

Centre for Law, Economics and Society

Research Paper Series: 3/2016



**Public Policy Considerations in
Competition Enforcement: Merger
Control in South Africa**

Azza A. Raslan

Centre for Law, Economics and Society

CLES
Faculty of Laws, UCL

Director: Professor Ioannis Lianos



CLES Research Paper Series
3/2016

**Public Policy Considerations in Competition
Enforcement:
Merger Control in South Africa**

Azza A. Raslan

February 2016

Centre for Law, Economics and Society (CLES)
Faculty of Laws, UCL
London, WC1H 0EG
The CLES Research Paper Series can be found at
www.ucl.ac.uk/cles/research-paper-series

All rights reserved.

No part of this paper may be reproduced in any form without permission of the authors.

ISBN 978-1-910801-10-9

© Azza A Raslan 2016

Centre for Law, Economics and Society

Faculty of Laws, UCL

London, WC1H 0EG

United Kingdom

**Public Policy Considerations in Competition Enforcement:
Merger Control in South Africa**

By Azza A. Raslan*

ABSTRACT

Adopting mixed policy objectives (economic and non-economic) introduces a divergence to the current competition (antitrust) law models in most developed countries. It is however a model some developing countries are opting for. One area of competition law where the divergence is prominently featured is merger control. South Africa is a leading example of a regime of mixed objectives of competition law and a diffusor of this deferential model among other developing countries. In this paper, we look at competition law enforcement in South Africa focusing on large mergers in the past fifteen years. The paper goes beyond the conceptual, pros & cons discussion of the inclusion of public interest considerations in competition law to identify the analytical process followed in a merger situation and empirically examines the impact these considerations have on the final decision, as opposed to the other considerations usually taken into account, i.e., efficiencies/consumer welfare. The paper also addresses administrability issues and challenges arising from this model and their implications for developing countries. This should, in turn, engage the academia in critical examination of this model, assist policymakers in making an informed policy choice and benefit practitioners in understanding how this deferential merger analysis functions.

JEL: K21, L40, G34, O55

* PhD candidate at the Faculty of Laws, University College London azza.raslan.10@ucl.ac.uk
The author would like to thank the participants at the 9th Annual Conference on Competition Law, Economics and Policy on the topic: “Competition policy and enforcement in BRICS countries” hosted by the South African Competition Commission and the Competition Tribunal, November 11, 2015, Durban, South Africa, for their comments and Professor. Ioannis Lianos for his insightful comments and discussions.

I. INTRODUCTION

Epistemic communities of competition law speak of how we need to adopt a deferential view to competition in developing countries citing factors that make them different from more advanced countries and how similar rules may yield very different results.¹ The general position is that one size does not fit all and that a country should critically design policies and laws that are in line with its own narrative.² Looking closely at competition laws emerging in developing countries, we identify the prevalence of a competition law model with greater inclusion of social and development goals especially in relation to merger control. This is one area where comparative study of the US antitrust and EU competition laws will not be able to fully assist given the pronounced divorce between economic (efficiency) goals and non-economic considerations in their competition analysis.³ Hence, there is great room for innovation these countries are undertaking.

One in particular stands out. The South African competition law is being diffused as a model of competition law for development. It has regional impact on African countries, whether through diffusion by learning and emulation and / or regulatory competition. South Africa synergies extend to other emerging economies outside of the Continent. The BRICS countries are a case in point where forums to exchange knowledge and experience are held periodically with the aim to advance an alternative development paradigm fit for our time and the unique challenges of globalization.⁴ Developing countries

¹ See for example Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, Southwestern Journal of Law and Trade in the Americas, Vol. 13, p. 211, 2007; NYU Law School, Public Law Research Paper No. 07-12; NYU Law and Economics Research Paper No. 07-26. Available at SSRN: <http://ssrn.com/abstract=1002637> p 1253, Michal S. Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*. COMPETITION, COMPETITIVENESS AND DEVELOPMENT, pp. 20-38, 2004. Available at SSRN: <http://ssrn.com/abstract=665181>, and OECD PUBLISHING, DAC GUIDELINES AND REFERENCE SERIES PROMOTING PRO-POOR GROWTH: POLICY GUIDANCE FOR DONORS (Organization for Economic Co-operation and Development (OECD) 2007) at p. 43. Last viewed October 10, 2015.

² However, part of the epistemic community supports a universally optimal competition law. See for example Professor Priest who argues that one optimal competition law should be applied and there is no need for special competition law in relation to developing countries. George Priest, *Competition Law in Developing Nations: The Absolutist View*, in *COMPETITION LAW AND DEVELOPMENT* (Daniel D. Sokol et al. eds., Stanford University Press 2013).

³ See however Alison Jones and Johns Davies, *Mergers and the Public Interest: Balancing EU and National law in the Protectionist Debate*, 10 *European Competition Journal*, p.453 (2014). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533860. Last viewed October 10, 2015.

⁴ See Jim O'Neill, *Dreaming with BRICs: The Path to 2050*, Goldman Sachs, Global Economics Paper no. 99 (2005) Available at <http://www.macropolis.org/oriente/BRICS.pdf> Last viewed October 10, 2015. In 2010, an "S" replaced the "s" for South Africa.

search for more relevant and recent example of countries to emulate in implementing their newly acquired competition laws.

With the increase in the number of countries pursuing a holistic approach to competition enforcement, recent and relevant empirical studies are crucial.⁵ Accordingly, in this paper we will examine the law and enforcement of non-economic objectives, i.e., public interest considerations, in merger control focusing our discussion on South Africa (SA), as a leading jurisdiction in that regard with a growing body of case law, which is accessible and relevant. This paper goes further than the existing discussion of the pros and cons of including public interest considerations in merger review. The paper delves beneath the surface to explore the actual weight these public interest considerations have in the merger process, how they are administered and what challenges awaits competition authorities that adopt this model.

The paper will be divided to four parts. In the second part, we look at the extent public interest considerations have weighed under South African's merger regulations. We will answer the question of how these considerations were interpreted and enforced by the relevant competition authorities,⁶ especially the Competition Tribunal of South Africa (the **Tribunal**). The third part we will discuss the challenges of this model followed by our conclusion.

⁵ See Lianos discussion of holistic competition law: Ioannis Lianos, *Some reflections on the goals of EU competition law*, in HANDBOOK ON EUROPEAN COMPETITION LAW: SUBSTANTIVE ASPECTS Volume I, Ioannis Lianos and Damien Geradin eds, (Edward Elgar Publishing 2013), pp. 1-84.

⁶ We use the term "competition authorities" in the broad sense to mean Competition commission, Tribunal and Competition Appeal Tribunal.

