required to apply both the competition and public interest tests in determining whether a merger should be approved, declined or approved with conditions.⁴⁸⁹ However, the scheme of the Kenyan merger provisions does not provide a clear direction and criteria on how the Kenyan Competition Authorities should apply these considerations. The criteria for merger evaluation is vague and uncertain in that it confers upon the Kenyan Competition Authorities with unfettered powers to impose ‘any criteria’ in the assessment of mergers, including public interest factors.

Furthermore, the Kenyan Competition Act does not prescribe the “substantiality” element as a requirement in the consideration of public interest provisions as compared to the South African merger provisions. The importance of the “substantiality” requirement in the assessment of public interest grounds has been well illustrated in that any refusal or approval of a merger must be based on substantial public interest grounds in order to ensure that mergers are not approved or prohibited on the basis of trivial issues raised in the mergers. Another concern raised in this chapter is the fact that Kenyan Competition Act does not provide direction regarding the role of public interest grounds in the assessment of mergers in Kenya and to what extent do these factors impact upon a decision on whether or not to refuse the merger or approve it, with or without conditions.

An analysis of the Kenyan Guidelines provides some direction on how to interpret and apply public interest factors in merger evaluation, most of which borrow from the South Africa Competition Law provisions. However, as pointed out in paragraph 3.4 above, the interpretation adopted in the Kenyan Guidelines is not consistent with the wording and scheme of the main merger provisions contained in the Act. The interpretational guide provided in the Kenyan Guidelines appears to significantly detract from the primary provisions of the Kenyan Competition Act and, it is submitted, are *ultra vires*

⁴⁸⁹ Ibid.

the Kenyan Competition Act. This issues may create uncertainty in merger regulation and give rise to many disputes in merger cases.

CHAPTER 4

A COMPARATIVE ANALYSIS OF THE PUBLIC INTEREST CONSIDERATIONS IN THE CONTEXT OF MERGER REGULATION OF SOUTH AFRICA AND KENYA

1 A comparative table

An overview of the similarities and differences between the South African and the Kenyan public interest considerations in the context of merger regulation is first provided in the following table:

NO.	DESCRIPTION	SOUTH AFRICA	KENYA
1	Competition Authorities	In South African there are three competition specialist institutions, namely, the Competition Commission, the Competition Tribunal and the Competition Appeal Court.	In Kenya, there are two competition specialist institutions, namely, the Competition Authority and the Competition Tribunal.
2	Definition of a merger	A merger occurs “when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.”	A merger “occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.”
3	Categories of mergers	The South African Competition Act classifies mergers into three categories, namely: a small, intermediate and large merger.	No classification of mergers.
4	Intervention in merger proceedings	Provision is made in terms of the South African Competition Act for the Minister of Trade, Industry	No provision made for third party intervention.

		and Competition and organized labour to be notified of a merger in order to participate in the merger proceedings and make representations on any public interest aspects of the merger.	
5	Consequences for failing to notify a merger, implementing a merger without approval or contrary to conditions imposed or contrary to the Competition Authorities decision to prohibit the merger	<ul style="list-style-type: none"> • An administrative penalty imposed not exceed 10 percent of the firm's annual turnover. • An order of divestiture. 	<ul style="list-style-type: none"> • The merger will not have any legal effect and the agreement between the merging parties is unenforceable. • constitutes an offence and a person guilty of such contravention is liable, upon conviction, to imprisonment or fine. • The Authority may also impose a penalty of any amount not exceeding ten percent of the undertaking(s)' previous year's gross annual turnover in Kenya.
6	Criteria for merger review	<ol style="list-style-type: none"> 1. Whether or not the merger is likely to substantially prevent or lessen competition; 2. if so, whether there are any technological, efficiency or other pro-competitive gains that will trump the initial conclusion so reached in 1; 	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 factors set out in section 46(2).

		3. Notwithstanding the outcome of the enquiries in 1 or 2, the determination of whether the merger can or cannot be justified on substantial public interest grounds.	
7	Public interest considerations	The merger can be approved or declined based on a closed list of five public interest grounds.	The merger can be approved or declined on the basis of a list of unlimited public interest grounds including the four prescribed public interest factors enumerated in section 46(2)(d) to (g).
8	Public Interest Guidelines	Not binding but must be taken into account by any party interpreting the Act.	Not binding.

