

**PUBLIC INTEREST VERSUS COMPETITION CONSIDERATIONS: A REVIEW OF  
MERGER REVIEW GUIDELINES IN TERMS OF SECTION 12A OF THE  
COMPETITION ACT, 1998.**

by

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## DECLARATION

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I, **Kamogelo Sidwell Magana**, declare that the work “**Public interest versus competition considerations: a review of merger review guidelines in terms of section 12A of the Competition Act, 1998**” is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or any other higher education institution.



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## SUMMARY

One of the recognised ways through which a firm may increase its market share or reorganise its presence in a market is through a merger. A merger occurs when independent firms combine their businesses. Section 12A of the Competition Act, 1998, provides two grounds in terms of which mergers must be evaluated by competition authorities. These are competition and public interest considerations. The Act is reticent on which, between the two considerations, should take precedence in the event that the two conflict. The anterior purpose of this study is therefore to provide an in-depth analysis on which consideration must take precedence in the event of conflict. On analysis, the majority of case law suggests that the competition considerations must take precedence. This observation is also buttressed by a significant amount of literature, which holds that in merger analysis, the public interests only play a secondary role to the competition inquiry.

## **KEY TERMS**

Merger evaluation, public interest considerations, competition considerations, competition law, anti-competitive merger, pro-competitive merger, Competition Act, Competition Amendment Act, competition authorities, Competition Commission, Competition Tribunal, Competition Appeal Court.

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## CHAPTER 1: INTRODUCTION

### 1.1. Introduction

Competition law is mainly concerned with the regulation of competition amongst firms competing in the same market. Among the conduct or practices regulated by competition law are, *inter alia*, pricing, market allocation, abuse of dominance conduct, and merger regulation. The latter is the focus of this study. Although some observers consider mergers to bear the least economic consequences,<sup>1</sup> there is consensus that merger activity deserves the full attention of competition authorities. As the former chairperson of the Competition Tribunal, David Lewis, aptly observes: “[m]erger regulation is substantively important because of the long-term impact that these combinations, the most powerful and permanent form of inter-firm cooperation, may have on the structure of markets.”<sup>2</sup>

The legal as well as economic concern of mergers is that they may result in single-firm dominance which in turn may result in unilateral abusive conduct or augment the potential for anti-competitive horizontal agreements.<sup>3</sup> Another likely consequence of a merger is that the merged entity may have incentives to exercise market power, with the potential to harm competition.<sup>4</sup> Kelly and others submit that mergers may result in either unilateral effects, where the merged entity is able to increase prices or output unilaterally; or co-ordinated effects, where post-merger there will be fewer firms competing in the markets and this is likely to lead competitors to co-ordinate their conduct.<sup>5</sup> Competition may be vexed if any of the risks and consequences of mergers were to occur. Thus, it is for this reason that merger regulation forms an integral part of competition law.

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<sup>1</sup> Lewis D *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (Edward Elgar 2013) 70-71.

<sup>2</sup> *Ibid* at 71.

<sup>3</sup> *Ibid*.

<sup>4</sup> Coppola M “Consideration of Public Interest Factors in Antitrust Merger Control” *Competition Policy International* 24 March 2015, available at <https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-inantitrust-merger-control/>, accessed on 24 March 2019.

<sup>5</sup> Kelly L, Unterhalter D, Goodman I, Smith P, & Youens P *Principles of Competition Law in South Africa* (Oxford, 2017) 171.

However, merger regulation is not a precise science, especially in South Africa. The Competition Act<sup>6</sup> (henceforth “the Act”), enjoins competition authorities, when considering a merger, initially to determine whether or not a merger is likely to substantially prevent or lessen competition.<sup>7</sup> This, the competition authorities must do, by assessing factors listed in section 12A(2) of the Act. If it appears that the merger is likely to prevent or lessen competition, the authorities must determine whether or not the merger is likely to result in any technological, efficiency, or other pro-competitive gains.<sup>8</sup> Secondly, the authorities must further determine whether the merger can or cannot be justified on public interest grounds,<sup>9</sup> notwithstanding the competition determination. However, the Act is reticent on which considerations, between the competition and public interest, should take antecedence when there is a clear conflict.<sup>10</sup> The cacophony of competition and public interest considerations therefore bear the grey area which this study seeks to elucidate.

This study considers the following issues: whether public interest considerations are of equal importance to competition considerations in merger regulation; whether public interests do not trump on competition considerations in merger determinations, and if so, what is the appropriate legal approach to balance these conflicting tests; whether the public interest grounds can be justified from a competition law perspective; and how these considerations have impacted on merger regulation since the coming into force of the Act. The study also considers the Competition Amendment Act<sup>11</sup> and how it impacts on balancing between competition and public interest considerations.

To distinguish this work from other works that may have gone before on the question of public interest versus competition considerations in merger review, the main focus of this study is to investigate which consideration, between public interest and competition considerations, takes precedence in the event of conflict between the

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<sup>6</sup> Act 89 of 1998.

<sup>7</sup> Sec 12A(1) of the Act.

<sup>8</sup> Sec 12A(1)(a) of the Act, as amended by section 9 of the Competition Amendment Act 18 of 2018.

<sup>9</sup> Sect 12A(1)(b) and 1A of the Act, as amended by section 9 of the 2018 Amendment Act.

<sup>10</sup> Balthasar S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer, 2018) 167.

<sup>11</sup> Act 18 of 2018.

two. The study therefore does not, as a central point of its departure, question the need and desirability of public interest considerations in merger review. To the extent that the debate on the need and desirability of public interest considerations in merger review may form part of this study, this will be done for purposes only of enriching analysis on the main question of this study: which consideration between public interest and competition considerations takes precedence in the event of conflict between the two.

## 1.2. Problem statement

South African competition policy and law have a unique feature in their merger analysis; this being the inclusion of public interests alongside competition considerations. The inclusion of public interest considerations in merger review, just like the origination of competition policy in South Africa, can be linked to government's effort to counter the excessive concentration of economic power.<sup>12</sup> As Hantke-Domas observes, the role of the public interests in competition law has more to do with the realisation of political and moral values.<sup>13</sup> Justification for the realisation of such values through competition policy can be traced back to South Africa's pre-constitutional order. As such, South Africa's economic and political history had a significant bearing in the formulation of the provisions and objectives of the Act.<sup>14</sup>

However, the immediate legal objective of merger regulation remains to ensure that the merged entity does not result in the market becoming less competitive. Accepting this as the main objective of merger regulation, how then do, public interest considerations marry with this objective?

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<sup>12</sup> Roberts S. "The Role for Competition Policy in Economic Development: The South African Experience" 2004 *Trade and Industrial Policy Strategies*, Working Paper 8 at 7. See also Australian Competition and Consumer Commission 'Better Regulation of Economic Infrastructure: Country-Based Review' (2013) Working Paper No. 8, at 10.

<sup>13</sup> Hantke-Domas M "The Public Interest Theory of Regulation: Non Existence or Misinterpretation?" 2003 *European Journal of Law and Economics*.

<sup>14</sup> Staples J & Masamba M "Fourteen years later: An assessment of the realisation of the objectives of the Competition Act 89 of 1998," *paper presented at the 6th Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, Johannesburg, South Africa (2012)* 4.

The Act is said to have been crafted in such a way that gives effect to “the traditional functions of promoting and maintaining competition while making provision for special needs of a developing economy.”<sup>15</sup> These “special needs”, being the public interest considerations, have caused much debate and confusion. The Act instructs that, in order for a merger to be approved, it must satisfy both competition and public interest considerations. However, as stated above, the Act is reticent as to which of these sometimes conflicting considerations should take priority in the event that the two conflict.

### **1.3. Point of departure and hypothesis**

Competition authorities, in deciding a notified merger, have the power to prohibit the merger or to approve it subject to, or without, conditions.<sup>16</sup> Approving a merger “subject to conditions”, may allow competition authorities to balance potentially conflicting considerations of competition and public interests. As the Competition Tribunal observed in *Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd*,<sup>17</sup> contradictions can be of two types: one is when opposite interests collide head on, where we are faced with a stark choice of whether to prohibit or approve a merger.<sup>18</sup> The other situation being where the opposite interests avoid one another, “like two vehicle bypassing each other in opposite directions on a dual lane road.”<sup>19</sup>

The latter type of conflict is straightforward and deserves no further discussion. Of particular interest, however, is the former type of conflict, which is often fraught with boisterous debates. A question which flows naturally from the former is: are authorities consistent in dealing with the conflict that often arise between the

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<sup>15</sup> Buthelezi Z & Njisane Y “Public Interest and Prohibited Conduct: A Juggling Act?” 2014 *Without Prejudice* 32.

<sup>16</sup> Sec 14(b) & sec 14A(b) of the Act.

<sup>17</sup> (08/LM/Feb02) [2003] ZACT 15 (19 March 2003).

<sup>18</sup> *Ibid* [221].

<sup>19</sup> *Ibid* [222].

competition and public interests inquiries? Grimbeek and others analysed the consistency of the Competition Commission in dealing with merger decisions between 2002 and 2009, and found that the Competition Commission has been consistent in its merger decisions both at applying the public interest considerations and in its prohibition of mergers for neediness of public interest considerations.<sup>20</sup> However, the shortcoming of their work is that it does not account for those merger cases which were referred to the Competition Tribunal as well as those ultimately appealed to the Competition Appeal Court. As this study will show,<sup>21</sup> there is visible inconsistency in dealing with the conflict between the competition and public interests inquiries in cases before the Competition Tribunal and Appeal Court. Another shortcoming in their work, published back in 2013, is that the period their study focused on, 2002 to 2009, is too short (seven years) to show any appreciable empirical trend. Undoubtedly, a lot has also happened in the merger regime in recent years.

In summary, the points of departure and hypothesis underpinning this study are as follows:

- a) The purpose of competition law in merger evaluation is to identify and prevent the would-be anticompetitive effects a merger – especially horizontal mergers – would pose on a particular market.<sup>22</sup> Since public interest considerations are not competition related, their inclusion in competition policy is necessary as they provide relief to socio-economic concerns arising directly from a merger.
- b) Despite the Act's valour to provide for the public interest considerations in merger evaluation, the Act is reticent on which considerations – between the competition related and public interest related – should take antecedence in case of conflict.
- c) Given that the primary aim of competition policy is economic efficiency, the authorities have dealt with the ambiguity by holding that competition

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<sup>20</sup> Grimbeek S, Koch SF & Grimbeek RJ "The Consistency of Merger Decisions at the South African Competition Commission" 2013 *South African Journal of Economics* at 22-24.

<sup>21</sup> See chapter 3 below.

<sup>22</sup> Kelly L, Unterhalter D, Goodman I, Smith P, & Youens P *Principles of Competition Law in South Africa* (Oxford, 2017) 171. See also Neuhoff M (ed) *A Practical Guide to the South African Competition Act* (LexisNexis, 2017) 237-238.

considerations take antecedence when in conflict with public interest considerations.

- d) Recent amendments to the Competition Act have come with specific emphasis to public interest considerations in merger evaluation. This added emphasis on public interest considerations does not alter the position that competition considerations triumph over public interest considerations when the two conflict.

#### **1.4. The structure of the thesis**

The study comprises five chapters. The five chapters shall be organised in the following order:

##### **1.4.1. Chapter 1**

Chapter 1 of the study is the introduction, which basically provides an introduction of the subject matter of the study. It also includes the problem statement, which identifies the grey area of the study, as well as the points of departure and hypothesis which underpins the central ideas and arguments of the study.

##### **1.4.2. Chapter 2**

This chapter discusses the general legal principles applicable to merger review under section 12A of the Act.

##### **1.4.3. Chapter 3**

This chapter analyses the most notable merger cases decided by the competition authorities with a view to assess how the conflict between public interest and competition considerations has been resolved.

#### **1.4.4. Chapter 4**

This chapter examines the 2018 Competition Amendment Act and how it impacts on resolving the conflict between competition and public interest considerations in future merger reviews.

#### **1.4.5. Chapter 5**

As is customary, this chapter contains the main observation and conclusion of the entire study. It also includes the recommendations of the study.

## CHAPTER 2: GENERAL PRINCIPLES

### 2.1. Introduction

Section 12A of the Competition Act,<sup>23</sup> (henceforth ‘the Act’), regulates the process of merger consideration. A merger, in the simplest terms, is when two independent firms combine their businesses.<sup>24</sup> The Act provides a more elaborate and technical definition of a merger. In terms of the Act, “a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.”<sup>25</sup> From the definition, it is clear that the acquisition of one firm by another need not only be direct nor in whole. Even indirect acquisition of only a part of another firm’s business is enough to constitute a merger. The acquisition may occur as a result of the purchasing or leasing of shares, an interest or assets of the target firm.<sup>26</sup> It may also occur from an amalgamation or other combination processes with the other firm.<sup>27</sup> The Act goes further to list instances where a person is regarded as having control as per the definition of a merger.<sup>28</sup>

The definition of a merger is significant, as it guides us to know with precision whether what is being assessed is a merger or not, before any further enquiries may take place. However, the definition is important for purposes of this study, only to the extent of determining whether a transaction constitutes a merger. What is germane to this study is the evaluation of mergers in terms of section 12A of the Act. Section 12A provides that in considering a merger the competition authorities must determine the effect of a merger on competition and public interest grounds.

What follows henceforward is an in-depth assessment of the role and importance of the bilateral test of competition and public interest considerations in merger

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<sup>23</sup> Act 89 of 1998.

<sup>24</sup> Neuhoff M (ed) *A Practical Guide to the South African Competition Act 2<sup>nd</sup> ed* (LexisNexis 2017) 235.

<sup>25</sup> Sec 12(1)(a) of the Act.

<sup>26</sup> Sec 12(1)(b)(i) of the Act.

<sup>27</sup> Sec 12(1)(b)(ii) of the Act.

<sup>28</sup> See sec 12(2) of the Act. For the sake of relevance, this provision is not discussed any further.



evaluation. Particular attention will be given to the conflict between competition and public interest considerations, which have sparked a plethora of arguments. The study will analyse the legislature's objective in merger evaluation, particularly with regards to the bilateral test of competition and public interest considerations. The study will also look at the impact of the 2018 Competition Amendment Act, on matters pertinent to this study.

## **2.2. Merger consideration: general overview**

The Competition authorities,<sup>29</sup> whenever required to determine a merger, must assess whether the merger is likely to substantially prevent or lessen competition.<sup>30</sup> If it appears that the merger is likely to substantially prevent or lessen competition, they must then determine whether the merger is likely or not to result in any technological, efficiency or other pro-competitive gain which is greater than, and offset the anti-competitive effect of the merger, that may only result if the merger were approved.<sup>31</sup> The competition authorities must further determine whether the merger can or cannot be justified on substantial public interest grounds.<sup>32</sup> Even if the merger is not likely to substantially prevent or lessen competition, the authorities are still required to determine whether it can be justified on substantial public interest grounds.<sup>33</sup> This bilateral test of competition and public interest considerations in merger evaluation is unique in that not many countries – save for most developing countries – explicitly include public interest considerations in their merger analysis.<sup>34</sup>

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<sup>29</sup> For ease of reference, 'competition authorities' refers to the Competition Commission and the Competition Tribunal whether as separate entities or as a collective, and where the context fits, it also refers to the Competition Appeal Court.

<sup>30</sup> Sec 12A(1) of the Act. See in this regard *Trident Steel (Pty) Ltd & Dorbyl Limited* (89LM/Oct00) [2001] ZACT 2 (30 January 2001).

<sup>31</sup> Sec 12A(1)(a) of the Act.

<sup>32</sup> Sec 12A(1)(b) of the Act. The public interest test under sec 12A(1)(a) is juxtaposed with, and occurs as a result of, the competition test in terms of sec 12A(1)(a). Apart from that, the public interest test in Sec 12A(1)(b) applies even where the merger is not likely to substantively prevent or lessen competition.

<sup>33</sup> Sec 12A(1A).

<sup>34</sup> Smith P & Swan A "Africa: Public Interest Factors in Competition Decisions" 2014 *Global Competition Review*. See also Oxenham J "Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty" 2012 *US-China Law Review* 211.