II. PUBLIC INTEREST CONSIDERATIONS (PICs) IN SA MERGER CONTROL REGIME

1. The General Framework of Merger Control and PICs

1.1 *The Impact of PICs on the Merger Process*

Under the South Africa Competition Act No. 89 of 1998 (as amended) (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.”⁷ A merger may be prohibited if they are “likely to substantially prevent or lessen competition”. This economic test (SLC) is then followed by an assessment of the proposed merger under public interest considerations. The procedural aspects of merger analysis thus are undertaken in two main stages. The first stage is the SLC test.⁸ The test is not whether a merger necessarily prevents or lessens competition but whether it is probable that it will do so in a material or considerable amount or duration.⁹ In case the merger passes the SLC test, the authorities move to the second stage: the Public Interest Considerations Test (PICs Test). If the merger fails the SLC test, the next step is to determine whether there are any efficiencies or public interest considerations that would likely arise to offset the anti-competitive effects which would not likely be obtained absent the merger.¹⁰ If said trade-

⁷ See Section 3, Article 12 of the Act. A merger may be achieved in any manner, including through (i) purchase or lease of the shares, an interest or assets of the other *firm* in question; or(ii) amalgamation or other combination with the other *firm* in question.” Thresholds are calculated based on the combined turnover or assets of both parties and individual turnover of the target. See <http://www.compcom.co.za/merger-thresholds/> (Last viewed October 10, 2015). It should be noted that the Act has departed from the previously hybrid test of dominance and test to the substantial lessening of competition (SLC) test. See Section 1(b) of Act No. 5 of 1986 of the Maintenance and Promotion of Competition Act 96 of 1979. See also OECD, STANDARD FOR MERGER REVIEW, DAF/COMP (2009) 21, p.221. Available at <http://www.oecd.org/competition/abuse/46503256.pdf>. Last viewed October 10, 2015.

⁸ In making such a determination consideration must be given to the non-exhaustive list of factors set out in Section 12A(2) of the Act.

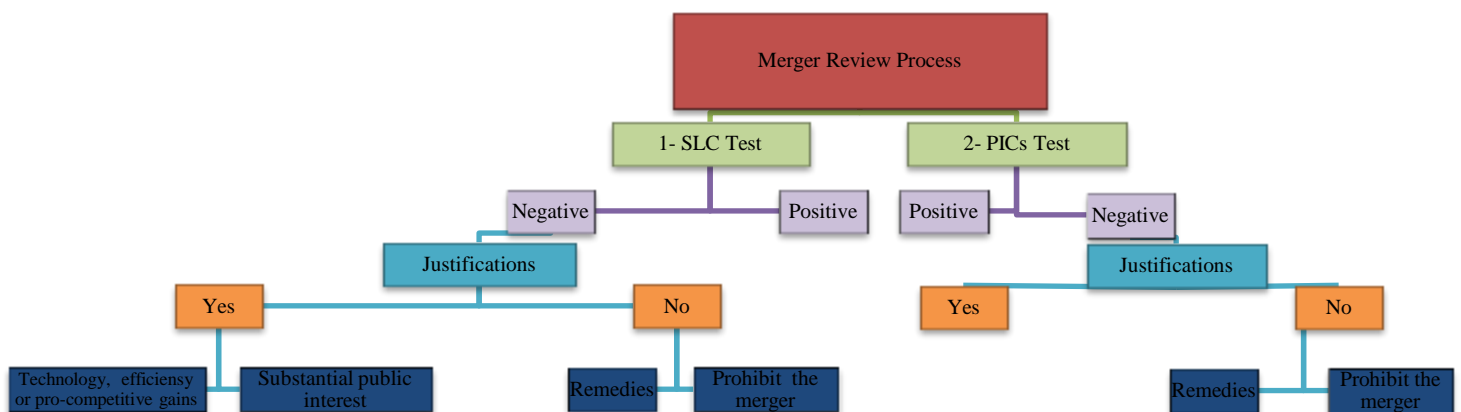
⁹ See case no.49/CAC/Apr05 however, this was not a merger case but price discrimination and Sasol Oil (Pty) Ltd vs. Nationwide Poles CC and Mondi Ltd/Kohler Cores & Tubes v Competition Tribunal (2003) I CPLR 25(CAC) at para. 38 and also case no. 5/CAC/Sep05 Medicross Healthcare Group (Pty) Ltd p.11. Such determination should be based on evidence that is available to competition authorities. See case no. 10/CAC/Aug01 Schumann Sasol (SA) (Pty) Ltd vs. Price's Daelite (Pty) Ltd, p.10.

¹⁰ “Whether efficiencies must be passed on to, or demonstrably benefit, consumers depends upon the nature of the claimed efficiencies. The Tribunal distinguishes “real,” quantifiable efficiencies, for which a clear showing of consumer benefit is less necessary, from “less compelling” claims for which there should be a demonstration that the benefit is passed through to consumers.” See the OECD PEER REVIEW, COMPETITION LAW AND POLICY IN SOUTH AFRICA (2003). Available at

off is found to offset the negative impact of the merger on competition then it passes the competition analysis. If the efficiency trade off or public interest considerations do not redeem the merger then the merger is found to be anti-competitive.

In any case, mergers, whether they pass the SLC Test or not, are then subjected to the PICs Test. This second stage of inquiry is to determine whether the merger can or cannot be justified on substantial public interest grounds.¹¹ This however does not mean that the merging parties are required to affirmatively justify a merger on public interest grounds, i.e., unless there is a net positive public interest gain from the merger it must be prohibited.¹² All that is needed is to “show that the merger will not have a substantial negative effect on the public interest.”¹³ However, once a substantial public interest ground has been demonstrated, the merging parties face an evidential burden of justification.¹⁴

Figure 1: Merger Review Decision Tree



Source: Based on the review of the provisions of Act by the author

<http://www.oecd.org/southafrica/34823812.pdf>. Last viewed October 10, 2015. It is not clear however why the analysis of public interest considerations is undertaken, at least in theory, twice. In practice, public interest considerations are considered separately as part of the second stage of review under the PICs test.

¹¹ Section 12 of the Act.

¹² It was argued in Harmony Gold and Gold Fields merger, that even if a merger raises no competition problems and no negative public interest issues, it must still be prohibited if there is no evidence that it can be justified on public interest grounds. The Tribunal found that such an approach "would render a good measure of the mergers which come before us daily, susceptible to prohibition". See case no. 93/LM/Nov04 para. 35, p.13.

¹³ *ibid* at para.61, p.19.

¹⁴ In Metropolitan and Momentum merger, once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it. Metropolitan Holdings Ltd v Momentum Group Ltd (41/LM/Jul10).