2 DISCUSSION

In Chapter 2 and Chapter 3 of this study we reflected upon role of public interest in merger regulation in South Africa and in Kenya respectively. In this chapter, we provide a comparative analysis on the differences and similarities of the public interest considerations in the context of merger regulation in South Africa and in Kenya in order determine the lessons these countries can learn from each other and to make recommendations for reform of their respective competition laws based on such lessons.

2.1 Competition Authorities

In South Africa, there are three competition authorities tasked with enforcing the South African Competition Act, namely, the Competition Commission, the Competition Tribunal, and the Competition Appeal Court (the CAC). These three institutions function independently and together make up South Africa's competition authority. With regards to merger regulation, the Commission is tasked with *inter alia*

investigating, considering and making decisions on intermediate and small mergers.⁴⁹⁰ The Tribunal is responsible for *inter alia* assessing and adjudicating upon large mergers which are referred to it by the Commission.⁴⁹¹ The CAC, which is similar to the South African High Court in status, is tasked with reviewing any decision of the Tribunal.⁴⁹² The CAC may give any judgment or make any order including an order confirming, amending or setting aside a decision of the Tribunal or refer a matter back to the Competition Tribunal for a further hearing on any appropriate terms.⁴⁹³

In Kenya, there are two competition specialist institutions established for the enforcement of the Kenyan Competition Act in Kenya, namely, the Competition Authority and the Competition Tribunal. The Authority has the power to investigate, adjudicate and decide upon all mergers in Kenya regardless of size.⁴⁹⁴ The Kenyan Tribunal's function is mainly limited only to hearing appeals emanating from the Authority.⁴⁹⁵ Unlike the South Africa Tribunal which assesses and adjudicate upon large mergers which are referred to it by the Commission, the Kenyan Tribunal does not sit as an adjudication body of first instance.⁴⁹⁶ In its determination of any appeal, the Kenyan Tribunal may confirm, modify or reverse the order appealed against or any part thereof.⁴⁹⁷ Furthermore, the Tribunal may refer a matter back to the Authority for reconsideration, either generally or in respect of any specified matters to which the appeal relates.⁴⁹⁸ As observed in Chapter 3⁴⁹⁹ the Kenyan Competition Tribunal only made its first ever ruling⁵⁰⁰ on 01 May 2020, ten years after the promulgation of the Kenyan Competition Act. One of the possible reasons for the Tribunal's inactivity as highlighted in Chapter 3⁵⁰¹ is that the Tribunal role in terms of the Kenyan Competition Act is only limited to reviewing the decisions of the Authority and does not make any determination of mergers at first instance.

⁴⁹⁰ Section 21 of the South African Competition Act.

⁴⁹¹ Section 16(2)(a) of the South African Competition Act.

⁴⁹² Section 37(1) of the South African Competition Act.

⁴⁹³ Section 37(1) of the South African Competition Act.

⁴⁹⁴ Section 44, 45 and 46 of the Kenyan Competition Act.

⁴⁹⁵ Section 48 of the Kenyan Competition Act.

⁴⁹⁶ Section 71(5) of the Kenyan Competition Act.

⁴⁹⁷ Section 74(3) of the Kenyan Competition Act.

⁴⁹⁸ Section 75(1) of the Kenyan Competition Act.

⁴⁹⁹ Supra Chapter 3 at 2.2.

⁵⁰⁰ *Telkom Kenya Ltd Another v Competition Authority of Kenya* Case No. CT/005/2020 (04 May 2020) <http://kenyalaw.org/caselaw/cases/view/194959/>, Accessed on 07 September 2020.

⁵⁰¹ Supra Chapter 3 at 2.2.

As further discussed in chapter 3, any appeal against the decision of the Tribunal is made to the High Court and must be lodged within thirty days after the date the Tribunal's judgment.⁵⁰² The decision of the High Court in respect of competition matters is final.⁵⁰³ Notably, the High Court is an ordinary court of law and, unlike in South Africa where the CAC is established and functions as a competition specialist body, is not a specialist body created to adjudicate exclusively over competition matters. Although the OECD has noted that the fact that a court is a generalist does not necessarily mean that it does not retain extensive knowledge and experience on substantive issues of economics and competition law, it nonetheless acknowledges that such expertise may rest with a particular judge, its staff and/or external experts or it may be developed through reviewing a large number of the competition authority's decisions, particularly if decisions are of the same nature.⁵⁰⁴ On this basis, it is recommended that, even though the decisions of the Kenyan Tribunal are subject to a review by an ordinary high court, it is imperative that that the judge(s) of the High Court adjudicating over competition matters, specifically mergers, should at least possess relevant knowledge and expertise in competition matters.