Unlike restrictive practices, such as price fixing and collusive tendering, and abuse of dominance, mergers do not present the most out-rightly discernible and pernicious anti-competitive effects. This is mainly because of the pre-emptive nature of merger evaluation. The legal test for merger evaluation is one of few legal tests that rely heavily on prediction, as opposed to remedying an act which has already occurred or an act which is imminent to occur. To this effect, the Competition Tribunal in the merger case between *Mondi Limited and Kohler Cores and Tubes (a division of Kohler Packaging Limited)*<sup>35</sup> aptly acknowledged that:

“Of course a prediction must be supported by evidence, but no amount of reliable evidence will remove the predictive or ‘probabilistic’ element in merger adjudication. This is explicitly recognized in the Act, which enjoins us to determine the ‘likely’ consequences of a transaction before us. The Act provides explicitly for a regime where the effect of a merger is assessed prior to its implementation. The necessary implication of this regime is that adjudication is *a priori*, not *post hoc*. Since the merger has not taken place at the time of adjudication and indeed may not take place at all, an element of prediction regarding what may happen after implementation is inherent in the statutory design. Fortunately significant advances in economic theory, particularly in game theory, have eased the task of prediction – based on observations of past behaviour and on the rational responses of profit maximizing firms to a given set of incentives we are able to make predictions from a strong scientific basis...”<sup>36</sup>

With this in mind, it should be axiomatic to envisage the vast contestations that take place in a merger evaluation process. This is mainly because of the predictability of the test. The Tribunal, as highlighted above in *Mondi*, is aware of the challenges that come with this legal test. It, however, notes advances in economic theory as having eased the task. Despite such economic advances, the balance between the competition and public interest considerations still lie unhinged. It is often said that merger evaluation calls for a “predictive judgment, necessarily probabilistic and judgmental rather than demonstrable.”<sup>37</sup> To this, Lewis is quick to warn that this does not entail “guesswork and crystal-ball gazing” – it is an exercise that is fact-based and necessarily requires predicting the likely responses to changes and likely

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<sup>35</sup> *Mondi Limited and Kohler Cores and Tubes (a division of Kohler Packaging Limited)* (06/LM/Jan02) [2002] ZACT 40 (20 June 2002).

<sup>36</sup> *Ibid* [24].

<sup>37</sup> *Hospital Corporation of America v Federal Trade Commission* 807 F.2D 1381 (1986).

changes in the matrix of factual evidence.<sup>38</sup> Notwithstanding, the exercise is still very much probabilistic, thus making the contestations valid.

It is important to note that a pro-competitive merger may still be prohibited for impecuniousness of public interest considerations, and conversely, a merger that promotes public interest considerations may still be prohibited for indigence of competition considerations.<sup>39</sup> What this only presupposes is that the two tests are of equal footing. However, even where equality exists, there still has to be a compromise for those rare occasions where contradictions arise. The question, accordingly, is, where do we draw the line? I employ semantics applied by the Competition Tribunal in an effort to answer the question later in this study.<sup>40</sup> The purpose of this part of the work is to elucidate on the different yet compelling arguments for and against the bilateral test in merger analysis in order to answer the overriding question: which of the two considerations should take precedence when the two conflict?

### **2.2.1. Amendment to the Act**

Despite the teeth that the competition authorities enjoyed under the Act, calls have been made for some time that something must be done to sharpen their teeth even more. Further, the calls included that the regulation of competition law must be much more inclusive. The result, *inter alia*, was the Competition Amendment Act,<sup>41</sup> which came into effect on the 06<sup>th</sup> of July 2019.<sup>42</sup> Of note, for purposes of this study, is the new section 12A(1A) of the Act, as introduced by section 9 of the Amendment Act. Section 12A(1A) provides that “despite” the determination on competition considerations in section 12A(1), competition authorities must “also” determine whether the merger can or cannot be justified on substantial public interest

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<sup>38</sup> Lewis D *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (Edward Elgar 2013) 92.

<sup>39</sup> *Harmony Gold Mining Co Limited/Gold Fields Limited* (93/LM/Nov04) [2005] ZACT 29 (18 May 2005) [45].

<sup>40</sup> See chapter 3 below.

<sup>41</sup> Act 18 of 2018.

<sup>42</sup> Proclamation No. 46 of 2019, Government Gazette vol. 649 12 July 2019 No. 42578.

grounds.<sup>43</sup> This wording implies that whatever the finding is on the competition test, the public interest test must still be carried out. This wording, although slightly different, does not introduce anything new substantively. Save for semantics and choice of words, the amendment is, in substance no different to the old section 12A(1)(b). In fact, the amendment further exacerbates the primary concern of this study. Section 12A(3), which provides a list of public interest factors to be taken into account when conducting merger review, has been amended to include “small and medium businesses” in the public interest grounds.<sup>44</sup> Again, this amendment does not affect the substance of the provision.<sup>45</sup>

## **2.3. Competition considerations**

### ***2.3.1. Importance of regulating merger evaluation***

To understand the competition test in merger evaluation, it is trite to first appreciate the importance of merger evaluation and how it impacts on competition. Neuhoff submits that merger regulation is an attempt to proactively regulate the structure of the economy and markets so as to ensure the optimal functioning of markets.<sup>46</sup> Neuhoff further submits that merger regulation is an effort to prevent market structures from developing in a manner that may enhance the ability of firms to either abuse their unilateral or co-ordinated market power.<sup>47</sup> This, Kelly and others submit, is because a merger may result in the removal of an effective competitor, for example where two firms in the same market propose to merge, thus providing structural incentives for the merged entity to become dominant with the possibility of abusing such dominance.<sup>48</sup>

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<sup>43</sup> Sec 12A(1)(b) which states that the authorities must “otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds...”, bears the same meaning as the amendment.

<sup>44</sup> Sec 9(e) of the Amendment Act.

<sup>45</sup> I provide a more detailed analysis of the implications of the Amendment Act in chapter 4 below.

<sup>46</sup> Neuhoff (n 24) above at 237.

<sup>47</sup> *Ibid.*

<sup>48</sup> Kelly L, Unterhalter D, Youens P, Goodman I, & Smith P *Principles of Competition Law in South Africa* (Oxford, 2017) 171-172.

A more practical example of concern to competition is a horizontal merger. Horizontal mergers, by definition, it is submitted, “reduce the number of competitors in a market.”<sup>49</sup> The impact of such mergers will often depend on the market structures.<sup>50</sup> For instance, in a market with few competitors and where the ability to meet consumer demand is not readily possible, the loss of a single competitor (due to a merger) may have dire competition effects on that particular market.<sup>51</sup> It may well be that two small firms merge in order to enhance incentives and efficiencies, so as to compete effectively with competitors. The latter is not of much concern to the authorities because as Green and Staffiero pithily posit, “[big is not always bad] especially when not directly linked to the possibility of abuse practices but rather to a higher ability to engage in fierce competition, which in general tends to benefit consumers.”<sup>52</sup> The former, however, is of serious concern to competition for its potential anti-competitiveness.

Lewis stresses on the impact of mergers on the structure of markets, by stating that mergers may result in single-firm dominance that may fortify abusive unilateral conduct.<sup>53</sup> Further, the merged entity may gain enhanced incentives that may have the potential to vex competition.<sup>54</sup> In *Masscash Holdings (Pty) Ltd v Finro Enterprises (Pty) Ltd t/a Finro Cash and Carry*<sup>55</sup> the Competition Tribunal drew this apt analogy on the importance of merger regulation:

“Economic theory suggests that unilateral anticompetitive effects are more likely in situations where differentiated-product firms compete closely, each representing the best alternative to the other for a substantial volume of business. Two firms might be very close competitors because they supply products and services that are seen as

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<sup>49</sup> Clarke J *International Merger Policy: Applying Domestic Law to International Markets* (Cheltenham: Edward Elgar Publishing 2014) 18. See also Kelly L, Unterhalter D, Youens P, Goodman I, & Smith P *Principles of Competition Law in South Africa* (Oxford, 2017) 171.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid* 19.

<sup>52</sup> Green J & G Staffiero “Economics of Merger Control” in *The 2007 Handbook of Competition Economics: Global Competition Review Special Report* (GCR 2007) 8 – 9.

<sup>53</sup> Lewis D *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (Edward Elgar 2013) 71.

<sup>54</sup> Coppola M “Consideration of Public Interest Factors in Antitrust Merger Control” *Competition Policy International* 24 March 2015, available at <https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-inantitrust-merger-control/>, accessed on 20 May 2019.

<sup>55</sup> *Masscash Holdings (Pty) Ltd v Finro Enterprises (Pty) Ltd t/a Finro Cash and Carry* (04/LM/Jan09) [2009] ZACT 66 (30 November 2009).

very similar by customers, and a merger between such firms might create a larger reduction in rivalry than would a merger between more differentiated firms.”<sup>56</sup>

The consequence of these combinations has the potential to result in monopolies, which, in turn, result in reduced competition and thus less consumer choice.<sup>57</sup> Competition law, in broad terms, is concerned with regulating conduct that threatens or harms competition, therefore resulting in less choice for consumers. The concept ‘the more the merrier’ is apposite of competition law, thus the interest of competition law in merger control is premised on this basis.

### **2.3.2. Regulating the competition considerations**

The Act enjoins the competition authorities to determine whether the merger will substantially prevent or lessen competition, and if so, whether the merger is likely to result in any technological, efficiency or other pro-competitive gains that may offset the lessening of competition.<sup>58</sup> The authorities must, in their pursuit, first determine the relevant market or markets to be affected.<sup>59</sup> This determination is for an obvious and simple reason: to understand and fully acquaint with the structure of the affected market or markets.

In addition to identifying the relevant market, the authorities must consider certain competition considerations in merger evaluation. For instance, the competition authorities must have regard to, *inter alia*, the merger’s impact on “the actual and potential level of import competition in a market”;<sup>60</sup> ease of entry into the market;<sup>61</sup> the level of concentration, including collusion in the market;<sup>62</sup> and “whether the

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<sup>56</sup> *Ibid* [59].

<sup>57</sup> Hovenkamp H *Federal Antitrust Policy: The Law of Competition and its Practice 3<sup>rd</sup> ed.* (West Group, 2005) 12.1.b. See also Kelly L, Unterhalter D, Youens P, Goodman I, & Smith P *Principles of Competition Law in South Africa* (Oxford, 2017) 172.

<sup>58</sup> Sec 12A(1)(a) of the Act.

<sup>59</sup> Kelly *et al* (n 57) above 192.

<sup>60</sup> Sec 12A(2)(a) of the Act.

<sup>61</sup> Sec 12A(2)(b) of the Act.

<sup>62</sup> Sec 12A(2)(c) of the Act.

merger will result in the removal of an effective competitor”.<sup>63</sup> These factors are necessary in examining the competition considerations of a merger.<sup>64</sup>

### 2.3.2.1. *Defences: efficiencies, technological and other pro-competitive gains*

The Act enlists three defences to justify otherwise ‘anti-competitive’ mergers. It registers efficiencies, technological and other pro-competitive gains as justifications for mergers that would otherwise be considered as being anti-competitive. I deal with each defence briefly *rursus*.

The efficiency defence is considered a full defence in the South African competition law regime.<sup>65</sup> Efficiencies have been concisely defined as “the measure of the level of wastage of the society’s resources.”<sup>66</sup> This presupposes that “[c]onduct is ‘efficient’ if it minimises waste and ‘inefficient’ if it increases waste.”<sup>67</sup> For instance, it may be efficient for firms competing in the same market to merge on account that the merger would result in better economies of scale and thereby increase in size and in consumer outreach. The Competition Tribunal has held that efficiencies must be quantified, verifiable and must be a direct consequence of the merger considered.<sup>68</sup>

There has been little discussion in the South African competition law on the technological and other pro-competitive gains as a defence. I would argue that much of this is because of the broader and more encompassing nature that the efficiency defence tends to play, resulting in merging parties opting to rather raise the efficiency defence alone. Moreover, South Africa is less innovative technologically to have the technological defence manifest more in mergers. However, these defences are nevertheless available to merging parties to prove that the anticipated merger will result in either a technological or any other pro-competitive gain. I can predict

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<sup>63</sup> Sec 12A(2)(h) of the Act.

<sup>64</sup> For the sake of relevance, I do not discuss the competition considerations save to mention them in obiter.

<sup>65</sup> Sutherland P & Kemp K *Competition Law of South Africa* (LexisNexis 2013) para 10.75.

<sup>66</sup> Clarke J (n 49) above 21.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Pioneer Hi-Bred International Inc/ Pannar Seed (Pty) Ltd Case 81/AM/Dec10*.

that in a world that is more and more consumed by digitalisation, these defences may be resorted to in order to justify an otherwise anti-competitive merger.

#### 2.4. Public interest considerations

The legislature thought it fit to have the public interest considerations as a standalone test for merger analysis. The Act provides that the competition authorities, after conducting the competition test, must determine whether the merger can or cannot be justified on substantial public interest grounds.<sup>69</sup> Section 12A(1)(b) on the one hand, is the public interest test which seeks to reconcile the competition test with the public interest test. This provision juxtaposes merger review on whether the merger will likely result in the lessening or prevention of competition and if so, whether it may be justified on competition defences;<sup>70</sup> and whether such a merger may also be justified on listed public interest grounds. Simply put, where a merger is likely to substantially prevent or lessen competition, the authorities must determine whether such a merger is likely to result in any competition defences, and whether it can or cannot be justified on public interest grounds.

Section 12A(1A) on the other hand, is a balancing approach which essentially requires the public interest test to be carried out to balance against the competition effects of a merger. In *Anglo American Holdings Ltd & Kumba Resources Ltd*<sup>71</sup> the Tribunal rightly stated that the public interest inquiry in the old section 12A(1)(b) meant that authorities must have regard to the public interest considerations even where competition is not implicated, because of the word “*otherwise*” in the provision.<sup>72</sup> The public interest in this provision, as the Tribunal noted in *Distillers Corporation SA Limited & Stellenbosch Farmers Winery Group Ltd*,<sup>73</sup> may permit an otherwise anti-competitive merger and conversely permit the prohibition of an

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<sup>69</sup> Sec 12A(1)(b) & sec 12A(1A) of the Act.

<sup>70</sup> Competition defences as provided in the Act are technological, efficiencies or other pro-competitive gain.

<sup>71</sup> (46/LM/Jun02).

<sup>72</sup> *Ibid* [138].

<sup>73</sup> (08/LM/Feb02).



otherwise pro-competitive effect.<sup>74</sup> Further, the public interest inquiry in this provision always emerges as having passed the competition inquiry.<sup>75</sup> Sutherland and Kemp point out that the fact that the two old provisions – section 12A(1)(a)(ii) and 12A(a)(b) – have the same wording, is a reflection on the section’s “mediocre drafting”.<sup>76</sup> I agree. However, this does not change the position already explained.<sup>77</sup>

The competition authorities must determine the effect of a merger on a particular industrial sector or region; employment; the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; the ability of national industries to compete in international markets; and the promotion of greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market.<sup>78</sup> These factors have been listed in the Act as the public interest considerations in merger analysis.

The Competition Commission published “Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998” (“the Guidelines”).<sup>79</sup> The Guidelines seek to provide guidance as to the approach likely to be followed by the Competition Commission in a merger analysis, as well as the kind of information required to satisfy the public interest grounds.<sup>80</sup> The general approach adopted in the Guidelines is as follows:

“6.1. The Commission in general will adopt the following steps when analysing each of the above public interest provisions:

- 6.1.1. determine the likely effect on the public interest;
- 6.1.2. determine whether the alleged effect on a specific public interest is a result of that merger or is merger specific. In other words, is there a sufficient causal nexus between the merger and the alleged effect;
- 6.1.3. determine whether these effects are substantial;

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<sup>74</sup> *Ibid* [214].

<sup>75</sup> *Harmony Gold Mining Company Limited & Gold Fields Limited* (93/LM/Nov04) [43].

<sup>76</sup> Sutherland P & Kemp K *Competition Law of South Africa* (LexisNexis, 2013) 10-92.

<sup>77</sup> *Ibid*. See also Balthasar S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer, 2018) 166-167.

<sup>78</sup> *Ibid*.

<sup>79</sup> Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (as amended). General Notice 86 of 2015, No. 38448.

<sup>80</sup> *Ibid* at p 8 para 4.1.

- 6.1.4. consider whether the merging parties can justify the likely effect on the particular public interest; and  
6.1.5. consider possible remedies to address any likely negative effect on the public interest.”<sup>81</sup>

If it appears on the onset that the effect on the public interest is not merger specific, then it is the end of the enquiry.<sup>82</sup> Further, if the effect is found to be merger specific, the Commission must determine whether the effect is substantial, and if it is found that the effect is not substantial, then that is the end of the enquiry.<sup>83</sup> The Guidelines are novel in that they provide merging parties with the approach likely to be taken by the Competition Commission in considering the public interest grounds, the kind of information needed to satisfy the public interest grounds, and they act as a form of formula to the Commission on which approach to take. However, merger transactions are considered on a case-by-case basis, and to add salt to injury, the Guidelines do not elucidate on how public interest considerations should be determined against competition considerations. The Guidelines, further, do not account for merger cases heard by the Tribunal and the Competition Appeal Court.

The Background Note to the Draft Guidelines holds that it is “imperative to determine the contours of public interest in merger regulation for policy certainty”. Whereas, the International Competition Network recognizes the public interest considerations in merger regulation regime. It states that: “If a jurisdiction's merger test includes consideration of non-competition factors, *the way in which the competition and non-competition considerations interact should also be made transparent.*”<sup>84</sup> It may be that the Guidelines provide the contours within which the public interest considerations should be applied as regards mergers, however, the Guidelines as well as the Act, do not demonstrate how the relationship between competition and public interest considerations should be maintained in case of conflict.

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<sup>81</sup> *Ibid* at p 11 para 6. Emphasis from the source.

<sup>82</sup> *Ibid* at para 6.2.

<sup>83</sup> *Ibid*.

<sup>84</sup> International Competition Network, Recommended Practices for Merger Analysis, the Legal Framework for Competition Merger Analysis. Own emphasis added.