There is no explicit hierarchy between these tests but rather a certain analytical progression that is being followed.¹⁵ By the same token, the public interest test may not encroach on the competition analysis.¹⁶ The simple version of this exercise is a merger where both competition and public interest analysis are not in tension with each other, i.e., both lead to the prohibition or clearance of the merger¹⁷. But what happens in the case where the outcome of the analysis of one is positive and the other is negative? Can a merger, which has failed the competition test but justified on public interest grounds be approved? Or can a merger that has passed the competition test but failed the public interest test be prohibited? The answer is in the affirmative in both cases. “[P]ublic interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not anticompetitive.”¹⁸ The practice of the competition authorities so far is that no merger has been approved for public interest considerations in case it was also found to be anti-competitive.¹⁹ However, pro-competitive mergers have been approved despite their detrimental impact on public interest with conditions mitigating that said impact.²⁰

1.2 Categories of Public Interest Considerations: substantive aspects

Four categories are identified as matters of public interest. These are the following:

¹⁵ Early on, the Competition Appeal Court (the CAC) affirmed that there is no subordination of the public interest considerations to competition ones. See case no. 46/LM/Jun02.

¹⁶ *Supra* note 10 at p.8. In Medicross Healthcare appeal, the CAC faulted the Tribunal for moving to the public interest analysis before deciding on the impact on competition. *Supra* note 10 at p.8. David Lewis however contends that the reference made to public interest was to emphasize the importance of the market in question and not to the public interest test under the Act. See David Lewis, ENFORCING COMPETITION RULES IN SOUTH AFRICA: THIEVES AT THE DINNER TABLE, (Edward Elgar, 2012) p. 108.

¹⁷ See for example case no. 51/LM/Jun06 Telkom SA Ltd and Business Connexion Group Ltd. In 2015, the Commission has recommended a merger between the same firms for approval with conditions. Available at

http://www.bcx.co.za/news/competition_tribunal_approves_the_merger_between_bcx_and_telkom/. Last viewed October 15, 2015.

¹⁸ See case no. 46/LM/Jun02 Anglo American Holdings Ltd and Kumba Resources Ltd.

¹⁹ See for example case no. 83/LM/Jul00, Tongaat-Hulett Group Ltd merger. The parties raised employment, positive impact on the Mpumalanga region as well on the Southern African region and exports as public interest factors to approve the merger. The Tribunal viewed the merger as an attempt to 'pre-empt efforts to intensify competition through progressive deregulation of a highly concentrated market. See

http://dspace.africaportal.org/jspui/bitstream/123456789/34859/3/PLAAS_WorkingPaper28Dubb_0.pdf last viewed October 10, 2015.

²⁰ See for example Wal-Mart – Massmart case no. 110/CAC/Jun11 and 111/CAC/Jun11, SACCAWU, the Minister of Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries vs. Wal-Mart Stores Inc. & Massmart Holdings Limited. Available at <http://www.comptrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/110111CACJun11-Walmart-judgment.pdf> (last viewed October 10, 2015) & Metropolitan *supra* note & 14 where both merger decisions were appealed on public interest grounds and approved subsequent to conditions.

- particular industrial sector or origin,
- employment,
- the ability of small business of firms controlled or owned by historically disadvantaged persons to become competitive and
- the ability of national industries to compete in the international markets.²¹

The PICs test is not an open-ended one. The Act limits the competition authorities' ability to remedy public interest concerns in two ways. First, it recognizes only a specific set of public interest concerns, for which it provides an exhaustive list.²² The competition authorities scrutinize the nature of the PICs claimed insuring that the theory of harm/benefit to PICs fits the facts. Protection against imports has been an interest that was presented under the gist of PICs as a concern that could fit in the employment PIC box, however unsuccessfully.²³ In general the competition authorities are careful not to step out of their boundaries. Nevertheless, in practice they may still find some room to exercise some discretion. In some instances this has led them to adopt broad interpretations of these categories in order to enable the Competition Tribunal to address other PICs, which are not covered under the Act. In cases where other important public policy consideration not expressly included in the Act were raised (e.g. media plurality) the Tribunal was only able to address it by characterizing it under one of the concerns under the Act.²⁴ Second, the PICs must be merger-specific and substantial. The analysis here moves to whether the detrimental effects on PICs are justifiable. In this aspect of PICs analysis, the competition authorities adopted the analytical method for efficiencies and extended it to PICs analysis. Factors that assert the specificity and substantiality of each of the listed

²¹ Section 12A(3) of the Act.

²² In JD Group Limited, the Tribunal noted that the public interest consideration raised (franchising) does not clearly correspond to any other declared ones. See case no. 78/LM/Jul00.

²³ In Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd, SACTWU's concerns with the employment effects of this merger lie less with the relatively small number of jobs lost in direct consequence of the transaction than with the larger question of Edcon's alleged support for imported merchandise. See case no. 21/LM/Mar05. Same arguments were raised again in 06/LM/Jan06 Pepkor Limited and Manrotrade Four (Pty) Ltd The Tribunal continued that this is a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments, which is not merger control issue.

²⁴ In Media 24 Limited merger, media plurality was raised but addressed as a SMMEs concerns. See case no. 15/LM/Mar11.

considerations are determined by the competition authorities (discussed below in more detail).²⁵

Another question arises here, what happens if there are competing public interest considerations, i.e., a merger has positive impact on a given consideration and a negative one on another? Is there any hierarchy between these considerations? There is no conclusive answer here. This issue presented itself in some cases when parties argued that the merger has a positive effect on public interest as it creates an internationally competitive firm while the unions asserted that the job losses arising from the merger have great adverse effect on employment and hence should be prohibited on public interest grounds. Although the Tribunal did not have to rule on this matter as it found no evidence of an adverse effect on public interest grounds, it did explain that in such situations (conflicting public interests) the Tribunal must first perform a balancing of the interests claimed to come to a net conclusion on whether there is a substantial public interest implicated by the merger or not.²⁶

The competition authorities are thus required to strike a balance between the various PICs in addition to the balance between competition analysis and PICs mentioned above.

1.3 Intervention in Merger Proceedings involving PICs: procedural aspects

An interesting aspect of how merger review is conducted in SA pertains to third-party intervention rules in merger proceedings. When notifying a merger both the primary acquiring and target firms must each provide a copy of the notice to the registered union that represents a substantial number of its employees. In case of absence of such union, the notice is provided directly to the employees concerned.²⁷ Not only do employees (or their unions) have the right to be notified, they also have the right to participate in merger proceedings. Accordingly, persons who are entitled to participate include not only the

²⁵ Earlier this year the Commission made a call for consultation on the draft guidelines on the assessment of public interest considerations in merger control. It provided a number of factors to assess these considerations. Available at <http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf> last viewed October 7, 2015.

²⁶ Case no. 08/LM/Feb02 Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd and Anglo and Kumba merger *supra* note 18 with the Industrial Development Corporation intervening.