As observed in Chapter 3,⁵⁰⁵ the benefits of the adjudication of competition matters by specialised courts or specialist judges are well recognised and include greater efficiency, enhanced uniformity and quality decisions.⁵⁰⁶ These benefits may come about through specialised procedures, staff and specialised judges who are well versed in the subject matter, resulting in a more efficient processes.⁵⁰⁷ They may also arise from specialised courts or specialist judges dealing with exclusive jurisdiction over particular areas of the law, thereby enhancing greater predictability and confidence in the courts, due to greater expertise and experience in applying the law to the facts properly.⁵⁰⁸

⁵⁰² Section 49(2) of the Kenyan Competition Act.

⁵⁰³ Ibid.

⁵⁰⁴ OECD (2016) "The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences" at 43 available at <http://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf> accessed on 26 September 2020.

⁵⁰⁵ Supra Chapter 3 at 2.2.

⁵⁰⁶ OECD (2016) "The resolution of competition cases by specialised and generalist courts: Stocktaking of international experiences" at 57.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

2.2 Definition of a merger

The definition of a merger in terms of the South African Act and the Kenyan Competition Act is similar. A merger, in terms of the South African Competition Act, occurs “when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm”.⁵⁰⁹ In terms of the Kenyan Competition Act, a merger “occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking.”⁵¹⁰ The two important elements of the definition of a merger for both South African and Kenya is the acquisition of control and that the interest, right or entity so acquired must constitute a business or part of business.

2.3 Intervention in merger proceedings

In South Africa, provision is made for the Minister of Trade, Industry and Competition and organized labour to be notified of a merger in order to participate in the merger proceedings and make representations on any public interest aspects before the Competition Authorities.⁵¹¹ Notably, the Kenyan Competition Act does not make provision for notification of interested parties of a proposed merger to afford them an opportunity make representations on any aspect of the merger that raises concerns, including any public interest concerns.

Section 46(3) of the Kenyan Competition Act provides that the Authority may refer a proposed merger to an investigator to investigate and submit a report to the Authority with regard to the merger criteria set out subsection (2).⁵¹² The investigator as so appointed is however only obliged to inform the parties to the merger transaction of the referral from the Authority.⁵¹³ Although, section 46(5) provides that any person, including a person who is not a party in the proposed merger, may voluntarily submit any document, affidavit, statement or other relevant information in respect of a proposed merger to an investigator or the Authority, it is not clear how such a person

⁵⁰⁹ Section 12(1)(a) of the South African Competition Act.

⁵¹⁰ Section 41 of the Kenyan Competition Act.

⁵¹¹ Section 13A, Section 14A and Section 18(1) of the South African Competition Act.

⁵¹² Section 46(3) of the Kenyan Competition Act.

⁵¹³ Ibid.

would come to know of the proposed merger if there is no provision to notify interested parties regarding the merger.

It is submitted that the absence of a provision for the notification of the merger upon interested in Kenya may result in merger determinations that are based on insufficient information as certain parties, such as employees of the merging undertakings, would not have been afforded an opportunity to submit material information which may be relevant for proper assessment of effect of a proposed merger on *inter alia* public interests considerations. It is therefore recommended that a provision be made in the Kenyan Competition Act to notify interested parties, especially employees of the merging undertakings, of the proposed merger and to afford them an opportunity to participate in merger proceeding in order to make submissions on aspects of the merger that may raise concerns.

2.4 Criteria for merger review

The Kenyan Competition Act provides that the Authority may base its determination of a merger on ‘any criteria’ which the Authority considers relevant to the circumstances of each case.⁵¹⁴ This criteria includes a list of eight non-exhaustive competition and public interest factors enumerated in sub-section 46(2). This means that Authority may consider other public interest factors (and competition factors) beyond those listed in section 46(2)(d) to (g) which the Authority “considers relevant to the circumstances involved in the proposed merger”. It is further worth noting that the eight competition and public interest factors listed in section 46(2) are not arranged in any particular order of progression or priority and there is no indication on what weight must be accorded to each consideration by the Authority. Beyond requiring that the Authority may consider these factors when analysing a proposed merger, the Kenyan Competition Act does not provide any criteria as a yardstick for the assessment of both the competition and public interest grounds. As pointed out in Chapter 3,⁵¹⁵ this broad articulation of the merger provisions leaves the Authority to grapple with finding the correct legal formulation applicable to the assessment of public interests aspects, including employment, which may often result in the inconsistent interpretation and application of the public interest considerations and protracted merger proceedings. It

⁵¹⁴ Section 46(2) of the Kenyan Competition Act.