#### **2.4.1. Public interest and the principle of deference**

The public interest considerations, strictly speaking, properly belong to the executive arm of government, since these considerations involve policy making and policy implementation.<sup>85</sup> As a result, it is vital that the competition authorities exhibit some level of deference towards these state institutions in their application of the public interest consideration in merger transactions.<sup>86</sup> In *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd*<sup>87</sup> the Competition Tribunal warned that:

“The competition authorities, however well intentioned, *are well advised not to pursue their public interest mandate in an over-zealous manner* lest they damage precisely those interests that they ostensibly seek to protect.”<sup>88</sup>

The Competition Tribunal subsequently cautioned in *Walmart Stores Inc v Massmart Holdings Ltd*<sup>89</sup> that the application of the public interest does not mean the competition authorities must entertain every concern arising from a merger transaction on account of public interest.<sup>90</sup> The Tribunal succinctly held that: “Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction.”<sup>91</sup> What this clearly demonstrates is that the competition authorities are not tasked with determining whether public interest concerns raised by parties are valid policy concerns, but whether such concerns fall within their powers to the extent of merger control.<sup>92</sup>

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<sup>85</sup> Vivian RW “Constitutionality of South Africa’s Competition Policy” 2011 *Paper presented at the Free Market Foundation*, 21 September 2011.

<sup>86</sup> Gal M “Reality Bites (or Bits): The Political Economy of Antitrust in Small Economies” 2001 *Fordham Corporate Law Institute’s 28<sup>th</sup> Annual Conference on International Antitrust Law and Policy*, 25-26 October 2001 at.

<sup>87</sup> *Shell South Africa (Pty) Ltd / Tepco Petroleum (Pty) Ltd* (66/LM/Oct10).

<sup>88</sup> *Ibid* [58]. Own emphasis added.

<sup>89</sup> *Walmart Stores Inc / Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 42 (29 June 2011).

<sup>90</sup> *Ibid* [35].

<sup>91</sup> *Ibid* [32].

<sup>92</sup> *Ibid*.

## 2.4.2. Limiting the public interest

### 2.4.2.1. *Public interest must be merger specific*

One of the important limitations of the public interest considerations is that they must be merger specific. In *Walmart Stores Inc v Massmart Holdings Ltd*<sup>93</sup> the Competition Tribunal noted that one of the limitations of the public interest considerations is that the public interest considerations must be merger specific. In other words, the merger must be the cause of the public interest concern.<sup>94</sup> Should it be found that the public interest existed preceding and irrespective of the merger transaction, it cannot be regarded as being merger-specific.<sup>95</sup>

In *Glencore International PLC & Xstrata PLC*<sup>96</sup> there were several public interest concerns which did not or could not arise as a result of the merger. The Tribunal noted that it could not do anything more than highlight such concerns as they were not merger-specific, however weighty.<sup>97</sup> The Tribunal was correct not to pursue such public interest concerns any further; doing otherwise would be *ultra vires* as the authorities' role in such circumstances is not to determine whether public interest concerns are legitimate policy goals,<sup>98</sup> but whether there is causation between the concerns and the merger. Absent causation between the public interest concerns and the merger, there can be no basis for intervention by the competition authorities.

### 2.4.2.2. *Public interest must be substantial*

The Act not only charges competition authorities to determine the impact of a merger on public interest grounds, but does so to a specific tune: on *substantial* public

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<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid* [32].

<sup>95</sup> Neuhoff M (ed) *A Practical Guide to the South African Competition Act 2<sup>nd</sup> ed* (LexisNexis 2017) at 274.

<sup>96</sup> 33/LM/Mar12.

<sup>97</sup> *Ibid* [103] to [105].

<sup>98</sup> *Walmart Stores supra* [32].

interest grounds.<sup>99</sup> By substantiality it is meant that the positive effects of a merger on public interest must outweigh the negative effects on competition.<sup>100</sup> Parties alleging substantiality must justify the substantial positive effects on public interest.<sup>101</sup> The competition authorities will then have to balance the negative effects on competition against the positive effects on public interest.<sup>102</sup> Simply put, the public interest must be so compelling that their effect may not be ignored.

The approach to determining substantiality was adopted in *Wal-Mart & Massmart*.<sup>103</sup> In terms of this approach, the substantiality of the public interest is assessed against the background of the entire economy and not only on the context of the merging parties alone.<sup>104</sup> In *Glencore International PLC & Xstrata PLC*<sup>105</sup> for example, the Tribunal protected one hundred jobs in a sector where thousands of jobs are lost every month because of market conditions. Balkin and Mbikiwa submit that this decision is not substantial because it is irreconcilable for every merger to be hamstrung “by the possibility of only a few retrenchments”.<sup>106</sup> The substantiality threshold demands that the context of the South African economy be considered in relation to the public interest effect of a particular merger.<sup>107</sup>

## **2.5. Public interest considerations: a necessary policy in merger evaluation?**

Public interest consideration is a unique policy in merger evaluation. Its inclusion in the Act does not come without sceptics. Here, I consider the arguments advanced both against, and in favour of, the public interest considerations in merger analysis. Although such arguments are academic in nature, they, notwithstanding, contribute towards a better appreciation of the inclusion and application of the public interest considerations in the merger remit.

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<sup>99</sup> Sec 12A(1)(b) of the Act.

<sup>100</sup> Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998 (as amended). General Notice 86 of 2015, No. 38448, at 6.3.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *Walmart-Massmart* [32].

<sup>104</sup> Balkin & Mbikiwa Balancing Competition Act: paradox” 2014 *Business Law and Tax Review* 2.

<sup>105</sup> *Glencore International* (n 96) *Supra*.

<sup>106</sup> Balkin & Mbikiwa above at 2.

<sup>107</sup> *Ibid.*

### **2.5.1. Criticism of the public interest considerations**

Balkin and Mbikiwa contend that in a developing economy such as South Africa, where unemployment is rife and where the need for redistribution of wealth and ownership is needed, the inclusion of the public interest considerations in merger evaluation cannot be faulted.<sup>108</sup> However, the authors submit that the inclusion of the public interest considerations is sometimes at odds with, and is divorced from, the primary objectives of competition law and policy<sup>109</sup> The authors further postulate that the “pendulum has swung too far in the direction of public interest [considerations]”.<sup>110</sup> For instance, in *Aon South Africa (Pty) Ltd and Another v Competition Commission, In re: Aon South Africa (Pty) Ltd v Glenrand MIB Ltd*<sup>111</sup>, the Tribunal approved a merger with imposition of employment conditions that would force the merged entity to retain an “inefficient employee base”. The merger was approved on condition that employees earning a certain amount of money would not be retrenched for a period of two years. Despite the fact that this would result in duplication of job positions, the public interest considerations were still upheld.<sup>112</sup>

*Glencore Internation PLC v Xstrata PLC*<sup>113</sup> is another case where the pendulum is believed to have “swung too far in the direction of the public interest [considerations]”. Here, the Competition Tribunal approved the merger transaction between the parties on condition that no retrenchments of no more than eighty unskilled and semi-skilled workers would take place within the first ninety days, and a maximum of one hundred retrenchments as a result of the merger, forever. Balkin and Mbikiwa ask this important question in respect of the two decisions by the Competition Tribunal: were the public interest concerns *substantial*?<sup>114</sup> They argue that the question of substantiality should be assessed on the context of the economy

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<sup>108</sup> Balkin J & M Mbikiwa “Balancing Competition Act: paradox” 2014 *Business Law and Tax Review* 1.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid* 2.

<sup>111</sup> *Aon South Africa (Pty) Ltd and Another v Competition Commission, In re: Aon South Africa (Pty) Ltd v Glenrand MIB Ltd* (37/AM/Apr11) [2011] ZACT 100 (24 November 2011).

<sup>112</sup> Balkin & Mbikiwa (n 34) above.

<sup>113</sup> *Glencore Internation PLC v Xstrata PLC* (33/LM/Mar12) [2013] ZACT 11 (6 March 2013).

<sup>114</sup> Balkin & Mbikiwa above.

as a whole, rather than on the basis of each transaction.<sup>115</sup> They further reason that the public interest in *Glencore*, for example, was not substantial in that the Tribunal protected one hundred jobs, as an attempt to save the public interest of employment, in a sector where thousands of jobs are lost each month due to market conditions.

The purpose of the Act has come under relentless scrutiny from some commentators. Section 2 of the Act lists a host of purposes for which the Act is intended. Roberts submits that the objectives of the Act are wide-ranging and takes into account concerns that may not always be consistent with one another in the actual assessment of cases.<sup>116</sup> The objectives of the Act as set out in section 2 are as follows:

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

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and to 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 people.”

The public interest considerations in merger analysis, by necessary implication, flow from the objectives of the Act – particularly the last four objectives. The first two listed objectives, on the one hand,<sup>117</sup> can easily be classified as the competition considerations in the widest sense of the Act. The last four objectives,<sup>118</sup> on the other

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<sup>115</sup> *Ibid.*

<sup>116</sup> Roberts S “The Role for Competition Policy in Economic Development: The South African Experience” 2004 *Trade and Industrial Policy Strategies* 7.

<sup>117</sup> (a) To promote the efficiency, adaptability and development of the economy;

(b) To provide consumers with competitive prices and product choices.

<sup>118</sup>(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 to 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

hand, can easily be classified as the public interest considerations in the widest sense of the Act. Marrying these sometimes conflicting considerations has come under scrutiny, most notably from Reekie, one of the earliest antagonists of the public interest considerations. He warns that:

“The task of the competition authorities is difficult. To add [the public interest considerations] ... to their remit may make it impossible...there is no denying that tough political choices often have to be made between the varying objectives of [public interests and competition interests]... Competition authorities, however, should not have to make them. If they so attempt it merely dilutes the predictability of their decision or results in inappropriate lobbying by defendants or plaintiffs.”<sup>119</sup>

Reekie cautions that relying on competition policy to advance the interests of employment, redistribution and black economic empowerment is “inappropriate”.<sup>120</sup> He adds further that when government wishes to achieve public interest objectives, it should apply other policies; the public interest goals are in the “bailiwick of other agencies”.<sup>121</sup> These contentions are merited. We ought to eschew bequeathing objectives other than those primarily intended for a specific institution on that particular institution as government’s effort to resuscitate socio-economic and other public interest objectives, lest the credibility of such institutions be lost. Contrary to this, the drive and indeed obligation to enhance public interest objectives, is for everyone to bear. Furthermore, the authorities’ evaluation of employment interests is not unfettered – it relates to employment concerns only as they arise directly from a merger.<sup>122</sup> To argue that this should be best decided by labour forums would make merger evaluation an unnecessarily and undesirably cumbersome process. A firm balance would, however, have to be struck. This is by no means an easy task.

The International Competition Network has set out three cardinal factors of a successful merger control; these being, timing, costs and certainty.<sup>123</sup> Mergers

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

<sup>119</sup> Reekie WD “The Competition Act: An Economic Perspective” 1999 *South African Journal of Economics* 259.

<sup>120</sup> *Ibid* 284.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Walmart Stores Inc & Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 42 (29 June 2011) [32].

<sup>123</sup> See in this regard the “Guiding Principles For Merger Notification and Review”, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>; and Recommended Practices for Merger Notification Procedures, available at



should be evaluated as expeditiously as possible to curtail the vulnerability of the merging parties. The costs incurred during a merger, being the filing costs and defending costs, should be kept to a minimum. Certainty is also key in merger analysis and this is birthed by an objective analysis of the merger against given legislative standards. Smith and Oxenham argue that an extensive analysis of the public interest considerations can cause delays and result in uncertainty in merger evaluation process and may vitally undercut the aims of the Act.<sup>124</sup>

Some commentators argue that the public interest grounds are misplaced as they are policy-laden and remain the province of the executive and the administrator.<sup>125</sup> Boshoff and others make this emphatic assertion that “[t]he competition authorities are not elected officials with a mandate from the electorate to decide on public policy issues.”<sup>126</sup> Gal argues that making public interest decisions that may impact on social, cultural or political consequences may damage democratic values.<sup>127</sup> The learned author continues that the competition authorities may not be the best-suited to balance the competing considerations as they may not possess the most effective and efficient means of achieving the objectives.<sup>128</sup>

I concede that the arguments respectively advanced by these authors have merit because, on the one hand, it is the government’s sanctuary to determine policy and what is in the public interest. On the other hand, competition authorities, like courts of law, do not have in their arsenal the necessary expertise to make decisions that

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<http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (accessed on 29 June 2019), *et seq.*

<sup>124</sup> Smith P & Oxenham J “What is competition good for – weighing the wider benefits of competition and the costs of pursuing non-competition objectives”, available at <http://www.compcom.co.za/wp-content/uploads/2014/09/140822-What-is-competition-good-for-FINAL.pdf> (accessed on 01 July 2019).

<sup>125</sup> See Vivian RW “Constitutionality of South Africa’s Competition Policy” 2011 *Paper presented at the Free Market Foundation September 21, 2011.*

<sup>126</sup> Boshoff W, Dingley D & Dingley J “The Economics of Public Interest Provisions In South African Competition Policy” 2014 *Competition Commission.* <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf>.

<sup>127</sup> Gal M “Presentation entitled ‘Reality Bites (or Bits): The Political Economy of Antitrust in Small Economies” 2001 *Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy (2001) October 25&26* at 13.

<sup>128</sup> *Ibid.*

involve government policy, failing which is to upset democratic values.<sup>129</sup> While I concede the weight of these arguments, it is desirable to paradoxically advance that the arguments are half-baked and myopic. Firstly, the Competition authorities do not exercise the public interest analysing powers (in mergers) without a source; they do so on account of the legislature's indictment. Secondly, the rule of law, and indeed democratic values, recognise 'a separation within' the separation of powers doctrine, premised on the law of delegation. Finally, to borrow from Bork, "[t]he need of the law generally is for the *systematic development of normative models of [legal and] judicial behaviour...*"<sup>130</sup>

Smith and Oxenham further argue that pursuing a pure competition test is "inherently supportive of growth and employment" in that a departure from this may dissuade investment and thus leading to reduced growth and employment.<sup>131</sup> In my view, this contention is half-baked. One of the basic ways of achieving economic growth is through a wider spread of economic participation by all citizens. This not only guarantees growth but it also guarantees sustainability and independence. It is far much better to have a hundred smaller local firms competing in the markets than just three or four multinational firms competing in the local markets. The latter breeds potential monopolies and/or oligopolies, with higher barriers to entry into markets and reduced consumer choice. Whereas the former typifies a pro-competitive economy that not only promotes competition but promotes inclusivity and more consumer choice, all features apposite of competition law and policy. I would further argue that South Africa currently is a quintessence of the latter yet unemployment is ubiquitous and economic growth is stagnant.

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<sup>129</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC) at [46] to [48], for a more detailed discussion on courts making policy-laden decisions, and why doing so may violate democratic values.

<sup>130</sup> Bork R *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books 1978) 72. Own emphasis added.

<sup>131</sup> *Ibid.* The authors argue that a public interest test is more uncertain than the competition test. Further, investors rely on certainty and predictability. As such, one of the ways of growing the economy and creating employment is through "investorship", therefore putting too much emphasis on the public interest test dissuades growth and employment, thereby defeating the public interest considerations in the process.

### **2.5.2. Approbation of the public interest considerations**

It is often suggested that an understanding of the economic consequences of merger control is necessary to decipher the potential societal impacts of merger control.<sup>132</sup> Whilst competition law and policy may regulate objectives beyond the pure economic, the primary concern of competition law is the economic objectives, nonetheless.<sup>133</sup> Conversely, merger control has manifest and paradoxical effects on the public as a whole.<sup>134</sup> This overture is important for, firstly, it recognises the impact of mergers on the public in general; secondly, the impact of merger control on the public is principally interwoven with the economic effects (competition considerations); and finally, the public as well as competition considerations in merger control cannot be divorced from one another. As Lewis correctly points out, merger evaluation – here and elsewhere – is always influenced by the impact of a merger on a particular industrial sector, employment and international competitiveness.<sup>135</sup> Though in some jurisdictions the public interest in merger evaluation may not be explicitly mentioned, they nevertheless somehow subliminally influence the determination.<sup>136</sup>

Modernisation demands that competition law be construed and enforced in a way that not only accords with competition considerations, but with economic development in the sense of public interest considerations.<sup>137</sup> In the South African context therefore, public interest considerations are an important feature.<sup>138</sup> As a result, the inclusion of the public interest must be read in context.<sup>139</sup> It is submitted that public interest should be the motif of all government action, and that the

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<sup>132</sup> Clarke J *International Merger Policy: Applying Domestic Law to International Markets* (Cheltenham: Edward Elgar Publishing 2014) 16.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> Lewis D “The Role of Public Interest in Merger Evaluation – Speech” Speech given at the International Competition Network, Merger Working Group, Naples, Italy 28-29 September 2002. [www.comptrib.co.za](http://www.comptrib.co.za).

<sup>136</sup> *Ibid.*

<sup>137</sup> Gal MS & Fox EM in Gal MS & others *The Economic Characteristics of Developing Jurisdictions – Their Implications for Competition Law* 2015 303 – 304.