²⁷ Section 13A(2) of the Act.

merging parties and the Competition Commission (the “**Commission**”) but also employees (and/or their unions) who indicated their intention to participate.²⁸

The Commission notes that in the beginning, the unions’ engagement with the competition authorities was limited, but through awareness and interaction with them, they have become much more involved in the process.²⁹ In some cases their submissions have extended beyond employment to other public interest concerns as well as competition issues.³⁰ A question arises as to what occurs if there is more than one labour union representing the employees. Can the merger parties find comfort if the union holding the majority of employees is not objecting to the merger? The Tribunal was unbothered by this fact and decided “*the level of representation does not alter the concerns if they are legitimate.*”³¹ This participation right is also extended to the Minister of Trade and Industry who may raise any public interest considerations that may arise from these mergers.³² Subsequently, not only parties to the merger may appeal the decision of the Tribunal to the Competition Appeal Court (the “**CAC**”), but also any person who had been a participant in the proceedings of the Tribunal may do so within 20 business days after notice of the decision.

Some consumer interest groups have also made use of their intervention right. In Glaxo Wellcome plc and Smithkline Beecham, the Aids Law Project, the legal

²⁸ Section 13 B and Section 53(1)(c) of the Act.

²⁹ See The Commission’s report, 10 Years of Enforcement by South African Competition Authorities, p38. Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf> (last viewed October 10, 2015) and case no. 55/LM/Sep01. Notably there is a rise in participation by unions in merger transactions. See for example case no. 14/LM/Mar10 Unilever Plc. and Unilever N.V and Sara Lee Corporation and the Competition New Edition, July 2011 regarding training union reps by the Commission <http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-News-Edition-39-July-2011.pdf> Last viewed October 10, 2015.

³⁰ Food & Allied Workers Union and McCain Foods (SAFAWU) argued that the Commission has erred by defining the relevant market too broadly in addition to raising concerns over employment loss. See case no. 17/AM/Mar01

³¹ SACTWU represented 15 out of a total 426 employees while the majority of the employees were represented by the National Union of Leather and Allied Workers, which had not objected to the merger. See case no. 58/LM/May12.

³² Section 18 of the Act stipulates that, in order to make representations on any public interest grounds referred to in section 12A(3), the Minister may participate as a party in any intermediate or large merger proceedings before the Commission, Tribunal or the Competition Appeal Court in the prescribed manner.

representatives of the Treatment Action Campaign (TAC)³³, were allowed to make a last minute submission on the day of the hearing requesting conditional approval of the merger, forcing the merging parties to allow generic competition for all medicines needed for the treatment of opportunistic infections in HIV/AIDS as well as anti-retroviral for HIV.³⁴ Also in Pioneer Hi-Bred International Inc. and Pannar Seed (Pty) Ltd and Competition Commission, the African Centre for Biosafety (ACB), was granted leave to intervene in the proceedings before the Tribunal, as an interested third party, on the basis that it represented the interests of small scale commercial and subsistence farmers in South Africa, who would be affected by any potential maize seed price increases, as a result of the proposed merger.³⁵ In AGFRI and AgriGroupe merger, the South African Communist Party challenged the merger raising various PICs.³⁶

Intervention in competition proceedings is not exclusive to these categories of persons. The CAC adopted a broad interpretation of the provisions of the Act and found that it does not exclude any other party from intervening on public interest grounds³⁷Hence, the CAC rejected the application of the “*material and substantial interest test*” to limit intervention in merger cases, finding it too restrictive a test to be applied.³⁸ Hence, a party who is unable to show a material substantial interest in the matter may well be admitted if it is able to provide evidence of its ability to assist the Tribunal in its

³³ The treatment action campaign (TAC) is a voluntary organization that campaigns for affordable healthcare in SA particularly for people living with HIV/AIDS. For more information see http://www.tac.org.za/about_us last viewed January 10, 2016.

³⁴ Case no. 58/AM/May00. Note that this was an intermediate merger however we include it in our discussion for relevance.

³⁵ Case no. 81/AM/Dec10

³⁶ AgriGroupe Holdings (Pty) Ltd v Afgri Ltd (017939) [2014]

³⁷ Upholding the Tribunal’s position that “*the potential harm of turning merger proceedings into battlefields open to disgruntled minority shareholders, customers or competitors in pursuit of private interests [...] should not overshadow the greater potential for legitimate issues to be raised by third parties in merger proceedings and the assistance they may render in facilitating our vigorous truth-seeking mission.*” 45/LM/Jun02 Industrial Development Corporation of South Africa Ltd and Anglo-American Holdings Ltd Competitor may also intervene in their rivals’ mergers proceedings. See also case no. 53/AM/May12 and case no. 015057 DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings(Pty) Ltd. See case no. 26/CAC/Dec02 Anglo South Africa Capital (Pty) Ltd, Others vs. Industrial Development Corporation of South Africa, The Competition Commission South Africa. To be able to assess whether a merger is justified on public interest grounds, the Tribunal might admit persons beyond those persons or bodies who are directly or indirectly involved in the merger.

³⁸ When applying the said test to the Act, which was adopted in order to safeguard the economic welfare of South African citizens, this may open the door for anyone to participate Case no. 12/CAC/Dec01 American Soda Ash Corporation (Appeal) and Patz v Greene 1907TS 424.

task.³⁹ This is a pragmatic approach followed by the court in order to ensure that the objectives of the Act are achieved.⁴⁰

With every right there is always the possibility of abuse, which may lead to prolonged merger proceedings. This is particularly important because parties to the merger may not implement the merger before obtaining the requisite approval. The competition authorities in general try to accommodate applicants who raise PICs. The court may go at length to contact such applicants using various means of communication to reach out to them and / or their legal representatives. With such a broad interpretation, the authorities should then engage in careful consideration as to who may intervene. An applicant for intervention should set out in their founding affidavits the matters upon which they seek to make representations identifying their interests and specifying the scope and nature of their proposed participation.⁴¹ In some cases, the pattern of applicant's conduct has been to generate delay after delay without any substantiation as to why such delays were justified. In Community Healthcare Holdings (Pty) Ltd merger, the CAC dismissed an intervention made under the gist of BEE as third-party failed to specify on what basis such intervention could be made despite countless invitations extended to them by the court.⁴² Hence a request for postponement which is unaccompanied by any affidavit or any substantive explanation is merely a delay tactic and will be disregarded.⁴³ A court will grant a postponement if its reasons have been fully explained, no delaying tactics used and where justice so demands.⁴⁴

Further, there are prescribed timelines under the Service Standard published by the Commission. The Service Standards sets the review periods that the Commission will commit to:

³⁹ Case no. 44/CAC/Feb05 Community Healthcare Holdings (Pty) Ltd.