⁵¹⁵ Supra Chapter 3 at 3.3.

is submitted that this criteria renders the application of merger assessment provisions vague and uncertain in that they confer upon the Authority an unfettered power to impose 'any criteria' in the assessment of mergers, including public interest factors.

In South Africa, the approach is different in that the assessment of mergers is based on a clearly defined criteria stipulating three separate but interrelated inquiries that the Competition Authorities must engage in.⁵¹⁶ In chapter 2 we indicated that section 12A(1) of the South African Competition Act requires Competition Authorities to first determine whether the merger is likely to substantially prevent or lessen competition. Secondly, if the result of the first inquiry is in affirmative, the Competition Authorities must thereafter determine whether there are any technological, efficiency or other pro-competitive gains that will trump the conclusion reached in the first step. Thirdly, irrespective of the outcome in the first and second step above, the Competition Authorities must determine whether the merger can or cannot be justified on substantial public grounds.⁵¹⁷

With regard to the public interest enquiry itself in South Africa, there are two lines of enquiry which Competition Authorities must conduct. In the first line of enquiry, following from a negative competition finding, the Competition Authorities must determine whether there are any substantial positive public interest grounds that could justify the approval of an anti-competitive merger.⁵¹⁸ This means that the Competition Authorities could approve an anti-competitive merger if there are substantial merger specific positive public interest grounds that justify the approval of the merger.⁵¹⁹ In the second line of enquiry, following from a positive competition finding, the Competition Authorities are required to consider whether the merger raises any substantial negative public interest effects. In this regard, a merger may be prohibited if it is established that there are substantial negative public interest effects, or conditions may be imposed to remedy the substantial negative public interest effects arising from a merger even, if the merger has a positive competition effect.⁵²⁰

⁵¹⁶ See in this regard Chapter 2.

⁵¹⁷ Section 12A of the South African Competition Act; *the Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 12, SA Guidelines at 10.

⁵¹⁸ South African Public Interest Guidelines at 5.5.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid* at 5.6.

2.5 The substantiality requirement

Merger provisions in South Africa and Kenya both require an evaluation of the “likelihood of the merger to prevent or lessen competition”. However, the South African Competition Act contains an element of “substantiality” as a requirement for both the competition and public interest test.⁵²¹ In terms of the competition test, the South African Competition Act is concerned with the “substantial” lessening or prevention of competition, an element that is absent from the Kenyan merger provisions. In terms of the public interest test enquiry, the South African Competition Act requires Competition Authorities to determine whether a merger can or cannot be determined on “substantial” public interest grounds, whereas the Kenyan Competition Act does not prescribe substantiality as a requirement.

Although the CAC noted in *the Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc*,⁵²² that the South African Competition Act does not provide guidance on the weight that must be placed on public interest grounds set out in section 12A(3),⁵²³ the CAC nonetheless recognized the fact that the public interest grounds have to be substantial, meant that the weight accorded to these grounds must be considerable if a Competition Authority is to refuse the merger.⁵²⁴ In this regard, the CAC held that the evidence presented to the Competition Authorities become crucial as to the proper judicial engagement with the range of enquires envisaged in section 12A.⁵²⁵

The CAC’s judgment in *the Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* demonstrates the importance of “substantiality” as a requirement in the assessment of public interest grounds in merger determinations, especially in view of the fact that these grounds are determinative of whether a merger is to be approved or refused. It is recommended that, given the importance of the “substantiality” requirement, the Kenyan merger

⁵²¹ Section 12A of the South African Competition Act.

⁵²² (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

⁵²³ *Ibid* at 113.

⁵²⁴ *Ibid*.

⁵²⁵ *Ibid* at 115.

provisions should make provision for any refusal or approval of a merger to be based on “substantial” public interest grounds in order to ensure that mergers are not approved or prohibited on the basis of trivial issues raised in the merger.