<sup>138</sup> Dhall V (ed) *Competition Law Today – Concepts, Issues, and the Law in Practice* (Oxford, 2007) 340 & 342.

<sup>139</sup> Hartzenberg T “Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa’s Competition Policy” 2004 *Trade Law Centre Southern Africa* 17.

enforcement of competition law is ultimately in the public interest.<sup>140</sup> It is further submitted that public interest considerations may be integrated in statutory provisions.<sup>141</sup> This integration of the public interest considerations in statutory provisions is to benefit the larger society. In the present context, the integration of the public interest considerations in section 12A of the Act is to benefit a majority of South Africans so as to protect and promote, *inter alia*, employment and the ability of small firms to enter markets.

Njisane rightly posits that the public interest considerations have been included in the Act as government's effort to satisfy the exigent need for South Africa's redistributive justice.<sup>142</sup> The advent of democracy meant that the government had to come up with new laws and policies in terms of which the economic level grounds of all citizens would be equalled, especially of those previously excluded under apartheid.<sup>143</sup> And the public interest considerations in merger analysis would be a part of this measure.<sup>144</sup> This finds support in what Lewis firmly postulates: that the competition authorities in developing countries have a long way to go to gain credibility and legitimacy, and to achieve this, the competition authorities should not stand "aloof from those issues that most engage popular sentiment".<sup>145</sup> By "those issues that most engage popular sentiment" the author refers to the public interest considerations. Lewis further argues that a competition policy that does not recognise the public interest considerations would "consign the act [*sic*] and the authorities to the scrap of the heap". This observation is endorsed by this work, though to a certain extent.<sup>146</sup>

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<sup>140</sup> Balthaser S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer 2018) 62.

<sup>141</sup> *Ibid.*

<sup>142</sup> Njisane, Y. "The Rise of Public Interest: Recent High Profile Mergers" 2011 [www.publicinterestlawgathering.com/wp-content/.../the\\_rise\\_of\\_public\\_interest.docx](http://www.publicinterestlawgathering.com/wp-content/.../the_rise_of_public_interest.docx) at 3.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.* Whether the public interest considerations in merger evaluation work for the benefit of the larger society and whether they contribute as intended to the developmental project, is assessed in chapter 4 below.

<sup>145</sup> Lewis (n 135) *supra et seq.*

<sup>146</sup> Whilst I agree with the learned author's observation, I should hasten to warn that a capricious concurrence of the observation may be both dangerous and misplaced. The danger that it poses lies in that, while the public interest considerations are adopted as a means to achieving credibility and legitimacy, others may paradoxically and cogently argue that the public interest considerations in fact discredits and delegitimizes the South African competition policy on account of treading on non-

The government of 1994,<sup>147</sup> inherited an economy clothed in high levels of inequality and concentration of resources in the hands of a few individuals and firms.<sup>148</sup> These needed to be addressed urgently in a democratic state and the public interest considerations are seen as part of the tools of undoing the past injustices.<sup>149</sup> The proponents of the public interest considerations contend that the inclusion of the public interest in competition policy – at least in merger regulation – is essential in developing countries, where competition policy is expected to contribute to the assuagement of poverty and other social needs.<sup>150</sup> The preamble to the Act makes the following recordal in favour of the above contentions:

“The people of South Africa recognise:

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 anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

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

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

*That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.”<sup>151</sup>*

The preamble goes further to state that the Act was enacted in order to provide all South Africans with an equal opportunity to actively participate in the economy; to regulate the transfer of economic ownership in a way that accords with the public interest; and to create greater capability for all South

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competition matters. The misplacement of the argument lies in the simple dialectic that the public interest considerations in merger evaluation may have been wrongly bequeathed to the competition authorities, whose expertise is not in determining public policy.

<sup>147</sup> The government of a democratic South Africa.

<sup>148</sup> Smit C “The Rationale for Competition Policy: A South African Perspective”. *Paper read at the biennial Economic Society of South Africa Conference*, 7-9 September 2015, Elangeni Holiday Inn, Durban, Kwazulu-Natal, South Africa 1. Last accessed 01 July 2019 at: [https://econex.co.za/wp-content/uploads/2015/04/econex\\_researcharticle\\_10.pdf](https://econex.co.za/wp-content/uploads/2015/04/econex_researcharticle_10.pdf).

<sup>149</sup> *Ibid.*

<sup>150</sup> Lewis D “Competition Regulation: The South African Experience” *Paper presented at ISCCO 2000 Conference*, in Taipei.

<sup>151</sup> Own emphasis added.

Africans to compete in the international markets. All these objectives form a part of the public interest considerations.

The arguments for the inclusion of the public interest considerations in merger evaluation seem to centre on the history of inequality and economic exclusion,<sup>152</sup> as well as the rampant levels of unemployment.<sup>153</sup> This centre, given that law is said to be a dynamic phenomenon whose focus is influenced by prevailing political dispensations and socio-economic imperatives,<sup>154</sup> *ipso facto* is well grounded. The past whence South Africa hails cannot be ignored in enacting as well as interpreting laws. This past, in line with constitutional imperatives, calls for a contextual, generous and purposive interpretation of the provision.<sup>155</sup>

## 2.6. Conclusion

From a purely economic perspective, the competition considerations alone should suffice as the yardstick for merger analysis. However, from a socio-economic perspective, it also makes sense to include the public interest considerations in merger analysis. For balance, the Act juxtaposes merger evaluation upon both factors. Striking a balance between the two complex amalgams of considerations, which are sometimes at war with one another, may not be an easy task.

Proponents of the public interest considerations, on the one hand, posit that, because of South Africa's long history of exclusion and marginalisation, the merger regime should be cognisant of this historical fact. They contend that the preamble to the Act as well as its objectives are instructive on the kind of merger regime we

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<sup>152</sup> In its "Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers Constraints and Opportunities" Report, published in March 2018, The World Bank named South Africa as the country with the worst inequality. <http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> (accessed on 01 July 2019).

<sup>153</sup> Stats SA currently estimates unemployment in South Africa at 27.6%, the highest in the world. <http://www.statssa.gov.za/?s=unemployment+rate&sitem=content> (accessed on 01 July 2019).

<sup>154</sup> Brooks PEJ "Redefining the objectives of South African competition law" 2001 *Comparative and International Law Journal of Southern Africa* vol 34:3 296.

<sup>155</sup> I deal with the relevant statutory tools of interpreting legislation within the context of sec 12A of the Act in Chapter 3 below.

should have – being a generous one which gives effect to public interest considerations. They argue that any developing country which fails to cater for social justice and transformatory needs in its competition law remit, may easily be discredited by the larger public.

On the other hand, antagonists of the public interest considerations submit that, competition law, and merger control in particular, should be about the maintenance and promotion of competition and economic efficiencies. They contend that the promotion and maintenance of competition should be the primary determinant, and that non-competition factors will inevitably take care of themselves, as long as competition thrives.

Both ends of this rod are sensible, providing competition authorities with a difficult choice to make. How these are then harmonised to ensure an effective and balanced interpretation of mergers is a task best left for the next chapter.

## CHAPTER 3: FINDING A BALANCE BETWEEN COMPETITION AND PUBLIC INTEREST CONSIDERATIONS: CASE ANALYSIS

### 3.1. Introduction

In the South African context, merger evaluation is juxtaposed on a bilateral test of competition and public interest considerations.<sup>156</sup> The competition authorities,<sup>157</sup> enjoined with applying this bilateral test, face an onerous task often imbued in conflicting sentiments. On the one hand, they face steadfast opprobrium from big businesses and analysts, who are averse to the idea of public interest considerations, when giving heed to the public interest considerations in merger analysis. Paradoxically, the competition authorities in the same providence, face manifest commendation from the trade unions and the general public. On the other hand, where the competition authorities prefer a more competition-based approach to merger analysis, the inverse is true as regards the sentiments from the different stakeholders. These sentiments find more traction owing to the fact that the legislature does not elucidate on which consideration, competition or public interest, should take precedence when there is conflict.<sup>158</sup> The question that is then the cloth upon which this chapter is pegged is: what happens where – as here – the Act does not provide guidance on what approach to follow when these two equally important legal determinations conflict?

The focus of this chapter is to analyse some of the most contentious and seminal merger cases decided by the competition authorities. The analysis is aimed at showing the approach preferred by the competition authorities in deciding which, between the competition and the public interest considerations, takes precedence when there is conflict between the two.

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<sup>156</sup> Sec 12A(1) & (3) of the Competition Act 89 of 1998.

<sup>157</sup> Reference to 'the competition authorities' in this work refers to the Competition Commission, the Competition Tribunal and the Competition Appeal Court, either separately or joint.

<sup>158</sup> *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13 (22 February 2002) at para 38.



### **3.2. Brief background: the ambiguity in section 12A of the Act**

As previously stated, section 12A(1) of the Act states that: “whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition”<sup>159</sup> The Act then goes further to provide that, despite the outcome of its competition determination, the authorities must determine “whether the merger can or cannot be justified on substantial public interest grounds”.<sup>160</sup>

What the Act omits to address is how, in case of conflict, the competition considerations and the public interest considerations should be tallied. Put differently, which of the two considerations or test should take precedence in the event of conflict. It is worthwhile to note that merger analysis has not been short of such conflict as regards the two legal tests. Below I deal with case analysis to illustrate some instances where conflict between the two tests was visible.

### **3.3. Case analysis**

#### ***3.3.1. Metropolitan Holdings Ltd v Momentum Group Ltd***

In *Metropolitan Holdings Ltd v Momentum Group Ltd*<sup>161</sup> the Competition Tribunal conditionally approved the merger between two public companies, which provide insurance cover to their clients and also offered financial services. The Competition Tribunal found that the merger did not raise any competition concerns as neither the evidence nor the Competition Commission’s market investigation found that the merger is unlikely to substantially prevent or lessen competition.<sup>162</sup> Moreover, the Tribunal also found that the merger would result in more efficiencies, such as

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<sup>159</sup> Sec 12A(1) of the Act which goes further to enumerate certain competition factors to be considered in merger analysis, which factors are not relevant for the purpose of this study.

<sup>160</sup> Sec 12A(1)(b) & 12A(1A) of the Act.

<sup>161</sup> (41/LM/Jul10) [2010] ZACT 87 (9 December 2010).

<sup>162</sup> *Metropolitan-Momentum* [52] & [60].

enhanced growth opportunities, cost synergies and economies of scale.<sup>163</sup> From a competition perspective, this merger is textbook pro-competitive.<sup>164</sup>

As mandated by the Act, the Tribunal also had to consider the public interest issues arising from the merger. The Tribunal found that the merger gave rise to only one public interest concern – employment. The merging parties estimated that the merger may result in one thousand (1000) retrenchments. This estimated number of retrenchments was found to be “*substantial*” and it was proposed that the merger must then pass the hurdle of being justified in terms of this concern to either be approved (conditionally) or prohibited.<sup>165</sup> The Tribunal found that where a *prima facie* public interest ground has been alleged, the burden of proof shifts to the merging parties to prove that the public interest concern can be justified.<sup>166</sup> The Tribunal propounded the following test:

“The evidential burden that the parties must meet, once the *prima facie* case has been established, must satisfy two criteria namely that:

1. a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and
2. the public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.”<sup>167</sup>

The Tribunal further explained that despite the merging parties having made a good efficiency argument for the loss of substantial jobs, the efficiency gain must nonetheless be justified on a ground that is public in nature – even those public grounds not mentioned in the Act – to countervail the public interest in the preservation of jobs.<sup>168</sup> The efficiency gains, the Tribunal found further, must therefore be of a public rather than a private nature. This presupposes that,

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<sup>163</sup> *Metropolitan-Momentum* [71].

<sup>164</sup> Despite the competition challenges raised, the merger would not likely prevent or lessen competition in any relevant potential market. The industry in which the parties operated had other large competitors, such as the merging parties, and smaller competitors, thus making the industry evenly spread-out. These other larger and smaller competitors would exercise a competitive constraint on the merged entity. – [41]-[42].

<sup>165</sup> *Metropolitan-Momentum* [100].

<sup>166</sup> *Metropolitan-Momentum* [68].

<sup>167</sup> *Metropolitan-Momentum* [70].

<sup>168</sup> *Metropolitan-Momentum* [71] *et seq.*

notwithstanding the plethora of efficiency gains to be accrued to, for instance shareholders, at the expense of substantial job losses, the justification of such job losses must be grounded upon a public consideration to countervail the job losses. Therefore, the cutting of costs resulting from a merger thereby benefiting shareholders through increased dividends as an efficiency, fails to meet the public interest standard as such a motive is intended for private gain rather than for a public gain. The Tribunal found that the merger fails to satisfy the first leg of the criteria propounded above in that there is no rational link between the job losses and the efficiencies sought to be achieved.<sup>169</sup> Alternatively, if the merging parties have satisfied the first leg of the test (which they did not), the Tribunal found that the parties failed to show any public interest that would justify the job losses.<sup>170</sup>

Although the merging parties did not justify the substantial employment loss, the Tribunal found that the employment losses do not justify the prohibition of the merger.<sup>171</sup> As a means to ameliorate the potential job losses, the merging parties had planned to redeploy, retrain and offer early retirement packages for the affected employees.<sup>172</sup> The Tribunal found that this was not adequate under the circumstances and imposed a moratorium on employment.<sup>173</sup> The moratorium stated that the merged entity “shall ensure that there are no retrenchments in South Africa resulting from the merger for a period of 2 (two) years”.<sup>174</sup> Thus, the Tribunal preferred an interpretation that saved the merger on its positive competition considerations rather than prohibit it based on its adverse effects to the public interest, with imposition of conditions to alleviate the adverse public interest finding.

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<sup>169</sup> *Metropolitan-Momentum* [92].

<sup>170</sup> *Metropolitan-Momentum* [100].

<sup>171</sup> *Metropolitan-Momentum* [117].

<sup>172</sup> *Metropolitan-Momentum* [79].

<sup>173</sup> *Metropolitan-Momentum* [102].

<sup>174</sup> *Metropolitan-Momentum* [120] & at Annexure “A2” of the consolidated order.

### **3.3.2. Distillers Corporation (SA) Limited & Stellenbosch Farmer's Winery Group Ltd**

In *Distillers Corporation (SA) Limited & Stellenbosch Famer's Winery Group Ltd*,<sup>175</sup> Distillers Corporation intended to acquire the assets and liabilities of the Stellenbosch Farmer's Winery Group (SFW), including the latter's shareholding in some companies.<sup>176</sup> This acquisition, in competition terms, translated to a merger. Both these firms operated in the production and wholesaling of alcoholic beverages.<sup>177</sup> The parties contended that the rationale for the merger is that the merger will lead to increased efficiencies that will enhance international competitiveness.<sup>178</sup> They substantiated this contention by arguing that, but for the merger, "neither company could afford the intensive marketing strategies nor effectively manage the supply and distribution of alcoholic products overseas."<sup>179</sup> The Tribunal found that in respect of four categories of identified alcohol markets, in three of those markets, the merger will not result in a substantial lessening or prevention of competition.<sup>180</sup> In respect of the third market, the proprietary spirits market, the Tribunal found that the merger will likely lessen or prevent competition on the evidence that the merger will likely result in significant barriers to entry in this market.<sup>181</sup>

The merging parties raised public interest grounds, which justify the implementation of the merger. These public interest grounds are those in subparagraphs (a) and (d) of section 12A(3).<sup>182</sup> The intervening unions relied on the effect of the merger on employment as a ground to prohibit the merger.<sup>183</sup> In respect of the quagmire resulting from the conflict between the competition and public interest

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<sup>175</sup> (08/LM/Feb02).

<sup>176</sup> *Ibid* [10].

<sup>177</sup> *Ibid* [[3] & 4].

<sup>178</sup> *Ibid* [19].

<sup>179</sup> *Ibid*.

<sup>180</sup> *Ibid* [169], [194] & [207]. These are in respect of the Flavoured Alcoholic Beverages, value spirits and premium spirits markets.

<sup>181</sup> *Ibid* [198] & [202].

<sup>182</sup> These public interest grounds are those of the impact of a merger on – (a) a particular sector or industry; and (d) the ability of national industries to compete in international markets.

<sup>183</sup> *Distillers Corporation (SA) Limited supra* [213].

considerations, and the conflict amongst the public interest grounds, the Tribunal stated the following:

“Thus the public interest asserted pulls us in opposing directions. However, the legislation expressly allows for this. Just as the legislation may allow the public interest to resurrect a merger that will harm 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 anticompetitive effect.”<sup>184</sup>

In striking a balance between the conflicts, the Tribunal stated that the language of the provision is instructive; adding that the wording “...otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)” is consistent with both a balancing approach and a reconciliation approach.<sup>185</sup> The Tribunal found that the number of jobs affected by this merger was estimated to be 1 414, with 630 people who have accepted voluntary retirement and with 621 who have accepted voluntary retrenchment, and a remainder of 164 people to be forcibly retrenched.<sup>186</sup> The Tribunal found that although the job losses were significant, the prodigious acceptance of voluntary retrenchment and retirement packages has reduced the adverse effects, and on balance, the remaining effect on employment did not constitute a substantial public interest ground justifying the prohibition of the merger.<sup>187</sup> The Tribunal remarked in *obiter* that it did not need to evaluate the parties’ public interest claim, because it would not alter the outcome of its finding on the competition criteria. The Tribunal stated that the public interest claims advanced by the merging parties aimed at resurrecting the merger already approved on competition considerations were not pertinent.<sup>188</sup>

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<sup>184</sup> *Distillers Corporation (SA) Limited supra* [214].