⁴⁰ *Ibid* at p. 7. For this reason the CAC found that Rule 46 sets out a higher threshold than the one which is required in terms of the Act for a party to be able to participate. Rule 46(1) required material interest to be able to intervene in the Tribunal proceedings.

⁴¹ See Anglo SA, *supra* note 37, the applicant for intervention provided a report by expert economists aimed at disputing certain views expressed in an economists report furnished on behalf of the merging parties. The intervening applicants sought to highlight material inadequacies in this report.

⁴² Community Healthcare Holdings merger *supra* note 41.

⁴³ Case no. 59/CAC/Feb06 Mybico and Vodafone. See also 110/LM/Nov05 Vodafone Group PLC and Venfin Limited

⁴⁴ *Madnitsky v Rosenberg*, 1949 (2) SA 392 (A) at 399 as mentioned in Mybico and Vodafone *ibid* at p.5.

- for phase 1 (non-complex mergers)⁴⁵ this is 20-business days,
- for phase 2 (complex mergers)⁴⁶ 45 business days and
- phase 3 (very complex mergers)⁴⁷ 60-business days.

The review of the Service Standard in 2015 showed that these timeframes were not met especially in relation to Phase 1 and Phase 3 mergers. This was attributed to the growing volumes in the number of mergers notified and the increasing complexity of investigations. Hence, the new standards issued by the Commission in 2015 added a sub-category to Phase 3 and divided it to Phase 3 intermediate mergers with 60 business days review period and Phase 3 large mergers with 120 business days review period.⁴⁸

Third party intervention in merger proceedings is different to that followed under US antitrust law and EU competition law. US law prohibits mergers that may substantially lessen competition or create a monopoly.⁴⁹ There is no duty to inform third parties or allow for their interference as per the South African model. Filing Hart-Scott-Rodino notifications is confidential and exempt from the Freedom of Information Act.⁵⁰ Under the Horizontal Merger Guidelines, in their search for evidence, agencies may contact customers, other industry participants, and industry observers to collect reasonably available and reliable evidence.⁵¹ A report by the FTC on merger investigations between 1996 and 2011 shows that the agency is twice as likely to challenge a deal when customers of the merger

⁴⁵ Merger where parties' combined market share is below 15 per cent, where no complex control structures arise or no public interest issues arise.

⁴⁶ Mergers involving transactions between actual or potential competitors (horizontal mergers) or between customers and suppliers (vertical mergers) where the parties hold more than 15 per cent in their respective markets.

⁴⁷ Mergers that the Commission considers likely to give rise to a substantial lessening or prevention of competition.

⁴⁸ Service Standard of 2015. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/Service-Standards_2015_Final1.pdf

⁴⁹ Section 7 of the Clayton Act. The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR) 15 U.S.C. § 18a, requires parties to certain mergers notify the enforcement agencies of the contemplated transaction and observe a waiting period prior to closing. Both the FTC and DoJ have concurrent powers to review these mergers. Said mergers are assigned, through clearance procedure, to one of these agencies on a case-by-case basis depending on which agency has more expertise with the industry involved. <https://www.ftc.gov/news-events/media-resources/mergers-and-competition/merger-review>

⁵⁰ See F TC, FREEDOM OF INFORMATION ACT & PRIVACY ACT HANDBOOK (2007). Available at <https://www.ftc.gov/sites/default/files/attachments/foia-request/foiahandbook.pdf>. Last viewed January 10, 2016.

⁵¹ See 2.2 Sources of Evidence in Horizontal Merger Guidelines (08/19/2010) | ATR | Department of Justice (2015). <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> Last viewed October 10, 2015.

parties raise credible and significant anticompetitive concerns to the proposed merger than when strong customer complaints do not exist⁵², while evidence from competitors is usually received with scepticism.⁵³ Hence, third parties are not privy to the filings and can only infer information about the merger if they have been contacted by the relevant agency in the course of review or if the parties themselves announced the merger.⁵⁴ In case they become aware of the merger, private third parties including customers, competitors, suppliers, distributors or wholesalers may complain to the relevant agency reviewing the merger.

In addition to complaining to competition agencies, challenges to the merger can be brought independently or through state attorneys. A third party may file a private civil antitrust lawsuit at any stage whether this is after the merger was announced, during the merger review period, after the merger was cleared by the antitrust agencies or after the merger has been consummated. These third-party parties will need to show to the court antitrust injury in order to have standing.⁵⁵ Consumers may also bring collective actions, i.e., class action against the merger. Direct consumers can ask for injunctive relief and treble damages while indirect customers may only ask for injunctive relief but not damages. Harm to third parties may also be addressed under *parens patriae*, where a state attorney general may bring a civil action on behalf of natural persons residing in the State to secure monetary relief for injury sustained by such natural persons to their property by reason of any violation. In price fixing cases, the US Supreme court limited damages to direct purchasers.⁵⁶ There is however, in relation to remedies, a statutory period for seeking public comments that is applied by the courts on a proposed consent decree or divestiture order. Pursuant to the Antitrust Procedures and Penalties Act, a consent order is subject to sixty-day comment period for third parties and the public after which the court must determine whether entry of the proposed final judgment “*is in the*

⁵² See FTC: Horizontal Merger Investigation Data Report (January 2013). Available at <https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf> last viewed October 10, 2015.

⁵³ *ibid* at 2.2.3 the Agencies do not routinely rely on the overall views of rival firms regarding the competitive effects of the merger. However, rival firms may provide relevant facts, and even their overall views may be instructive, especially in cases where the Agencies are concerned that the merged entity may engage in exclusionary conduct.

⁵⁴ In the course of the preliminary review of a proposed merger, the relevant agency may contact the merger parties and third parties with “informal, voluntary” information requests, such as customers, competitors, and trade associations.

⁵⁵ *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 447 (1977)

⁵⁶ *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977).

*public interest.*⁵⁷ Also settlement agreements with the FTC are subject to 30-day public comment period where anyone may file comments concerning the case.⁵⁸ In few occasions, labour unions submitted comments raising concerns over the impact of divestiture order on employment. The FTC countered their claims stating that “*the antitrust laws are not subject to this proposed weighing of policy interests*” on which the court concurred.⁵⁹

EU competition law also grants the Directorate General for Competition at the European Commission the right to seek information from the merger parties, third parties and interview any natural or legal person who consents, in order to collect information in relation to an investigation. Third parties are identified as those having a ‘sufficient interest’ in the Commission’s procedure, such as customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognized workers’ representatives of those undertakings.⁶⁰ The 2004 Best Practices provides for “*triangular meetings*” where the views of the notifying parties and opposing third parties can be heard in a single forum.⁶¹ “*Third parties do not have a right to be heard in the absence of an explicit invitation by the Commission and are expected to comment only on the competition implications of the merger, rather than on broader issues, such as the protection of employment, environment, and so on.*”⁶² The EU’s General Court has the power to review the legality of all Commission decisions, including decisions under the Merger Regulation. An appeal can be brought not only by the

⁵⁷ OECD, UNITED STATES CONTRIBUTION TO WORKING PARTY NO. 3 ON CO-OPERATION AND ENFORCEMENT, DAF/COMP/WP3/WD (2011) 58 p.9-10. Available at <http://www.justice.gov/sites/default/files/atr/legacy/2011/07/29/273459.pdf> last viewed October 10, 2015.