2.6 Public interest considerations

In South Africa, the Commission and the Tribunal must, irrespective of the prior competition test, analyse the likely effect of the merger on the closed list of five public interest grounds enumerated in subsection (3) of section 12A of the South African Competition Act.⁵²⁶ These public interest considerations are a particular industrial sector or region;⁵²⁷ employment;⁵²⁸ the ability of small and medium businesses or firms controlled by historically disadvantaged persons to effectively enter into, participate in or expand within the market;⁵²⁹ the ability of national industries to compete in national markets;⁵³⁰ and the protection 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.⁵³¹

In Kenya, the list of public interest factors that the Authority may consider when making a determination on a proposed merger is unlimited and includes the four public interest factors enumerated in section 46(2)(d) to (g), namely, a particular industrial sector or region; employment, the ability of small undertakings to gain access to or to be competitive in any market and the ability of national industries to compete in international markets. These four public interest factors are similar to those of South Africa but are, as mentioned, non-exhaustive. The Kenyan Competition Act does not define the term “public interest” nor does it provide guidance or set parameters on what other factors may be considered as “public interest” considerations for purposes of merger determination by the Authority. As discussed in chapter 3, the limitlessness and the absence of a definition of the term “public interest” in Kenya raises a concern regard the lack of transparency, certainty and unambiguity in the assessment of mergers in Kenya regarding the consideration of public interest factors. It is thus

⁵²⁶ Section 12A(2) of the South African Competition Act.

⁵²⁷ Section 12A(3)(a) of the South African Competition Act.

⁵²⁸ Section 12A(3)(b) of the South African Competition Act.

⁵²⁹ Section 12A(3)(c) of the South African Competition Act.

⁵³⁰ Section 12A(3)(d) of the South African Competition Act.

⁵³¹ Section 12A(3)(e) of the South African Competition Act.

recommended that the Kenyan Competition Act should define the parameters of the Authority's powers in relation to the assessment of a proposed merger by either defining the term "public interest" with greater precision or confining the consideration of public interest aspects to a defined closed list of these factors in order to enhance and promote transparency, consistency and certainty in merger regulation.

2.7 Role of public interest considerations in merger assessment

Both the Kenyan Competition Act and the South African Competition Act, as mentioned above,⁵³² contain similar public interest grounds which pertain to the effect of the proposed merger on a particular industry or sector; employment; small businesses and national industries.⁵³³ In South Africa, the public interest considerations are considered in "justification" of a prior competition test, irrespective of its outcome.

In *Harmony Gold Mining Company Limited and Goldfields Limited*,⁵³⁴ The Tribunal stated that:

"the public interest inquiry may lead to a conclusion that is the opposite of the competition one, but it is a conclusion that is justified not in and of itself, but with regard to the conclusion on the competition section. It is not a blinkered approach, which makes the public interest inquiry separate and distinctive from the outcome of the prior inquiry. Yes, it is possible that a merger that will not be anti-competitive can be turned down on public interest grounds, but that does not mean that in coming to the conclusion on the latter, one will have no regard to the conclusion on the first. Hence section 12A makes use of the term "justified" in conjunction with the public interest inquiry. It is not used in the sense that the merger must be justified independently on public interest grounds. Rather it means that the public interest conclusion is justified in relation to prior competition conclusion."⁵³⁵

⁵³² Supra at 2.6.

⁵³³ Section 12A(3) of the South African Competition Act and Section 46(2)(d) to (g) of the Kenyan Competition Act.

⁵³⁴ CT case 93/LM/Nov 04 at para 56. The CAC cited this approach with approval in *the Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* at 14.

⁵³⁵ *Harmony Gold Mining Company Limited v Goldfields Limited* CT case 93/LM/Nov 04 at para 56.

The Kenyan Competition Act however does not provide direction regarding the role of public interest grounds in the assessment of mergers in Kenya. It is therefore unclear what role do these factors play in merger assessment and to what extent do they impact upon a decision whether or not to refuse the merger or approve it, with or without conditions. It is thus recommended that provision be made for the Kenyan Competition Act to prescribe the role that public interest consideration play in the determination of whether a merger should be prohibited or approved with or without conditions.