<sup>185</sup> *Ibid* [218] & [219].

<sup>186</sup> *Ibid* [227].

<sup>187</sup> *Ibid* [243].

<sup>188</sup> *Ibid* [246].

### **3.3.3. Aon South Africa (Pty) Ltd and Another v Competition Commission and Glencore Internation PLC & Xstrata PLC**

I discuss these two separate mergers together for reasons that will self-eventuate further below in the discussion. In *Aon South Africa (Pty) Ltd and Another v Competition Commission, In re: Aon South Africa Glenrand MIB Ltd*<sup>189</sup> the Competition Tribunal approved the merger between the two merging parties subject to conditions. The merger was between Aon South Africa and Glenrand MIB, both firms conducting business as short-term insurance brokers and risk advisory.<sup>190</sup> It was perspicuous that the transaction was not likely to prevent or lessen competition, therefore, calling for no competition analysis.<sup>191</sup> Albeit the transaction did not present any competition concerns, the analysis on the public interest concerns raised by the transaction warranted analysis for purposes of this chapter.

The merger had a substantial negative impact on employment. Approximately, 220 employees out of 1500 (which constituted about 15% of the merged entity's workforce) was to be retrenched as a result of the merger.<sup>192</sup> The parties contended that the reason for the potential retrenchments was, *inter alia*, that there would be duplication of roles at certain senior and executive management positions.<sup>193</sup> The parties, upon further evaluation, came to a number of retrenchments lower than the initial one and thereby lower number of redundancies.<sup>194</sup> However, the Tribunal still narrowed the number of employees to be retrenched, despite this lowered estimate. The Tribunal imposed a condition that the merged entity will not dismiss any employee earning less than R15 000 per month and that there will be no retrenchments of more than 24 employees earning between R15 000 and R30 000 per month, for a period of two years resulting from the merger.<sup>195</sup>

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<sup>189</sup> (37/AM/Apr11) [2011] ZACT 100 (24 November 2011).

<sup>190</sup> *Ibid* [7].

<sup>191</sup> *Ibid* [1].

<sup>192</sup> *Ibid* [8] & [9].

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid* [16].

<sup>195</sup> *Ibid* [28].

In *Glencore Internation PLC & Xstrata PLC*<sup>196</sup> the Competition Tribunal conditionally approved the merger between the parties. The primary acquiring firm was Glencore which provides services relating to natural resources, and has activities in, *inter alia*, the mining, smelting, refining and processing of metals.<sup>197</sup> The primary target firm was Xstrata, which is involved in the production of coal, ferrochrome, vanadium, and copper, amongst others.<sup>198</sup> The parties submitted that the rationale for the proposed transaction was that the transaction was a combination of two complementary businesses with ancient links.<sup>199</sup> Further, the transaction will lead to enhanced scale and market positions in the production and marketing of key commodities.<sup>200</sup>

The Tribunal found no cogent evidence that the proposed transaction would likely substantially prevent or lessen competition in the relevant market. The merger, however, raised employment concerns.<sup>201</sup> To mitigate the possible employment harm, the Tribunal imposed a condition that no more than 80 semi-skilled employees may be retrenched, and in respect of semi-skilled and unskilled employees, the merging parties must conduct a review whether the retrenchment of these classes of employees is required, and if so, the merged entity may only retrench them two years after the end of the review; and that no more than 100 employees of this class may be retrenched as a result of the merger forever.<sup>202</sup> This is notwithstanding the duplication of positions already pleaded by the parties.<sup>203</sup>

Although the conditions in both cases were in relation to the public interest, they nonetheless affected the merged entity's aptitude to compete effectively – more so because the mergers were found to not likely lessen or prevent competition. Balkin and Mbikiwa proffer that the conditions imposed would render the merged entities uncompetitive “because it forced it [the merged entities] to maintain an inefficient

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<sup>196</sup> (33/LM/Mar12) [2013] ZACT 11 (6 March 2013).

<sup>197</sup> *Ibid* [27].

<sup>198</sup> *Ibid* [31].

<sup>199</sup> *Ibid* [35].

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid* [96].

<sup>202</sup> *Ibid* [99] & [100].

<sup>203</sup> *Ibid* [96].

employee base at a much greater cost than its rivals.”<sup>204</sup> The authors then question whether the decision to impose such conditions was appropriate.<sup>205</sup> They further submit that not all jobs warrant saving if regard is had to the substantial impact in the context of the South African economy, as doing so may be irreconcilable with broader competition objectives.<sup>206</sup>

### **3.3.4. Anheuser-Busch InBev SA/NV & SABMiller Plc**

In 2016, the Competition Tribunal conditionally approved the large merger between the largest beer company in the world and the second largest beer producer on a global scale, in the case of *Anheuser-Busch InBev SA/NV & SABMiller Plc* (“*AB InBev*”).<sup>207</sup> No doubt, a merger between two firms of such gargantuan status globally, will attract the attention of all relevant regulators in the countries in which the firms operate.<sup>208</sup> Both these firms were in the market of manufacturing beverages, but more pertinent to the merger, was the manufacturing of clear beer and flavoured alcoholic beverages (“*FAB*”).<sup>209</sup>

The first competition concern that the Tribunal had to grapple with is the likelihood of the increased market share that the merged entity would enjoy post-merger in respect of the beer market. To mitigate this possibility, the merging firms undertook to divest certain SABMiller brands in South Africa, which collectively account for 1.4% of the market share in South Africa.<sup>210</sup> In turn, the merging party was estimated

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<sup>204</sup> Balkin J & M Mbikiwa “Balancing Competition Act: paradox” 2014 *Business Law and Tax Review* 2.

<sup>205</sup> Chapter 2 above discusses substantiality in more detail, as propounded by the Competition Tribunal in *Wal-Mart & Massmart* case.

<sup>206</sup> Balkin & Mbikiwa above.

<sup>207</sup> LM211Jan16 [1].

<sup>208</sup> SABMiller is an iconic manufacturing firm in South Africa which operates in over 75 countries. Therefore, the Tribunal’s jurisdiction is founded on the basis that SABMiller has interest in the South African beverages manufacturing market – [9]. Another ground for jurisdiction is that the acquiring firm, Anheuser-Busch InBev, distributes beer products in South Africa although with a miniscule market share – [12].

<sup>209</sup> *AB InBev* supra [10].

<sup>210</sup> *Ibid* [12].



to gain a market share of 0.1%, thus diminishing rather than enhancing its market presence.<sup>211</sup>

The Tribunal stated that the challenge with the divested and gained market shares is that there is a projection of what market share might be gained in the medium term.<sup>212</sup> The Tribunal found that the projection of possible market share to be gained is premised on untested assumptions, and found that in the clear beer market, the merger is unlikely to lead to an increase in the merged firm's market share.<sup>213</sup> It seems to me, on the one hand, prudent to err on caution's side and state that the Act does not prohibit dominance – only its abuse – thus, the divestment of some market share in return of lesser market share, is a consideration that is at odds with the Act. This is so because the divestment condition aims to reduce the merged entity's dominance. Assuming, on the other hand, that dominance in the form of increased market share was likely to lessen or prevent competition, the Tribunal misdirected itself in accepting that the projected market share to be gained is “insufficiently probative”.<sup>214</sup> I buttress this submission by likening it with the following illustration: when a Goliath join arms with another Goliath, it is the Davids that stand to suffer;<sup>215</sup> therefore, to curtail this suffering, the consortium between the two Goliaths must be prohibited, or hatched about with stern conditions.<sup>216</sup>

In contrast to the beer market, the Tribunal found that the merger does not lead to a substantial lessening or prevention of competition in the FAB market.<sup>217</sup> The Tribunal based this finding on the basis that SABMiller, being the largest player in the local

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<sup>211</sup> *Ibid* [17].

<sup>212</sup> *Ibid* [18].

<sup>213</sup> *Ibid* [19].

<sup>214</sup> *Ibid* [18].

<sup>215</sup> This is notwithstanding the rather ironic and improbable turn of events in the metaphor.

<sup>216</sup> My submission is based on the fact that it is inevitable that the merged entity's market share will increase, thus the increased probability of market foreclosure in this sector. To avoid this, there are two extremes available. Firstly, prohibit this merger with the possibility of a counter-factual to the merger being that AB InBev may be a potential competitor of SABMiller in South Africa. The Tribunal found that the Competition Commission in its market inquiry did not consider this possibility despite a document by AB InBev tantalising with the possibility – [15]. This should have been probed further. Whether such a possibility was real or superficial, remains moot at this point because this would have required further assessment. Secondly, impose stricter conditions to ensure that the possibility of market foreclosure does not result because of the merger. The divestment condition is, with respect, simply not sufficient.

<sup>217</sup> *AB InBev supra* 21.

FAB market, will, post-merger, as per the divestiture, have reduced economic interest in this market.<sup>218</sup> Furthermore, AB InBev is also a producer of highly renowned FAB products which, if introduced in the local market will make the FAB market more competitive.<sup>219</sup> I agree with this finding, as it allows the local FAB market to be more competitive – especially with the divestment – allowing firms which were subsidiaries of SABMiller to trade independent of SABMiller. This promoted healthy competition and ensures a widespread of participation in the local FAB market.

The second competition concern was that the merger could lead to import substitution of inputs at the peril of local industry.<sup>220</sup> The other one is that the merged entity sources all available inputs from the local industry to support its international operations, thus forcing local competitors to source inputs from more expensive suppliers.<sup>221</sup>

The merger raised public interest concerns which can be properly classified as falling under section 12A(3)(b) and (c) of the Act.<sup>222</sup> As a measure to alleviate these public interest concerns, the parties undertook to invest two billion one hundred million rand on transformation.<sup>223</sup> Although the competition authorities are conferred with the power to approve a merger *subject to any* conditions,<sup>224</sup> such conditions must not be unrelated to the merger, or must not protect interests that do not stem from the merger.<sup>225</sup>

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<sup>218</sup> *Ibid* 20.

<sup>219</sup> *Ibid*.

<sup>220</sup> *Ibid* 26. This is because the combined buying power of the merged entity and AB InBev's extensive procurement network, could lead to inputs being obtained more cheaply from international suppliers.

<sup>221</sup> *Ibid*.

<sup>222</sup> These public interest concerns are the impact of a merger on employment and, the ability of small businesses, or firms owned or controlled by historically disadvantaged persons, to become competitive.

<sup>223</sup> *AB InBev Supra* 31.

<sup>224</sup> The Competition Commission derives this power subject to sec 14(1)(b); the Competition Tribunal in terms of sec 16(2); and the Competition Appeal Court in terms of sec 17(3).

<sup>225</sup> In *Wal-Mart & Massmart*, the Competition Appeal Court stated that the public interest – and by extension, their conditions – must be merger-specific.

In my opinion, the merger should not have been approved, or if so approved, subject to stricter competition conditions. The failure by the Competition Commission and subsequently the Tribunal, to probe further into the counterfactual that the parties may be potential competitors is staggeringly odd. In *Tongaat-Hulett Group Limited & Transvaal Suiker Beperk*<sup>226</sup> the Tribunal stated that merger analysis is concerned with the plausible counterfactual of potential competition between the merging parties, and that this consideration “complies with the standards established by the Act”.<sup>227</sup> The conditional approval of this merger shows three things. Firstly, that the competition considerations rank higher than the public interest considerations in that the merger was approved on competition terms despite the substantially adverse findings on public interest. Secondly, that instead of prohibiting a merger based on its negative public interest effects, it is far much better to approve it and cushion the negative effects on public interest with the imposition of conditions – no matter how ominously burdensome and overreaching. Lastly, approving the merger on competition terms and challenges, as are present in the case, with such lax competition conditions, shows a preference for competition considerations.

### **3.3.5. *Tongaat-Hulett Group Limited & Transvaal Suiker Beperk***

In *Tongaat-Hulett Group Limited & Transvaal Suiker Beperk*<sup>228</sup> the Tribunal prohibited the merger between the parties. The merger was between Tongaat-Hulett Group (THG), being the acquiring firm and the second largest sugar producing company in South Africa.<sup>229</sup> The target firm was Transvaal Suiker Beperk (TSB), which was the third largest sugar producing company in South Africa.<sup>230</sup> Both these firms are in the sugar producing industry. The Tribunal found that the merger would result in the merged firm having market power, and that it was likely to prevent or lessen competition in the South African sugar market.<sup>231</sup> The merging parties raised the defences of technological, efficiency and other pro-competitive gains as

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<sup>226</sup> (83/LM/Jul00).

<sup>227</sup> *Ibid* [84].

<sup>228</sup> (83/LM/Jul00).

<sup>229</sup> *Ibid* [15].

<sup>230</sup> *Ibid*.

<sup>231</sup> *Ibid* [95].

offsetting the anti-competitive effect of the merger.<sup>232</sup> The Tribunal found that the defences raised, properly measured against the negative effect of the merger on competition, do not offset the anti-competitiveness of the merger and must therefore fail.<sup>233</sup>

The remaining question for determination was whether the merger can or cannot be justified on substantial public interest grounds. The merging parties entered a public interest defence under all the categories of the listed grounds.<sup>234</sup> Amongst others, the merging parties averred that due to its large economies of scale and opportunities, the merged entity would be in a position to expand its operations and therefore create employment opportunities of over 3000 additional jobs.<sup>235</sup> Further, the parties contended that the merger would benefit the region of Mpumalanga as the parties undertook to continue to procure their inputs of their Mpumalanga operations from local suppliers, and that they would sell a portion of TSB's 8000 hectares of land to historically disadvantaged communities.<sup>236</sup> Despite these benignly positive effects to the public interest, the Tribunal found that they are not "sufficiently substantial to countervail the negative impact of the merger on competition".<sup>237</sup> This finding goes a long way to show that despite the most positive effects of a merger on the public interest, the role of the public interest remains secondary to that of the competition considerations<sup>238</sup> – and that a merger that is "perfectly bad" for competition, cannot be saved by its positive impact on the public interest.

### **3.3.6. Walmart Stores Inc & Massmart Holdings Limited**

The *Walmart Stores Inc & Massmart Holdings Limited*<sup>239</sup> ("Walmart-Massmart") merger case was described as one of the seminal cases on public interest

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<sup>232</sup> *Ibid* [104] – [107].

<sup>233</sup> *Ibid* [109] – [110].

<sup>234</sup> *Ibid* [111].

<sup>235</sup> *Ibid* [112].

<sup>236</sup> *Ibid* [113].

<sup>237</sup> *Ibid*.

<sup>238</sup> *Shell South Africa (Pty) Ltd & Tepco Petroleum (Pty) Ltd* (66/LM/Oct01).

<sup>239</sup> *Walmart Stores Inc & Massmart Holdings Limited* (73/LMDec/10).

considerations in the history of merger analysis in South Africa.<sup>240</sup> The acquiring firm was Walmart, the largest retailer in the world, operating in over fifteen countries. The target firm was Massmart, which trades across the African continent. It is perspicuous that the merger did not raise any competition concerns.<sup>241</sup> Several parties including trade unions and government departments (“the government”) intervened in the proceedings to raise the public interest grounds, which would be affected by the merger. The public interest considerations pertinent in this case were the effect of a merger on a particular industrial sector or region, employment and the ability of small businesses or firms owned by historically disadvantaged persons, to become competitive.

Before the merger, an estimate of 503 Massmart employees were retrenched. It was argued on behalf of the unions and the government that the job losses were in anticipation of the merger and therefore occurred as a result of the merger. This, it was argued, was because of the closeness of the timing of the retrenchments and the negotiations to merge; meaning, there was sufficient nexus between the two events. The merging parties, however, argued that the retrenchments occurred as a result of Massmart’s operational requirements and had nothing to do with the merger.

At the time of the negotiation between the two parties, Walmart was also considering to merge with other African retailers. However, Walmart could only merge with one of them and not all of them. In the due diligence report done by Walmart, it was revealed that Walmart would prefer a Massmart with a smaller employee base.<sup>242</sup> The Tribunal had to consider the argument that Massmart would have downsized pursuant to the merger so as to entice Walmart – leading to 503 job losses. In finding that the two events were not related, the Tribunal stated thus:

“But it seems unlikely that given the total size of the Massmart labour force – about 26 500 – that this figure of 503 affected employees would prove material in persuading Walmart that Massmart was a sweeter prospect than its rivals. Whilst it is

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<sup>240</sup> Boshoff W, Dingley D & Dingley J “The Economics of Public Interest Provisions in South African Competition Policy” 2012 4.

<sup>241</sup> *Walmart-Massmart* [26].