⁵⁸ *ibid*

⁵⁹ Bureau of Federal Trade Commission at 45 n.20 as mentioned in OECD, UNITED STATES CONTRIBUTION TO THE GLOBAL FORUM ON COMPETITION, DOES COMPETITION CREATE OR KILL JOBS, DAF/COMP/GF/WD (2015) 43, p.4 Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2015\)43&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)43&docLanguage=En) Last viewed October 10, 2015.

⁶⁰ COUNCIL REGULATION (EC) NO 139/2004 ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS (THE EC MERGER REGULATION). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF> Last viewed January 15, 2016.

⁶¹ EUROPEAN COMMISSION Competition DG COMPETITION Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU (2010). Available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf last viewed January 15, 2016.

⁶² Ioannis Lianos, *The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication* (2008) p. 17.

merging parties, but also by third parties “*directly and individually concerned*” by the decision. Although the EU definition of third parties is broader than that of the US, it is still narrower than that of SA.

Further, under the EU competition regulations and the UK Competition Act, either the commission or authority may accept voluntarily commitments / undertakings from entities under investigation to address competition concerns thus abandoning its investigation.⁶³ Unlike a finding of infringement, the Commission (or CMA in the UK) cannot impose remedies bringing the infringement to an end and/or impose a fine.⁶⁴ Commitments should be proportional to the competition problem and entirely eliminate it.⁶⁵ A full text of the commitments is made public for interested third parties to comment. A consultation process precedes a commitment decision where third parties may voice their opinion about the subject of commitment.⁶⁶ The weight given to third party participation is still a matter of debate. As per the CAT decision in Skyscanner appeal, the commission must conscientiously take consultation responses into account when they make their ultimate decision. The CAT found that it was not right of the OFT to require Skyscanner to provide further evidence for its concerns “*if a consultation response raises an important and obvious point of principle, it is for the authority to examine it further. This is particularly so where the authority has not carried out an analysis of the economic effects of the practices which it proposes to address with its commitments decision and where that decision itself may generate its own economic effects within the market.*”⁶⁷ Also, the right to access public files is different for “*undertakings concerned, third interested parties involved in the proceedings...and third parties that are not involved in the competition authorities’ proceedings*”.⁶⁸

⁶³ Article 9 of COUNCIL REGULATION (EC) NO 1/2003 OF 16 DECEMBER 2002. Available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001> Last viewed January 15, 2016.

⁶⁴ See European commission - PRESS RELEASES - antitrust: Commitment decisions – frequently asked questions (Mar. 8, 2013), http://europa.eu/rapid/press-release_MEMO-13-189_en.htm last viewed October 10, 2015.

⁶⁵ Recital 13 of the COUNCIL REGULATION (EC) NO 1/2003, *supra* note 63.

⁶⁶ Transparency and effective consultation of Member States as well as of interested third parties should be ensured throughout the procedure. See COUNCIL REGULATION (EC) NO 139/2004 *supra* note 60.

⁶⁷ Skyscanner Limited v Competition and Markets Authority, Case No.: 1226/2/12/14, para 90.

⁶⁸ See Lianos *supra* note 62 at p. 27.

Accordingly, although participatory rights of third parties under a commitment decision are wider than that of an infringement decision, it is still very limited in terms of category of participants, the subject of participation and right to access to files compared to the South African model. This illustrates that integrating public interest considerations in merger control does not only affect the substantive tests performed but also the organisation of the merger review process and more broadly the various procedures put in place in order to enhance participation from the affected interests and groups (e.g. consumers, employees, the general public) legislation seeks to protect.

2. Enforcement of Public Interest Considerations in South Africa

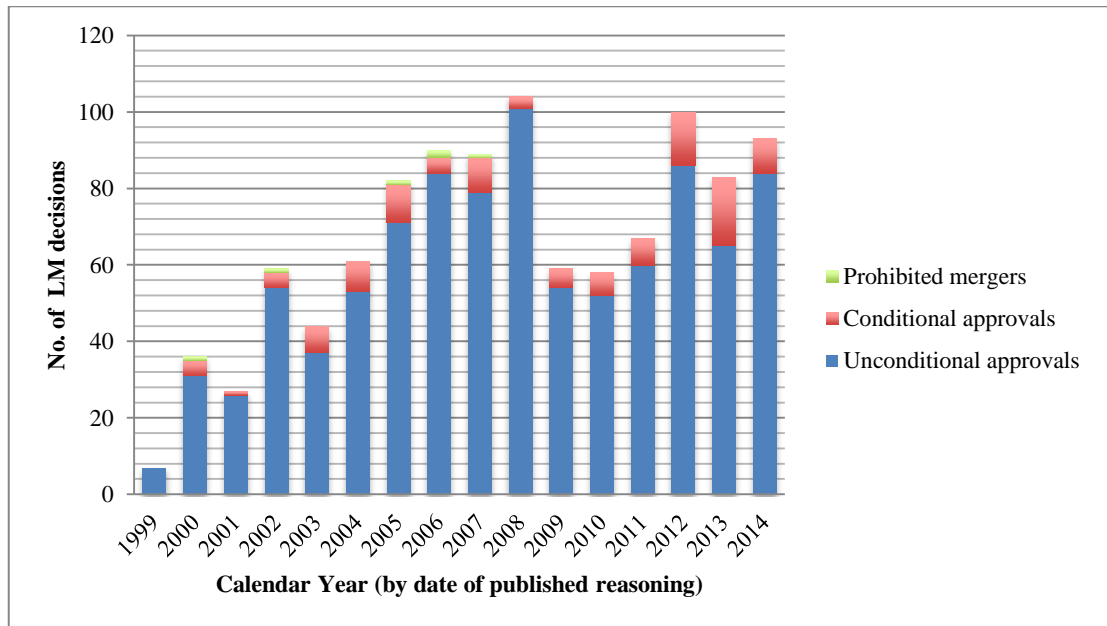
In this part we will examine how the South African competition authorities interpreted the provisions of the Act regarding PICs. We will focus on published decisions of the Tribunal (and a few intermediate mergers and CAC decisions, when relevant) from 1999 up to the year 2014 in order to understand in which instances public policy considerations were applied and how.⁶⁹

As discussed above, PICs can manifest either in the positive or the negative sense, i.e., to enhance the chances of approval or support a request for prohibition (or conditional approval) of a merger. We will first quantify the impact PICs have in the decisions of the Tribunal. To do that, we selected a subsection of all these decisions, which are accessible, as well as sufficiently representative in the sense that they cover a substantial period of enforcement and provide the judicial precedents on the matter. We surveyed the Tribunal's decisions in large mergers (LM) from the date of operation in 1999 to the end of 2014 (based on the date of publication of the reasoning for each decision).⁷⁰

⁶⁹ We have also reviewed intermediate mergers decisions by the Tribunal however we have referred to them in our discussion of enforcement when they are of relevance.