2.8 Public interest Guidelines

Both South Africa and Kenya have issued Guidelines on the assessment of public interest provisions which aim to provide guidance on the approach that the Commission and the Authority, respectively, are likely to follow when assessing public interest factors in the context of merger regulation. The South African Public interest Guidelines were prompted by certain key cases that were brought before the Competition Authorities which sparked a robust debate on the assessment standard for public interest issues.⁵³⁶ The South Africa Public Interest Guidelines recognise that, whilst the CAC and the Tribunal have given valuable guidance in certain areas of public interest considerations, there is still a large area in respect of the law which remains undeveloped.⁵³⁷ In terms of the Public Interest Guidelines, two approaches are adopted in the assessment of public interest considerations. Firstly, a general approach is applied to each of the public interest grounds. The second approach concerns an assessment of each of the of the public interest considerations. However, as previously mentioned,⁵³⁸ the Public Interest Guidelines are not binding but the recent amendments to the South African Competition Act makes it mandatory for anyone who interprets or applies the Competition Act to take the Public Interest Guidelines into account. Although the Public Interest Guidelines provide a comprehensive step by step approach to public interest consideration in respect of each public interest grounds, it is submitted that the best way to achieve a significant degree of legal certainty and consistency in the application of public interest provisions, is to give legal effect to the Public Interest Guidelines by translating them

⁵³⁶ Ibid chapter 2 at 3.4.

⁵³⁷ Public Interest Guidelines at 3.4.

⁵³⁸ Supra Chapter 2 at 5.4.4.

into Regulations and therefore giving them the force of law. This will render them binding upon any person interpreting the South African Competition Act, including all the Competition Authorities, and will thus enhance efficiency, cost-effectiveness, transparency and speed in the determination of mergers in South Africa.

Section 4 of the Kenyan Guidelines deal with merger analysis. In terms of the Guidelines, the Authority subjects mergers to two main review processes, namely, the competition assessment and the public interest assessment.⁵³⁹ Under the competition assessment, the Authority reviews the transaction to see whether it is likely to lead to a “substantial” lessening of competition which may arise from unilateral or coordinated effects.⁵⁴⁰ The foregoing test is said to be informed by Section 3(g) of the Kenyan Competition Act which contemplates bringing Kenyan competition law in line with international best practice.⁵⁴¹ The Guidelines provide that the public interest assessment uses a separate but complementary assessment to the competition assessment and allows the Authority to ascertain whether an otherwise anti-competitive or pro-competitive merger will conflict with certain government policies, for example, employment stability and the protection and encouragement of the growth of small businesses.⁵⁴²

In terms of the Guidelines, the Authority conducts a public interest assessment regardless of the outcome of the competition assessment.⁵⁴³ The Authority applies a balancing approach in assessing the public interest test and the competition test while ensuring that the principle of merger specificity is maintained.⁵⁴⁴

As previously mentioned, the Kenyan Guidelines are not binding and do not have the force of law.⁵⁴⁵ It therefore remains to be seen whether the guidance provided by the Authority for the assessment of mergers, including the consideration of public interest factors, is consistent with the wording and scheme of the merger provisions of the Kenyan Competition Act. In chapter 3,⁵⁴⁶ have found some inconsistencies with regard to the provisions of the Kenyan Guidelines.

⁵³⁹ Ibid at para 41.

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Ibid at para 217.

⁵⁴⁴ Ibid.

⁵⁴⁵ Supra at 3.4.1.

⁵⁴⁶ Supra chapter 3 at 3.4.

Firstly, we have found that the Kenyan Guidelines envisage an application of two separate tests to merger review being the competition test and the public interest test.⁵⁴⁷ This interpretation was found in chapter 3 to be inconsistent with the wording and the scheme of merger provisions found in section 46 of the Kenyan Competition Act in that the eight competition and public interest factors listed in section 46(2) are not arranged in any particular order of progression or priority and there is no indication on what weight must be accorded to each consideration by the Authority. Beyond requiring that the Authority may consider these factors when analysing a proposed merger, the Kenyan Competition Act does not provide any criteria as a yardstick for the assessment of both the competition and public interest grounds. Although the provisions of the Kenyan Guidelines are borrowed from the South African merger jurisprudence, it is submitted that they are not aligned to the main provisions of the Kenyan Act and are therefore unsuitable in aiding interpretation of this section.

Secondly, we have found that the Guidelines also prescribe requirements that are not contained in the Kenyan Competition Act. For instance, the Guidelines contemplate that, under both the competition and public interest assessment, the Authority reviews the transaction to see whether it is likely to lead to a “substantial” lessening of competition and/or a “substantial” negative impact on the public interest considerations. However, section 46 of the Kenyan Competition Act does not prescribe the element of substantiality with regard to the consideration of the competition and public interest grounds. It is therefore submitted that the provisions of the Kenyan Guidelines in this regard may be *ultra vires* the Kenyan Competition Act as they are not informed by the main provisions of the Act.