<sup>242</sup> *Walmart-Massmart* [41] & [53].

true that some of the due diligence reports done by Walmart ... might suggest that Walmart would prefer a leaner Massmart, there is nothing to suggest the former's hand in the latter's earlier retrenchments."<sup>243</sup>

The merger also raised a competition concern in that the merged entity would procure services of Asian manufacturers. The unions and the government argued that because of Walmart's global procurement network, procurement of local producers would suffer at the peril of lower cost Asian producers. It was argued on behalf of the merging parties that the competitors in South Africa are relatively large and some are larger than Massmart. For this reason, the competition concern of procurement from local suppliers for international suppliers with the possibility to gain market power, was gainsaid. The Competition Tribunal made a finding to this effect as well.<sup>244</sup>

Applying the provisions of section 12A of the Act, the Tribunal stated that "subject matter and substantiality are not the only limitations in considering the public interest"; as an addition to these, the public interest consideration must be merger specific.<sup>245</sup> The Tribunal stated that since the Act came into being, no anti-competitive merger has ever been rescued by the public interest, and that no merger with adverse public interest has prohibited a 'pro-competitive' merger.<sup>246</sup> The Tribunal maintained that this did not render the public interest useless; rather, the authorities have thought it adequate to impose conditions to address the adverse public interest findings. The Tribunal remarked that the public interest mandate is linked to its competition inquiry and that the two are analysed with regard to each other, but does not go as far as a balancing exercise as required with the efficiency analysis.<sup>247</sup>

To avert the job losses post-merger, the Tribunal imposed a condition that the merged entity must ensure that there are no retrenchments based on operational reasons in South Africa for a period of two years after the effective date of the

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<sup>243</sup> *Walmart-Massmart* [55].

<sup>244</sup> *Walmart-Massmart* [116].

<sup>245</sup> *Walmart-Massmart* [32].

<sup>246</sup> *Ibid*, et seq.

<sup>247</sup> *Ibid* [36].

merger.<sup>248</sup> Preceding this, the Tribunal stated that a further limitation to the public interest is that the public interest concern must be merger specific.<sup>249</sup> The imposition of the employment condition is, in my view, at odds with this limitation. The Tribunal agreed with the merging parties' argument that no jobs would be lost as a result of the merger post-merger. The employment condition was therefore *non sequitur*, unless its imposition is to ensure and indeed safeguard its finding. Be it as it may, the employment condition comes across as a conflict with the Tribunal's own *dictum* that public interest concern must be merger specific.

Given Walmart's notorious anti-union approach, SACCAWU submitted that its position as the largest union representative of Massmart's employee base would be affected by the merger and made further submissions to ensure that its position is not affected by the merger. Alert to this concern, the Tribunal further imposed a bargaining condition, which ensured that the merged entity does not, *inter alia*, challenge SACCAWU's position as the largest representative union of its workers to represent the bargaining unit for a period of three years.<sup>250</sup> It is important to note that, section 3 of the Act clearly states that:

### 3. Application of Act

"This Act applies to all economic activity within, or having an effect within, the Republic, except –

- (a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995."<sup>251</sup>

Firstly, the Act explicitly excludes collective bargaining from its ambit, which means the Tribunal's imposition of the unionisation condition is at odds with the Act's scope of application. Secondly, the labour laws of South Africa make provision for union representation and how this should be addressed within the labour scheme.<sup>252</sup> 'Employment' refers to exactly that and not to the negotiation and representation of bargaining deals as the unions are intended for. Finally, it is not within the remit of

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<sup>248</sup> *Walmart-Massmart* [1.1] of the Order.

<sup>249</sup> *Walmart-Massmart* [32].

<sup>250</sup> *Walmart-Massmart* [1.3] of the Order.

<sup>251</sup> Sec 3 of the Act is the Application provision of the Act.

<sup>252</sup> See Chapter 3 of the Labour Relations Act 66 of 1995.

the competition authorities to make such a condition because there is no law empowering them to do so, instead, there is law – section 3 of the Act – against doing so. Therefore, in my opinion, the Tribunal acted *ultra vires* in imposing the condition. As a result, the Tribunal's imposition of a bargaining condition was an unacceptable overstretch of the public interest inquiry.<sup>253</sup>

The government took the Tribunal's decision on review to the Competition Appeal Court (CAC).<sup>254</sup> The CAC set aside the decision of the Tribunal, although not in its entirety. Here I consider those parts of the Tribunal's decision which were upheld by the appeal court and which are relevant to this study. Pertinently, the CAC grappled with the application of section 12A, when the competition and public interest considerations conflicted. It noted that on a holistic reading of the Act, it is possible to argue that if the merger is not likely to substantially prevent or lessen competition, the competition authorities must still proceed to consider the public interest enquiry.<sup>255</sup> The CAC stated that this approach is seemingly compatible with the wording of the provision. The CAC further stated that the public interest considerations in deciding whether to approve the merger must be analysed distinctly. The CAC also made remarks on how the Act fails to provide guidance on how much weight is to be attached to the public interest inquiry, and how the relationship between the competition factors in section 12A(2) are regulated as against the public interest grounds. In my view, the weight of the public interest must be considerable because the public interest must be 'substantial' to refuse a merger that is found to not lessen or prevent competition. However, since there has not been such a merger which has resulted in its refusal solely on its adverse public interest effect, the public interest do not weigh as considerably as the competition considerations.

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<sup>253</sup> Staples J, Holland M & Rossouw J "Taking public interest too far: *Walmart Stores Inc v Massmart Holdings Ltd*" 2013 *South African Mercantile Law Journal*.

<sup>254</sup> *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 and Another* (110/CAC/Jun11, 111/CAC/Jul11) [2012] ZACAC 6 (9 October 2012).

<sup>255</sup> *Ibid* [113], *et seq.*



Buttigieg submits that the competition authorities, in the interests of “consumers and society” should err on the side of approving rather than preventing a merger.<sup>256</sup> The CAC endorsed this principle, but warned that this should be done in a strict manner.<sup>257</sup> The CAC concluded that unless the effect on the public interest contained in section 12A(3) is proven to be substantial, the authorities cannot employ the public interest inquiry to prohibit the merger.

### **3.4. Striking a balance between competition and public interest considerations**

The balance, it is suggested, lies in that law is a dynamic phenomenon whose focus is influenced by prevailing political dispensations and socio-economic imperatives.<sup>258</sup> This proposition strikes at the heart of the argument that the public interest analysis is misplaced. A transformative legal system ought to recognise the prevailing norms of society and adjust according to the prevailing norms and needs at the time.<sup>259</sup> The current legal and political needs of South Africa warrant that the public interest be a part of merger analysis. The gnawing need for economic transformation is an indication to go by.

In *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*<sup>260</sup> the Tribunal stated that the competition authorities play a secondary role in its public interest intervention.<sup>261</sup> The rationale for this is that there are other specialised institutions whose primary mandate is to advance the public interest. Secondly, the Tribunal stated that when competition is unimpaired, the competition authorities should curtail their scope of intervention.<sup>262</sup> I agree with this approach. Hodge, Goga and Moahloli submit that in merger filings, parties do not concede an anticompetitive effect of a

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<sup>256</sup> Buttigieg E *Competition Law: Safeguarding the Consumer Interest. A Comparative Analysis of U.S. Antitrust Law and EC Competition* 2009 Kluwer Law International 255 - 256.

<sup>257</sup> *Minister of Economic Development supra* [114].

<sup>258</sup> Brooks PEJ “Redefining the objectives of South African competition law” 2001 *Comparative and International Law Journal of Southern Africa* vol 34:3 296.

<sup>259</sup> P Langa “Transformative Constitutionalism” 2006 *Stellenbosch Law Review* vol. 3, 351-360.

<sup>260</sup> *Shell South Africa (Pty) Ltd & Tepco Petroleum (Pty) Ltd* (66/LM/Oct10).

<sup>261</sup> *Ibid* [58].

<sup>262</sup> *Ibid*.

merger to argue a substantive public interest to justify such anti-competitiveness.<sup>263</sup> The authors further posit that the Tribunal in *Shell South Africa* has interpreted the public interest in a way that accords with their initial inclusion in the Act, and in a way that is consistent with achieving a balance between the competition and public interest considerations.<sup>264</sup> The authors base their submission on mainly three reasons. The first is premised on Lewis' assertion that merger review in emerging countries must recognise the public interest in their regime for credibility purposes – but “that credibility is lost either if public interest dominates most decisions or is ignored in its entirety”.<sup>265</sup> Secondly, the public interest considerations are directly served by competition itself, and that their consideration in merger review is secondary.<sup>266</sup> Finally, although there is no “good” merger that has been prohibited on its negative public interest, public interest considerations do not dominate in a vast majority of merger cases. This is so because the public interest can be cured by the imposition of conditions so as to achieve the balance between the public interest and competition considerations.<sup>267</sup>

In *Harmony Gold Mining Company Limited and Gold Fields Limited*<sup>268</sup> the Tribunal stated that in balancing the considerations, the competition considerations take priority.<sup>269</sup> The Tribunal stated that this prioritisation of the competition inquiry is explained by the use of the word ‘justification’ in the public interest inquiry.<sup>270</sup> It was further stated that although the public interest inquiry may lead to a conclusion that is opposite to the competition one, such a conclusion will be justified with regard to the competition one and not in and of itself.<sup>271</sup> Put simply, the public interest inquiry is not made in isolation of the prior competition test. To this effect, the Tribunal succinctly held that:

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<sup>263</sup> Hodge J, Goga S & Moahloli T “Public Interest Provisions in the South African Competition Act: A Critical Review” 2009 *Competition Policy, Law & Economics Conference* 9-10.

<sup>264</sup> *Ibid.*

<sup>265</sup> *Ibid* 10. Lewis D “The Role of Public Interest in Merger Evaluation”, International Competition Network, Merger Working Group, Naples, 28-29 September 2002, at p 2.

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> (93/LM/Nov04) [2005] ZACT 29 (18 May 2005).

<sup>269</sup> *Ibid* para 56.

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.* This position was also followed by the Tribunal in *Distillers* where it was stated that once it has been found that there is no competition concern, the next step is evaluating whether a substantial public interest has emerged and if so “we must decide whether that would alter our conclusion on the competition grounds”.

“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.”<sup>272</sup>

The wording of section 12A (1) instructs the competition authorities to “initially determine” the competition question and “then determine” the public interest question. This was interpreted in *Harmony* as meaning that the merging parties are not required to positively justify a merger on the public interest grounds. In *Metropolitan Holdings Limited and Momentum Group Limited*,<sup>273</sup> the Tribunal extended the interpretation in *Harmony* as meaning that the merging parties only have an evidential burden to rebut a *prima facie* allegation of a substantial effect to the public interest grounds, if and when such an allegation is made. The effect of this is that if, on the facts before the competition authorities, there is no allegation of the public interest grounds being fraught, the authorities may dispense with the matter based on the competition test alone. This interpretation is warranted by section 12A of the Act. Moodaliyar and Roberts submit that while the public interests are contained in the Act, their role is to “supplement a standard competition enquiry”.<sup>274</sup> Thus, the public interest is not a standalone inquiry; its application depends on the competition inquiry.

Balthasar suggests that the fact that section 12A(1) starts off with the competition considerations, should point out that the competition considerations take priority.<sup>275</sup> Balthasar further points out that this position is guided by the use of the word “initially” when referring to the competition analysis. The author is, however, quick to point out that this principal position is not irrefutable. Hartzenberg rightly posits that despite the Act’s wealth of objectives, in the end economic efficiency takes centre

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<sup>272</sup> *Ibid.*

<sup>273</sup> *Metropolitan-Momentum Supra.*

<sup>274</sup> Moodaliyar K & Roberts S “The Development of Competition Law and Economies in South Africa” 2014 (131) *The South African Law Journal* 713.

<sup>275</sup> Balthasar S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer, 2018) 167, *et seq.*

stage.<sup>276</sup> Roberts points out that economic efficiency is the overriding principle, and that the public interest only play a secondary and supplementary role.<sup>277</sup>

As stated earlier, since the Act was enacted, no merger was prohibited based on the public interest considerations alone. Instead, the authorities imposed conditions to ensure that the public interest considerations are not vexed by the approval of a merger.<sup>278</sup> It is correct that in some instances the authorities have let the “pendulum” to swing “too far in the direction of the public interest”.<sup>279</sup> However, this is no matrix to go by in balancing the conflicting interests. The correct approach is the one articulated above.

In essence, the competition test should take precedence when the two considerations are at war, for the reasons above. Moreover, I should hasten to submit that we must shun upon using the public interest inquiry in merger analysis to cure South Africa’s social and economic woes. The role of the competition authorities is “not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction”.<sup>280</sup> Social and economic concerns which can be properly canvassed at forums or institutions whose primary mandate and expertise is to remedy such concerns, must be addressed at such forums and not by the competition authorities. However, competition authorities should also not be dismissive in dealing with public interest concerns which properly fall within their remit. The balance is to be found in whether the Act permits or prohibits certain intervention into the public interest.

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<sup>276</sup> Hatzenberg T “Competition Policy and Practice in South Africa: Promoting Competition for Development” 2006 *Northwestern Journal of International Law & Business* 667.

<sup>277</sup> Roberts S “The Role of Competition Policy in Economic Development: the South African Experience” 2004 Trade and Industrial Policy Strategies 7.

<sup>278</sup> Although some conditions aimed at protecting the public interest considerations such as in *Walmart-Massmart*, constitute an unjustifiable judicial overreach, it is by no means an indication of how the two considerations must be weighed. *Walmart-Massmart* and other cases where the authorities overreached in their public interest pursuit are an argument for *de lege ferenda* as opposed to *de le lata*.

<sup>279</sup> Balkin J & M Mbikiwa “Balancing Competition Act: paradox” 2014 *Business Law and Tax Review* 2.

<sup>280</sup> *Massmart-Walmart* [32].

### 3.5. Conclusion

It is submitted that the “pendulum has swung too far in the direction of public interest.”<sup>281</sup> This may be correct considering that the authorities have, in some instances, imposed conditions which are not part of the listed public interest grounds to safeguard the public interest considerations.<sup>282</sup> Such cases do not illustrate how the competition considerations and the public interest considerations should be balanced in case of a conflict. Such cases are bad in law and should therefore not serve as reference to the overriding inquiry of this study.

The competition test should take precedence when there is conflict with the public interest test. Section 12A of the Act although not expressive of this, is couched in such terms that it warrants this interpretation. The primary concern of competition law and the primary role of the competition authorities is competition. Although the Act introduces concerns outside the competition law scheme, the authorities’ intervention as regards such concerns has been correctly laid out as being secondary. This does not, however, mean that the authorities must shy away from inquiring and deciding on such non-competition factors. It simply means that the competition authorities must assert their scope of intervention to the extent permitted by the Act. Therefore, this justifies the approach that the competition considerations take precedence against the public interest considerations.

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<sup>281</sup> Balkin J & M Mbikiwa “Balancing Competition Act: paradox” 2014 *Business Law and Tax Review* 2.

<sup>282</sup> Cases to this effect have been discussed above.

## CHAPTER 4: THE EFFECT OF THE 2018 COMPETITION AMENDMENT ACT ON THE MANAGEMENT OF CONFLICT BETWEEN PUBLIC INTEREST AND COMPETITION CONSIDERATIONS IN MERGER CONTROL

### 4.1. Introduction

It is accepted that the Competition Act (“the Act”)<sup>283</sup> was enacted partly to eradicate persisting structural inequalities in the South African economy.<sup>284</sup> After 20 years of the enforcement of the Competition Act, it became clear that the objective of the Act to address inequalities in the Country, could not be fully achieved under the Act without giving the competition authorities some added powers and responsibilities. Thus, in response to this, the Competition Amendment Act (“the Amendment Act”)<sup>285</sup> which came into effect on the 06<sup>th</sup> of July 2019,<sup>286</sup> was enacted. The Amendment Act was enacted to, *inter alia*, give the authorities added powers and responsibilities, with the objective to address “concentration and the racially-skewed spread of ownership of firms in the economy”.<sup>287</sup>

The Competition Amendment Bill, 2017, which gave rise to the Amendment Act asserted that, “[t]hese amendments seek to ensure evidence-based inquiry into and explicit scrutiny of concentration when [amongst others] mergers are considered... The amendments permit the competition authorities to undertake far-reaching and targeted interventions to address concentration.”<sup>288</sup> The amendments, the Bill stated further, are also aimed at providing scrutiny of the racially-skewed spread of ownership in the economy. Therefore, in order to achieve these added objectives,

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<sup>283</sup> Act 89 of 1998.

<sup>284</sup> Balthasar S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer, 2018) 147. See also Swan A & das Nair R “Appropriate Standards for Assessing Exclusionary Conduct: A Case Study of the Nitrogenous Fertilizer Industry in South Africa” 2008 *Presented at Competition Commission, Competition Tribunal, & Mandela Institute Second Annual Competition Law & Economics Conference, Johannesburg, 22 May 2008* 1.

<sup>285</sup> Act 18 of 2018.

<sup>286</sup> Proclamation No. 46 of 2019, Government Gazette vol. 649 12 July 2019, No. 42578.

<sup>287</sup> Competition Amendment Bill, 2017. Government Gazette No. 41294, 1 December 2017 p 6.