⁷⁰ A large merger is where the combined turnovers/asset values of the acquiring group and the target firm exceeds R6.6bn and where the target firm's turnover/asset value exceeds R190m. While the Commission must be notified of all intermediate mergers if the value of the proposed merger equals or exceeds R560 million (calculated by either combining the annual turnover of both firms or their assets), and the annual turnover or asset value of the transferred/target firm is at least R80 million. A small merger is where the combined turnovers/asset values of the acquiring group and the target firm is below R560m and where the target firm's turnover/asset value is below R80m. Small mergers are merger where annual turnover or assets of both the acquiring and transferred / target firms are valued at or above R6.6 billion, and the annual turnover or asset value of the transferred / target firm is at

Figure 2: Tribunal decisions LM (1999-2014)

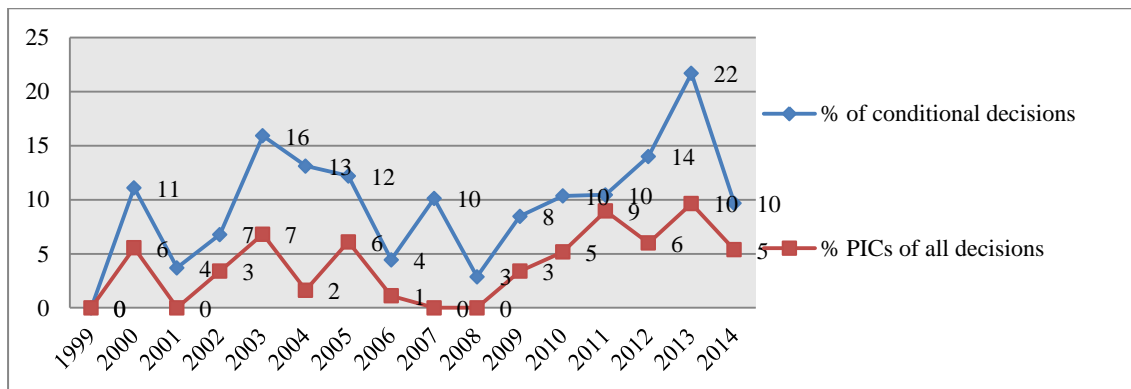


Source: Compilation by author based on the review of the database of the published decisions of the Tribunal

The above shows that almost 90% (89.1%) of these mergers were approved with no conditions while 0.5% (total of 6) were prohibited. Approximately 10% of these mergers were conditionally approved. However, we need to identify the number and percentage of the PICs related conditions compared to the competition related conditions in order to be able to quantify how much negative public interest considerations featured in the work of the Tribunal during the said period.

least R190 million, the merger must be notified to the Competition Commission as a large merger. Small mergers may be notified on exceptional basis. See Subsection 3 of the Act.

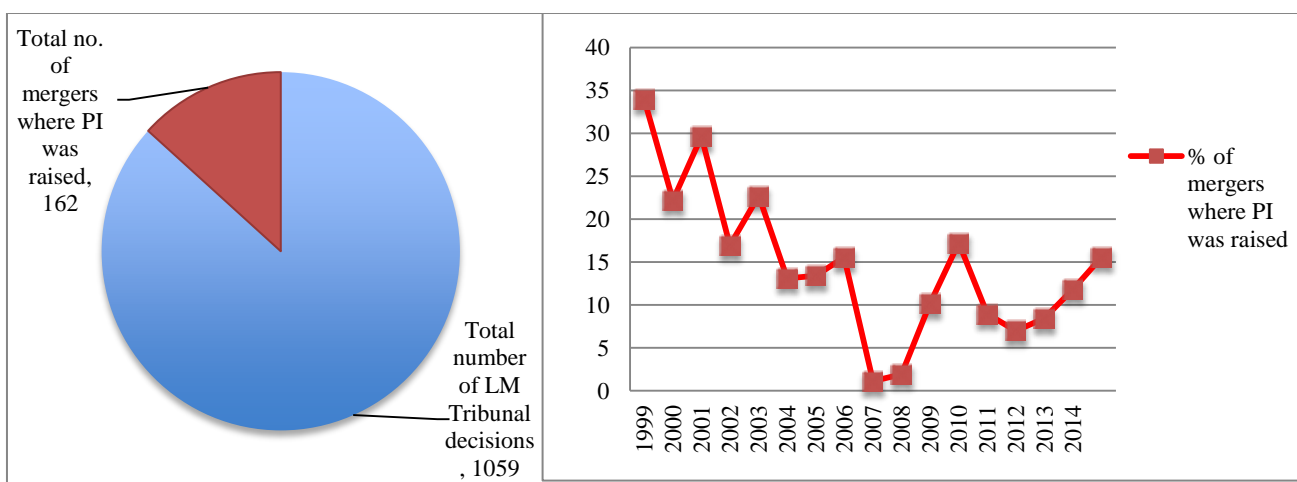
Figure 3: Tribunal LM Conditional approval (1999-2014)



Source: Calculations by author based on the review of the database of the published decisions of the Tribunal

Accordingly, we found that, out of those 10% of conditional approvals, about 40% were public interest related conditions (4% of all decisions). This does not however, address situations where the public interest was raised in the positive sense, i.e., in order for the Tribunal to approved the merger. To get an indication on these figures, we surveyed all the LMs decisions where one or more PIC was raised (that includes both positive and negative) regardless of whether conditions were adopted.