It is worth noting that the Kenyan Guidelines are not binding and are not intended to substitute that the merger provisions under Part 4 of the Kenyan Competition Act. Therefore, these Guidelines are devoid of any legal force and will not apply in any merger assessment if they are found to be inconsistent with the provisions of the Kenyan Competition Act. It is therefore recommended that, in order to give credence to the principles envisaged in the guidelines, amendment to the primary provisions of the Kenyan Competition Act would need to be amended in order to align the Kenyan Competition Act with the interpretation provided in the Kenyan Guidelines.

⁵⁴⁷ Ibid at para 41.

2.9 Publication of reasons for merger decisions

Both the South African Competition Act and the Kenyan Competition Act provide that their respective Competition Authorities must publish a notice of their merger decisions in the Gazette and issue written reasons for the decision if they prohibit or conditionally approve the merger or if a party to the merger requests the said reasons.⁵⁴⁸ In South Africa the Commission makes a determination in respect of small and intermediate mergers whereas the Tribunal makes a determination of large mergers. In Chapter 2, we discussed some of the seminal merger decisions involving the consideration of public interest factors issued by the South African Competition Authorities which have built and shaped the South African jurisprudence on the application of public interest factors in the context of merger regulation. In Kenya, all merger determinations, irrespective of size are made by the Authority. However, the Authority does not publish any reasons for its merger decisions resulting in a dearth of jurisprudence with regard to the merger decisions, including the consideration of public interest consideration. It is submitted that the non-publication of the Authority's reasons for its merger decisions may pose a risk to the efficient regulation of mergers and the application of the public interest consideration in Kenya. As observed in Chapter 3, the International Competition Network ("ICN") recognises the principles of consistency and transparency as the most important principles to a good merger control regime.⁵⁴⁹ Therefore in order to promote transparency, certainty and unambiguity regarding the consideration of public interest factors it is recommended that provisions be made in Kenyan Competition Act to make the publication of the merger decisions by the Authority mandatory.

4 CONCLUSION

This study has demonstrated that South Africa has a well-established merger regime, particularly in the application of public interest considerations which other jurisdictions may draw lessons from. Although certain key cases brought before the South Africa

⁵⁴⁸ Section 13(7), 14(3) and 16(4) of the South African Competition Act and section 46(6) and 48(4) of the Kenyan Competition Act.

⁵⁴⁹ ICN "Recommended Practices for Merger Notification and Review Procedures", accessible at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> accessed on 27 September 2020. One of the key objectives of the ICN is to "build consensus and convergence towards sound competition policy principles across the global antitrust community". Notably, the Competition Authority of Kenya is one of the member of the ICN.

Competition Authorities have sparked a robust debate on the assessment standard for public interest issues, they have nonetheless laid down key principles in respect of public interest considerations and have provided a yardstick in the interpretation of public interest grounds in South African Competition Law. The South African Guidelines issued by the Commission on the assessment of public interest grounds provide a comprehensive guide on the approach adopted by the Commission in assessing public interest consideration. Although these Public Interest Guidelines are not binding, the recent amendments to the South African Competition Act makes it mandatory for anyone who interprets or applies the Competition Act to take the Public Interest Guidelines into account. However, there is a need to strengthen the interpretation of public interest considerations in the South African merger as recommended in this chapter.

Kenya boasts a modern competition law and has joined many African jurisdictions like South Africa who have adopted public interest considerations in the regulation of their merger regimes. The establishment of the two specialist institutions in terms of the Kenyan Competition Act for the regulation and enforcement of competition laws serves to enhance an effective and efficient regulation of competition law especially given the highly specialised nature of this area of the law. The Kenyan Competition law regime, similar to South Africa, incorporate aspects of macro-economic or wider public goals such the consideration of the impact of a merger on a particular industrial sector or region, employment, ability of small undertakings to gain access to or to be competitive and the ability of national industries to compete in international markets. However, as discussed in this study, the lack of transparency in the determination of mergers which manifests by the non-publication of the Authority's reasons for its merger decisions may pose a risk to the efficient regulation of mergers and significantly curtail the development of competition jurisprudence in Kenya.

Therefore, it is recommended that both the South African and the Kenyan Legislature respectively review the current substantive merger provisions with a view of putting in place legislative reform in line with the recommendations made in this chapter.

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