<sup>288</sup> *Ibid* p 7.

the provision of the Competition Act relating to mergers, amongst others, must be strengthened.<sup>289</sup>

The Amendment Act came with added responsibilities for competition authorities, some of which relate to public interest considerations in mergers. Thus, this bears the potential to impact on how competition and public interest considerations are evaluated in merger regulation. The *raison d'être* for this chapter is therefore to consider the effect of the Amendment Act on how the conflict between public interest and competition considerations in mergers is to be managed.

As stated in the preceding chapters, merger evaluation in terms of section 12A of the Competition Act (“the Act”),<sup>290</sup> is juxtaposed upon two considerations – competition and public interest considerations. In terms of the provision, the competition authorities must determine the effects of a merger on both considerations. It is also trite that these considerations sometimes conflict. The provision is, however, reticent on how to resolve such a conflict whenever the two considerations conflict. As evinced in chapter three above, competition considerations take antecedence when in conflict with the public interest considerations. This, however, does not mean that public interest considerations are less important, as compared to competition considerations. Both considerations are important, but when in conflict, competition considerations have generally taken priority with the view that public interest concerns can be cured with conditions.

Following the promulgation of the Amendment Act, it may be appropriate to consider whether, when conflict between public interest and competition considerations arise, competition considerations will continue to be prioritised over public interests. In addressing this question, it is apposite to consider, briefly, the background to the promulgation of the Amendment Act. In the Explanatory Memorandum to the Competition Amendment Bill, 2017,<sup>291</sup> the objects of the amendments are stated, among others, as to address “the high levels of economic concentration in the

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<sup>289</sup> *Ibid* p 8.

<sup>290</sup> Act 89 of 1998.

<sup>291</sup> Government Notices No. 1345, Government Gazette No. 41294 1 December 2017. [www.gpwonline.co.za](http://www.gpwonline.co.za)

economy and skewed ownership profile of the economy”.<sup>292</sup> These objects are to be achieved through, amongst others, providing special attention to merger regulation in particular by giving prominence to some public interest issues.<sup>293</sup>

The Explanatory Memorandum explains that the amendment to section 12A, which deals with the evaluation of mergers, adds requirements that consideration be given to cross-shareholdings and cross-dictatorship by merging parties, so as to address the problem of concentration.<sup>294</sup> The amendments also add a requirement that the merging parties disclose their merger activity engaged in the preceding three years.<sup>295</sup> This is also aimed at identifying markets in which creeping concentrations may occur. Further and more fittingly, the amendments intend to explicitly create public interest grounds in merger evaluation to address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.<sup>296</sup>

#### **4.2. Section 12A of the Competition Act, as amended by section 9 of the 2018 Competition Amendment Act**

As a preface, it is prudent to quote section 12A(1) of the Act prior the amendment in order to distinguish it from the position under the amended provision. Section 12A(1) of the Act before the amendment read as follows:

##### **“12A. Consideration of Mergers.**

Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –

- (a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –

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<sup>292</sup> *Ibid* p 60.

<sup>293</sup> *Ibid*.

<sup>294</sup> *Ibid* 64.

<sup>295</sup> *Ibid*.

<sup>296</sup> *Ibid*.



(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

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

(b) *otherwise*, determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).<sup>297</sup>

From the above, it is clear that the provision was perspicuous on how merger analysis was to be carried out. Firstly, the authorities had to initially determine whether the merger was likely to substantially prevent or lessen competition based on the listed competition considerations. Secondly, if the merger was likely to substantially prevent or lessen competition, the authorities had to determine whether the merger was likely to lead to any technological, efficiency or other pro-competitive gains which would offset the anti-competitiveness and which would not occur but for the merger. Thirdly, dependent on the competition test, the authorities had to determine whether such a merger could or could not be justified on substantial public interest grounds. Finally, the authorities had to determine, separate from the competition test, whether the merger could or could not be justified on substantial public interest grounds. The distinction between the two public interest considerations, under section 12A(1)(a)(ii) and 12A(1)(b), was significant and therefore requires more elucidation.

In terms of section 12A(1)(a)(ii) of the Act, the public interest test was dependent on the competition test. The public interest analysis under this provision is used to harmonise or reconcile the competition test with the public interest test. The Guidelines on the assessment of public interest in merger regulation under the

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<sup>297</sup> Own emphasis added.

Competition Act (“the Guidelines”)<sup>298</sup> issued by the Competition Commission, state that in the first public interest inquiry, under section 12A(1)(a)(ii), the finding on competition grounds must be negative.<sup>299</sup> Following from this negative finding, the Commission must determine whether there are any substantially positive public interest grounds justifying the otherwise anti-competitive merger.<sup>300</sup> This means an anti-competitive merger may be approved based on its positive benefits to the public interests.<sup>301</sup>

The public interest inquiry under section 12A(1)(b), on the other hand, stems from or occurs regardless of a positive competition finding. This means that the Commission is required to determine whether an otherwise good merger from a competition perspective raises any substantially negative public interest effects.<sup>302</sup> In *Anglo American Holdings Ltd and Kumba Resources Ltd*,<sup>303</sup> the Competition Tribunal stated that the effect of the word “otherwise” in section 12A(1)(b) means that the public interest evaluation must nonetheless be undertaken, regardless of the outcome of the competition evaluation.<sup>304</sup> Therefore, this means the public interest evaluation in this provision must be undertaken even where competition is unimpaired. The effect of this is that the public interest evaluation in this provision may permit an anti-competitive merger and conversely prohibit a pro-competitive merger.<sup>305</sup>

Section 12A has since been amended by section 9 the Amendment Act. Following the amendment, subsections (1)(a)(ii) and (1)(b) have been replaced by the new subsections (1)(b) and (1A), respectively. The wording of subsection (1)(a)(ii) has been retained in the new subsection (1)(b) in its previous form and has the same substantive effect. The new subsection (1A), which amends subsection (1)(b), has

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<sup>298</sup> General Notices No. 1228 of 2015, Government Gazette No. 39560, 22 November 2015. These Guidelines were issued by the Competition Commission in terms of section 79(1) of the Act. [www.gpwnline.org](http://www.gpwnline.org)

<sup>299</sup> *Ibid* para 5.5.

<sup>300</sup> *Ibid*.

<sup>301</sup> *Ibid*.

<sup>302</sup> *Ibid* para 5.6.

<sup>303</sup> (46/LM/Jun02) [2003] ZACT 45 (4 September 2003).

<sup>304</sup> *Ibid* [138].

<sup>305</sup> *Distillers Corporation SA Limited & Stellenbosch Farmers Winery Group Ltd* (08/LM/Feb02) [2003] ZACT 15 (19 March 2003) at [214].

adopted a different wording. The subsection provides that “*despite*” the determination in subsection (1) – being the competition test – the competition authorities must also determine whether the merger can or cannot be justified on substantial public interest grounds. Prior to amendment, subsection 1(b) of the Act, as quoted above, used the word “*otherwise*”. The difference between the two subsections is that one uses the word “*otherwise*” and the other uses the word “*despite*”. The word *otherwise* means “in another manner” or “in other respects”.<sup>306</sup> Whereas the word *despite* means “in spite of”.<sup>307</sup> The Tribunal has interpreted the word *otherwise* in context, as meaning regardless of the competition analysis, the public interest analysis must still be carried out.<sup>308</sup> This interpretation is inextricably consistent with the meaning of the newly used word – *despite*. Save for the semantic difference in the subsections, I do not find any cogent reason to conclude that there are substantive differences between the two words. If the contrary was intended, the legislature would have made that intention perspicuous. Therefore, this difference in wording does not alter the interpretation that public interest considerations play a secondary role, and that competition considerations take priority when in conflict with the former in merger analysis.

Irvine correctly submits that the new section 12A does not alter the previous position already developed by the Competition Tribunal and Competition Appeal Court in some of the cases already discussed in chapter 3.<sup>309</sup> She further adds that the amended section 12A “appears largely to codify the existing approach to weighing up competition and public interest considerations”, rather than developing or amending it.<sup>310</sup> She further points out that the Explanatory Note to the Amendment Act does not place any onus on the parties to prove that their transaction benefits either competition or public interest considerations.<sup>311</sup> By necessary implication, this means that the position prior to amendment – where parties ground their proposed transaction on competition considerations rather than public interest considerations,

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<sup>306</sup> Dictionary.com [www.dictionay.com/browse/otherwise](http://www.dictionay.com/browse/otherwise) (accessed: 04 July 2020).

<sup>307</sup> *Ibid* [www.dictionay.com/browse/despite](http://www.dictionay.com/browse/despite) (accessed: 04 July 2020).

<sup>308</sup> *Anglo American Holdings Ltd and Kumba Resources Ltd supra* [138].

<sup>309</sup> Irvin H “Proposed amendments to the merger review provisions of the Competition Act” 2018 *Without Prejudice* 11. The author refers to *Walmart/Massmart* and *AB InBev/SAB* merger cases discussed in chapter 3 above.

<sup>310</sup> *Ibid*.

<sup>311</sup> *Ibid*.

and only relying on the latter to supplement their argument on the former – prevails.<sup>312</sup>

Section 12A(3) of the Act, prior to amendment, enumerated four public interest grounds upon which the public interest evaluation had to be grounded. It enlisted the effect of a merger on “a particular industrial sector or region;<sup>313</sup> employment;<sup>314</sup> the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive;<sup>315</sup> and the ability of national industries to compete in international markets.<sup>316</sup>” Added by the Amendment Act to this list of public interest factors, is the effect of a merger on “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.<sup>317</sup>” The addition of this factor is immaterial on how the conflict between competition and public interest considerations should be resolved.

#### **4.3. Recent merger cases decided after the 2018 Amendment Act**

In chapter 3 the observation made is that competition considerations take antecedence when in conflict with public interest considerations in merger evaluation. However, this finding did not factor in the impact of the 2018 Competition Amendment Act. In this part, I make an attempt to consider some merger cases decided after the Amendment Act came into force, with a view to assess the impact of the Amendment Act on how the balance is to be struck between competition and public interest considerations when the two are in conflict.

In 13 August 2019, the Competition Tribunal conditionally approved the merger between *British American Tobacco Holdings South Africa (Pty) Ltd & Twisp (Pty)*

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<sup>312</sup> Hodge J, Goga S & Moahloli T “Public Interest Provisions in the South African Competition Act: A Critical Review” 2009 *Competition Policy, Law & Economics Conference* 9-10.

<sup>313</sup> Sec 12A(3)(a) of the Act.

<sup>314</sup> Sec 12A(3)(b) of the Act.

<sup>315</sup> Sec 12A(3)(c) of the Act.

<sup>316</sup> Sec 12A(3)(d) of the Act.

<sup>317</sup> Sec 12A(3)(e) of the Act.

*Ltd.*<sup>318</sup> The acquiring firm, British American Tobacco (BAT), manufactures, markets and distributes cigarettes in South Africa.<sup>319</sup> The target firm, Twisp, supplies a variety of vaping products as well as e-cigarettes.<sup>320</sup> The rationale for the merger, *inter alia*, was that there was substantial potential for growth for vaping products and e-cigarettes, which makes the transaction an investment.<sup>321</sup> It was noted that suppliers of cigarettes compete for, amongst others, shelf space from retailers.<sup>322</sup> It was found that Twisp is the dominant supplier of e-cigarettes in South Africa.<sup>323</sup> The Competition Commission, in its market inquiry, found that BAT has a market share of over 60% of the South African cigarette market.<sup>324</sup> This meant that BAT has market power to influence the amount of shelf space retailers should allocate it.<sup>325</sup> The Tribunal found that this potentially exclusionary conduct by BAT may be used to foreclose competition in both the cigarette and e-cigarette markets.<sup>326</sup> The Tribunal ultimately approved the merger subject to strenuous behavioural conditions.<sup>327</sup>

The Tribunal found that the merger raises the public interest concern of employment.<sup>328</sup> During the merger process, BAT had intended to retrench a number of its employees. BAT subsequently withdrew the retrenchments notices because of indications of the economy recovering and that government indicated that it would deal with the illicit sale of cigarettes.<sup>329</sup> Despite this, a moratorium on employment was imposed for a period of two years.

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<sup>318</sup> LM262Jan18.

<sup>319</sup> *Ibid* [4].

<sup>320</sup> *Ibid* [11].

<sup>321</sup> *Ibid* [15]. Some of the reasons behind the transaction have been hidden as being confidential.

<sup>322</sup> *Ibid* [41].

<sup>323</sup> *Ibid* [70].

<sup>324</sup> *Ibid* [54].

<sup>325</sup> *Ibid*. The Tribunal found that indeed BAT has such market power. It stated that “[t]he Commission further noted that there are instances in which BATSA has exclusive arrangements with organised retail for the supply of BATSA’s unitary. In these instances, BATSA stipulates the amount of space that must be allocated to BATSA’s cigarette products ... [and] rival cigarette suppliers get the remaining space”.

<sup>326</sup> *Ibid* [59] - [66].

<sup>327</sup> *Ibid* [80].

<sup>328</sup> *Ibid* [82].

<sup>329</sup> *Ibid* [87]. Some eight months later, and as fate would have it, lo and behold, none of BAT’s reasons for withdrawing its initially intended retrenchments were to be realised. Due to the COVID-19 pandemic and government-imposed regulations to curb the spread of the pandemic, the economy fell into a slump. The sale of illicit cigarettes became more lucrative than ever, due to the government-imposed regulations to ban the sale of cigarettes, as a measure to curb the spread of the pandemic.

Although the Tribunal imposed adequate conditions to address the serious competition concerns, it nonetheless implicitly used the public interest inquiry in section 12A(1)(b) to determine whether the otherwise anti-competitive merger was justifiable on public interest considerations. The finding on this basis was to the affirmative. Of course, this is by no means an indication that the merger was approved based on it being justifiable on public interest grounds. In fact, it is quite the contrary. Despite the merger having conspicuously grievous competition concerns, the Tribunal still opted to save the merger rather than prohibit it. The conditions imposed are, in my view, adequate but potentially improbable to realise and monitor successfully. This is why prohibition would have been much easier. This is an indication that competition considerations – whether correctly considered or not – have a slight advantage in the final decision making.

In *Harmony Gold Mining Company Ltd and Others & The remaining gold mining South African operations of AngloGold Ashanti Ltd*<sup>330</sup> the Competition Tribunal unconditionally approved the merger between the parties. The acquiring firms were Harmony Gold Mining Company together with its wholly owned subsidiaries (“Harmony gold”),<sup>331</sup> which operates in the mining, production and exploration of gold and silver across South Africa.<sup>332</sup> The target firms were the remaining gold mining South African operations of AngloGold Ashanti (“AngloGold”), which operates in the mining, production and exploration of gold and silver.<sup>333</sup> The Tribunal found that the rationale for the proposed transaction was that the transaction aligns with AngloGold’s disposals of its gold mining assets in South Africa, and that Harmony Gold stood to acquire strategic gold fit assets.<sup>334</sup>

The Tribunal found a horizontal overlap in the supply of gold and silver in the international markets.<sup>335</sup> In the international market for the supply of gold, the

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<sup>330</sup> LM/171/Mar20 [1].

<sup>331</sup> Harmony Moab Khotsoang Operations (Pty) Ltd and Golden Core Trade & Invest (Pty) Ltd. These being the other two parties in the merger.

<sup>332</sup> *Harmony Gold Mining Company Ltd and Others & The remaining gold mining South African operations of AngloGold Ashanti Ltd* LM/171/Mar20 [5].

<sup>333</sup> *Ibid* [6] & [8].

<sup>334</sup> *Ibid* [10].

<sup>335</sup> *Ibid* [11].

Tribunal found that the merged entity would have about 1.7% of the market post-merger.<sup>336</sup> The Tribunal again found that in the international market for the supply of silver, the merged entity would have about 0.3% of the market share post-merger. The Tribunal concluded that “the merged entity would continue to face competitive constraints from a highly fragmented market as no participant’s market share exceeded 10%” in both the supply of gold and silver. In the result, the Tribunal found that the merger is not likely to prevent or lessen competition in either of the markets.

The merger raised several public interest concerns. The first being of employment. The Tribunal imposed a moratorium of 12 months on retrenchments resulting from the merger.<sup>337</sup> The second public interest concern was the greater spread of ownership of historically disadvantaged persons. In this regard, the Tribunal found that because both Harmony Gold and AngloGold are both JSE-listed companies, with Harmony Gold’s shareholding at group level being +30% B-BBEE, this would result in a greater spread of ownership and increased levels of ownership by historically disadvantaged persons.<sup>338</sup> As a result, the Tribunal concluded that no public interest concerns arise from the proposed merger.

From this merger, there appears to be no deviation following the Amendment Act from how the competition and public interest considerations were weighed against each other prior to the amendment. This merger is also an example of how to apply the new public interest factor introduced by section 12A(3)(e), which refers to a greater spread of ownership and increased levels of ownership by historically disadvantaged persons.

In *Emerging African Property Partners (Pty) Ltd & Lisaline Investment Holdings (Pty) Ltd*<sup>339</sup> the Competition Tribunal approved the merger between the two parties pursuant to the amended Act. On the competition inquiry, the Tribunal found that the

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<sup>336</sup> *Ibid* [12] – [14] *et seq.*

<sup>337</sup> *Ibid* [15] & [16].

<sup>338</sup> *Ibid* [19].

<sup>339</sup> (LM124Oct19) [2020] ZACT 4 (10 January 2020).

merger was not likely to prevent or lessen competition in the relevant market.<sup>340</sup> It further found that the proposed merger resulted in a “pro-public interest” benefit. The public interest benefit was that a black-owned women-empowerment company will be partnering with the Government Employees Pension Fund. This public interest benefit, by necessary implication, falls squarely under the new subsection (3)(e) of section 12A. As a result, the merger was approved unconditionally. Again, it cannot be reasonably construed that the Tribunal deviated from the erstwhile position of weighing the competition and public interest considerations against each other.

Owing to the fact that the Amendment Act came into effect only recently, the real impact of the new amendments are yet to be fully determined. Some of the merger cases decided following the Amendment Act seemed so straightforward that they did not warrant any lengthy or detailed analysis. The decision making process has generally followed a familiar pattern established before the Amendment Act. As a result, the cases discussed above which were decided following the amendment of the Act do not indicate a departure from the position established prior to the amendment of the Act. Although this assertion may not be completely reliable, as only a few cases are discussed above, the legislative language used in the Amendment Act also does not suggest a departure from the practice established before the Act was amended.

#### **4.4. Conclusion**

The Amendment Act is laden with increased emphasis on public interest considerations. This emphasis is especially more pronounced in merger control. Despite this, the Amendment Act does not alter the established practice that in merger evaluation, competition considerations take precedent when in conflict with public interest considerations. This observation is grounded on evidence borne out from the text of the Act before and after the amendments. The new section 12A of the Act does not differ materially or in substance with the provision before it was amended. Accordingly, despite heightened attention to public interest issues in the

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<sup>340</sup> *Ibid* [8].



Amendment Act, competition considerations still take precedence when in conflict with public interest considerations in merger evaluation.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1. Introduction

The advent of democracy in South Africa necessitated that the structure of the economy, with high concentration levels and racial inequality in terms of economic participation, had to be reconsidered.<sup>341</sup> The new economy had to be open to address economic participation of historically disadvantaged persons and to integrate them in the economy.<sup>342</sup> These issues needed to be dealt with urgently and effectively.<sup>343</sup> It was also recognised that these issues would be best-addressed by a variety of economic and social policies, particularly those relating to trade and industry, with competition policy being an important part of the interventions envisaged.<sup>344</sup> Apart from the traditional concerns of competition law and economic inequality, this envisaged competition policy would also address employment interests within its remit.<sup>345</sup> Thus, such non-competition interests are known as public interest considerations, and they form an integral role in competition regulation.

There is no doubt that the Competition Act (“the Act”)<sup>346</sup> was enacted largely to address the past injustices.<sup>347</sup> The Preamble to the Act stands as testament. Of particular importance to this study is how the Act regulates mergers.<sup>348</sup> The Act enjoins the competition authorities to initially determine whether or not the merger is likely to substantially prevent or lessen competition.<sup>349</sup> The next step is to determine, if the merger is likely to impact negatively on competition, whether the merger is

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<sup>341</sup> Smit C “The Rationale for Competition Policy: A South African Perspective” 2005 Paper read at the biennial Economic Society of South Africa Conference 7-9 September 2005, Elangeni Holiday Inn, Durban, Kwazulu-Natal, South Africa 1.

<sup>342</sup> Hirsch A *Season of Hope – Economic Reform under Mandela and Mbeki* (University of KwaZulu-Natal Press, 2005) 69.

<sup>343</sup> *Ibid.*

<sup>344</sup> Hartzenberg T “Competition Policy and Enterprise Development: The Role of Public Interest Objectives in South Africa’s Competition Policy” 2004 *Trade Law Centre for Southern Africa* 6-7.

<sup>345</sup> Brassey M *et al Competition Law* (Juta, 2002) 58 & 83.

<sup>346</sup> Act 89 of 1998.

<sup>347</sup> Balthasar S *The Interface of Competition Law, Industrial Policy and Development Concerns: The Case of South Africa* (Springer, 2018) 150.

<sup>348</sup> Chapter 3 of the Act deals exclusively with mergers.

<sup>349</sup> Sec 12A(1) of the Act.

likely to result in any efficiency gains.<sup>350</sup> Finally, the authorities must determine whether such a merger can nevertheless be justified on substantial public interest grounds.<sup>351</sup> The bilateral test of competition and public interest considerations in merger analysis may be thought of as the state's needed intervention to bridge the gap between competition policy, on the one hand, and socio-political imperatives, on the other.

How these tests are applied in practice is an interesting pedagogy. In terms of the competition test, the authorities must compare the competitiveness of markets in the absence of the merger to the likely competitiveness of markets post-merger.<sup>352</sup> The assessment in the latter inquiry requires the authorities to hypothesise on whether consumers would be harmed (as a result of higher prices and reduced product choice) if the merger were approved.<sup>353</sup> The authorities must also determine whether a merger found to be anticompetitive, may be justified by efficiency gains which offset the likely anticompetitive effect of the merger, and which would not be possible were it not for the merger.<sup>354</sup>

The second part of this evaluation is the public interest inquiry. On the one hand, section 12A(1)(b) requires the authorities to determine whether, based on the competition inquiry, the merger can or cannot be justified on substantial public interest grounds. On the other hand, Section 12A(1A) provides that the authorities must, independent of the competition test, determine whether such a merger may be justified on substantial public interest grounds. The Act enumerates the public interest grounds upon which the merger should be measured. These are the effect of a merger on: "a particular industrial sector; employment; the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; the ability of national industries to compete in international markets; and the promotion of a greater spread of ownership, in particular to

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<sup>350</sup> Sec 12A(1) of the Act.

<sup>351</sup> Sec 12A(1)(b) & sec 12A(1A) of the Act.

<sup>352</sup> Blignaut L & Goodman R "Second-guessing the future in merger reviews" 2008 *Without Prejudice* 1.

<sup>353</sup> *Ibid.*

<sup>354</sup> Sec 12A(1)(a)(i) of the Act.

increase the levels of ownership by historically disadvantaged persons and *workers in firms* in the market.”<sup>355</sup>

Although public interest considerations are unlikely to trump on an otherwise pro-competitive merger, as evinced from chapter 3, a substantial amount of time and effort is put by parties into whether a merger is justified on substantial public interest grounds.<sup>356</sup> The Competition Amendment Act<sup>357</sup> was introduced in response to calls that the competition authorities needed sharper teeth in prosecuting competition law cases. The impact of this amendment on mergers – especially for the purpose of this work – is rather limited. Section 9(e) of the Amendment Act states that “*despite*” the competition inquiry, the authorities must still determine the impact of a merger on public interest grounds. Substantively, this is not a departure from the replaced section 12A(1)(b), which provided that the authorities must “*otherwise*” determine the impact of a merger on substantive public interest grounds. If anything, the two carry the same meaning substantively. The only difference is a semantic difference in the form of wording.<sup>358</sup> As a result, the Competition Amendment Act does not alter the position that competition considerations take priority when in conflict with public interest considerations.<sup>359</sup>

The Act explicitly provides that the authorities “*must initially determine*” the competition question and thereafter determine the public interest question.<sup>360</sup> In *Harmony Gold Mining Company Ltd & Gold Fields Ltd*,<sup>361</sup> the Tribunal stated that this prioritisation of the competition inquiry explains the word “justification” in regard to the public interest, and further explains why the public interest inquiry is justified not in and of itself, but with regard to the competition inquiry.<sup>362</sup> In *Anglo American*

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<sup>355</sup> Sec 12A(3) of the Act.

<sup>356</sup> Hartzenberg T “Competition Policy and Practice in South Africa: Promoting Competition for Development” 2006 *Northwestern Journal of International Law & Business* 681.

<sup>357</sup> Act 18 of 2018.

<sup>358</sup> Sec 9(e) of the Amendment Act uses the word “despite”, whilst sec 12A(1)(b) uses the word “otherwise”. The interpretation of the latter is settled law, and such an interpretation has the same substantive effect as the amendment.

<sup>359</sup> Irvine H “Proposed amendments to the merger review provisions of the Competition Act” 2018 *Without Prejudice* 11.

<sup>360</sup> Sec 12A(1)

<sup>361</sup> (93/LM/Nov04).

<sup>362</sup> *Ibid* [55] – [56].

*Holdings Ltd & Kumba Resources Ltd*<sup>363</sup> the Tribunal stated that the public interest “can operate either to sanitise an anticompetitive merger or to impugn a merger found not be [sic] anticompetitive”.<sup>364</sup> This effectively means that an anticompetitive merger may be approved on its positive effect to the public interest, and vice-versa.<sup>365</sup> To this day, no merger has been approved solely on its positive effect to the public interest in contrast to its anti-competitiveness.

## **5.2. The public interest considerations: is this necessary in competition policy?**

There are steadfast contestations on the rightfulness of the public interest considerations in both competition law, in general, and merger review, in particular. On the one side of the spectrum are those who contend that public interest should not be part of competition policy. Reekie warns that relying on competition policy to foster socio-economic objectives is “inappropriate” because the competition authorities are ill-suited to compare the complex polycentric considerations at play.<sup>366</sup> The author adds further that the competition authorities lack the institutional expertise to deal with such polycentric issues; there are institutions properly constituted for this very purpose.<sup>367</sup> On the other side of the spectrum are those who advocate for the inclusion of public interest in competition policy. They posit that the inclusion of the public interest is government’s effort to meet the gnawing need of South Africa’s redistributive justice.<sup>368</sup> They further argue that the credibility of any competition law regime, especially that of developing countries, relies on its ability to address “those issues that most engage popular sentiment”, being the public interest.<sup>369</sup>

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<sup>363</sup> (46/LM/Jun02).

<sup>364</sup> *Ibid* [138].

<sup>365</sup> *Harmony Gold Mining Company Ltd supra* [45].

<sup>366</sup> Reekie WD “The Competition Act: An Economic Perspective” 1999 *South African Journal of Economics* 284.

<sup>367</sup> *Ibid* 259.

<sup>368</sup> Njisane Y “The Rise of The Public Interest: Recent High Profile Mergers” 2011 [www.publicinterestlawgathering.com/wp-content/.../the\\_rise\\_of\\_public\\_interest.docx](http://www.publicinterestlawgathering.com/wp-content/.../the_rise_of_public_interest.docx) at 3.

<sup>369</sup> Lewis D “The Role of the Public Interest in Merger Evaluation – Speech” Speech given at the International Competition Network, Merger Working Group, Naples, Italy 28-29 September 2002. [www.comptrib.co.za](http://www.comptrib.co.za).

I think both arguments are valid. However, I am indisposed to agree with those who argue against the public interest. This argument is grounded mainly on constitutional imperatives. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) is perspicuous on the need for transformation and enjoins the state to take legislative and other measures towards the achievement of this goal.<sup>370</sup> The Constitutional Court affirmed this and stated as follows in *South African Police Service v Solidarity obo Barnard*:

“Remedial measures may exact a cost our racial history demands we recognise. The Constitution permits us to take past disadvantage into account to achieve substantive equality. But it does so generous-heartedly and ambitiously: it licenses reparative measures designed to protect or advance all persons who have been disadvantaged by any form of unfair discrimination. For reasons of history, racial and gender disadvantage are the most prominent.”<sup>371</sup>

Thus, the recognition of the public interest considerations in merger analysis under the Act, constitutes a “legislative measure” under section 9(2) of the Constitution to ensure that there is reparative justice for the unfair and discriminatory laws of the past. The lack of economic participation by the vast majority of South Africans is due to apartheid and its marginalisation laws. Therefore, to account for this, public interest considerations in mergers are part of the reparative measures echoed by the Constitution. The position of the public interest in competition policy is therefore grounded on constitutional tenets.

### **5.3. Balancing the competition and public interest considerations**

Despite the guidance of section 12A on how to assess a merger, the provision leaves moot the question which, between the competition and public interest considerations, take antecedence when the two conflict. The focal purpose of this study ultimately is to assess which between the competition and public interest considerations take precedence when they conflict. The finding of the study is that

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<sup>370</sup> Sec 9(2) of the Constitution.

<sup>371</sup> (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014) para 79.

when balancing the two considerations, the competition considerations take primacy. In *Harmony Gold Mining Company Limited and Gold Fields Limited* the Tribunal asserted that the public interest inquiry is not an independent inquiry; it does not exist in and of itself independent of the competition inquiry.<sup>372</sup> The Tribunal stressed that the wording of the provision should be instructive; adding that the words “*initially determine*” as regards the competition test, and “*then determine*” as regards the public interest, are instructive as to which between the two should take precedence.<sup>373</sup> The Tribunal found that the public interest need not be justified in and of itself, but must be justified in conjunction with the competition considerations.<sup>374</sup>

In *Shell South Africa (Pty) Ltd & Tepco Petroleum (Pty) Ltd*, the Tribunal stated that the role of the public interest is secondary to that of the competition considerations.<sup>375</sup> This expression finds support from Hodge and others, who submit that the public interest plays a supplementary role in merger analysis.<sup>376</sup> They correctly contend that the parties do not concede the anti-competitiveness of mergers to argue the positive impact to the public interest. Although a bad merger may be sanitised by the public interest, it will not ultimately depend on the public interest whether to prohibit or approve such a merger. This may be evinced by the case of *Tongaat-Hulett Group Limited & Transvaal Suiker Beperk* where the Tribunal prohibited an anti-competitive merger despite its many positive impact to the public interest considerations.<sup>377</sup> This is another indication that the public interest considerations play a secondary role, and that when in conflict with the competition considerations, the latter take precedence.

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<sup>372</sup> *Harmony Gold Mining Company Limited* [56].

<sup>373</sup> *Ibid* [54].

<sup>374</sup> *Ibid* [56].

<sup>375</sup> (66/LM/Oct01).

<sup>376</sup> Hodge J, Goga S & Moahloli T “Public Interest Provisions in the South African Competition Act: A Critical Review” 2009 *Competition Policy, Law & Economics Conference* 9-10.

<sup>377</sup> (83/LM/Jul00).

## 5.4. Recommendations

To this day, not a single merger has ever be prohibited solely on its negative effect on the public interest. Instead, the authorities have cushioned such negative effects to the public interest with conditions. It is precisely such conditions which, in most cases – as seen from the foregoing chapters, have attracted opprobrium on the basis that they are overreaching and thus show an unwarranted elevation of the public interest. While these arguments may be correct, they do not reveal the balance between the public interest and competition considerations. The authorities, conscious of this concern, should not overreach in their imposition of the public interest conditions. This has the potential to discredit their interpretation of the balance between the public interests and competition considerations.

The jurisprudence on balance exists but not to such a degree that is perspicuous or copious. This potentially leads to misperception and misinterpretation. Therefore, to alleviate this, it would be judicious to frequently restate the position. This will assist in cementing the overarching burden and concern of which between the public interest and competition considerations take precedence when the two are in conflict.

The objectives of the Act are vocal on transforming the erstwhile exclusive economy inherited from apartheid to become inclusive. However, to this day the economy is still similar to that which the Act initially sought to transform.<sup>378</sup> The 2018 Amendment Act is seen as a deliberate furtherance of the initial objectives, in that the Amendment Act proposes more effective measures to address this economic calamity.<sup>379</sup> Although the Amendment Act places more emphasis on public interest considerations, this alone is not enough to achieve its objectives – particularly those of transformation. Much needs to be done. Competition policy can only go so far. In a politically dynamic country such as South Africa, where politicians are law and policy makers, this political dynamism should extend far beyond lobbying for votes,

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<sup>378</sup> Black A, Craig S, & Dunne P “Capital intensity, industrial policy and employment in the South African manufacturing sector” Working Paper 2016 *Research Project on Employment, Income Distribution & Inclusive Growth* [www.REDI3x3.org](http://www.REDI3x3.org).

<sup>379</sup> Mondliwa P & Roberts S “Structural transformation, competition and economic power: the need for better policies” 2018 [www.econ3x3.org](http://www.econ3x3.org) 1.



to also using political power to adopt more inclusive and radical policies in other sectors to realise the ultimate goal of transformation.

## 5.5. Conclusion

While it is correct that competition demands rivalry,<sup>380</sup> a balanced regulation of this is also important, as it guides against over-enforcement and under-enforcement. In a system where over-enforcement prevails, the obvious consequence is that there is less flexibility, resulting in strict conditions for firms to conduct their businesses. On the other hand, under-enforcement may result in big businesses creating higher barriers to entry, thus denying smaller businesses the platform on which to compete. A balanced regulation ensures that neither the latter nor the former prevail, and where the latter prevails, consequences are meted against the offending party.

This balanced regulation is also important as regards merger analysis on whether the public interest considerations or the competition considerations should take precedence when they conflict. The scenery of regulation in general above, shows that competition in itself imbue the public interest without the need for directly relying on the public interest to determine a merger. Therefore, it is correct that the competition interests take antecedence when in conflict with the public interest considerations. It is also correct that the position of the public interest in both competition in general, and mergers in particular, is well-founded.

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<sup>380</sup> Roberts S “Barriers to entry and implications for competition policy” *Preliminary Draft Report for Competition Commission and Tribunal 2016 Conference*.

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