Figure 4: % of LM mergers where PICs were raised

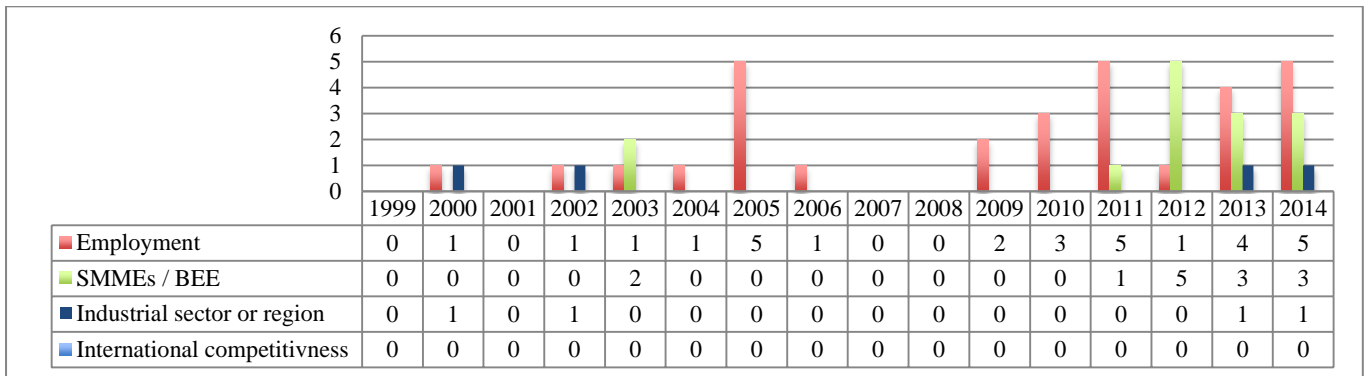


Source: Calculations by the author based on the review of the database of the published decisions of the Tribunal

We found that the total average percentage of public interest considerations raised

in LMs during that period is slightly above 15%, fluctuating from almost 30% in a given year to 0% in other. We wanted also to identify the most frequently used PICs among the four categories. The data on public interest conditions may provide us an indication on the most featured ones.

Figure 4: No. of PICs conditional approvals by the Tribunal in LM- by category of public interest



Source: Calculations by author based on the review of the database of the published decisions of the Tribunal

As expected, employment is the top public interest concern followed by SMMEs / HDI, ability of a sector or a region to compete and finally international competitiveness.

It should be noted that employees’ rights are safeguarded under the Constitution and the Labour Relations Act 66 of 1995 (as amended) (“**Labour Act**”).⁷¹ The Labour Act dealt with the issue of job loss in case of ordinary or insolvency transfers. There are slight differences on how the act treated employees in each of these cases. In both transfer scenarios, the new employer is obliged to honour the employment obligations of his predecessor, i.e., the new employer takes over the employees subject to terms and conditions of employment which are, on the whole, not less favourable than those

⁷¹ Labour relations in South Africa were riddled with inequality and preferential treatment for white labour as a consequence of the Apartheid system. These were turbulent times that witnessed waves of strikes and resistance, such as the 1914 and 1922 strikes. See Jon Lewis et al., *Industrialisation and Trade Union Organization in South Africa, 1924 1955: The Rise and Fall of the South African Trades and Labour Council* (Cambridge University Press 1984). The 1994 Constitution strived to redress this injustice by stipulating some fundamental rights for labour such as the right form and join a union and to participate in its activities, the right to strike and the right of trade union, employers’ organization and employer to engage in collective bargaining. Section 23 of the South Africa Constitution of 1996 (Bill of Rights).

awarded by its predecessor.⁷² This includes arbitration awards and collective agreements.⁷³ Accordingly, competition law should be a measure of last resort where no other law or regulation can remedy the situation. Only then the competition authorities may intervene to either prohibit or set conditions on a merger approval.⁷⁴

SMMEs are defined as per the National Small Business Act No. 102 of 1996 (as amended in 2003). They are categorized on the basis of their turnover, assets and number of employees into four categories: micro,⁷⁵ very small, small and medium sized entities.⁷⁶ Similar to other public interest considerations, SMMEs arguments may be used in order to approve a merger (positive sense)⁷⁷ or prohibit a merger (negative sense).⁷⁸

The ability of historically disadvantaged individuals (HDI), what is sometimes referred to as the Black Economic Empowerment (BEE) clause, to become competitive is

⁷² S197 (a) of the Act 'business' includes the whole or a part of any business, trade, undertaking or service; and (b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

⁷³ Collective agreements are given great importance under the Labour Act where it emphasizes the need for organised labour and business to regulate its relationship through the entering into of collective agreements which binds the employer, the union's members and, where the union represents more than 50% of the employees in a workplace and if such intent is stated, non-union members in the workplace

⁷⁴ See Distillers Corporation merger *supra* note 26, case no. 38/LM/Jul03 Super Group Trading (Proprietary) Limited and Businesses of DNA Supply Chain Investments Limited, case no. 04/LM/Jan00 Lexshell 296 Investment Holdings and case no. 17/LM/Feb00 AECI Coatings, PPG Securities Industries and AECI

⁷⁵ Survivalist enterprise: The income generated is less than the minimum income standard or the poverty line. This category is considered pre-entrepreneurial, and includes hawkers, vendors and subsistence farmers. In practice, survivalist enterprises are often categorized as part of the micro-enterprise sector. See NATIONAL CREDIT REGULATOR, LITERATURE REVIEW ON SMALL AND MEDIUM ENTERPRISES' ACCESS TO CREDIT AND SUPPORT IN SOUTH AFRICA 2011 http://www.ncr.org.za/pdfs/Literature%20Review%20on%20SME%20Access%20to%20Credit%20in%20South%20Africa_Final%20Report_NCR_Dec%202011.pdf Last viewed October 10, 2015.

⁷⁶ These categories features enterprises in both the formal and informal sectors of the economy. See Chapter 1, Section 1, sub-section (xxxii) of Competition Act. The ILO's defines the informal sector as businesses characterized by seven specific traits, including low barriers to entry, small-scale operations, being labour intensive, family owned, reliant on skills acquired outside of formal schooling and operating in unregulated and competitive markets. In 2013 1,5 million people were running informal businesses. Black Africans predominantly run informal businesses, persons aged 35–44 years, and those with the lowest levels of education. See <http://www.statssa.gov.za/?p=3016> (Statistics South Africa, PRESS STATEMENT: Survey of employers and the self-employed (SESE), 2013:| statistics South Africa (Aug. 14, 2014), <http://www.statssa.gov.za/?p=3016>. Last viewed October 10, 2015.

⁷⁷ The Tribunal approved a merger that presents small banks with the opportunity to achieve the critical mass required to become more competitive to compete with larger banks and increase efficiencies as well as the fact that smaller banks have black economic empowerment components.

⁷⁸ While in Media 24 merger, the Tribunal found that the harm to competition expected (foreclosure) in KwaZulu-Natal and the Northern Eastern Cape, will also have a detrimental effect on small publishers often are also black owned and approved the merger conditionally. Media 24 merger *supra* note 28.

the twin brother of the SMMEs consideration.⁷⁹ Both BEE and SMMEs considerations often arise together since individuals covered by BEE are usually the owners of these SMMEs.⁸⁰ All through South Africa's constitutional and legal framework one may find provisions for BEE. These include human resource development, employment equity, enterprise development, preferential procurement, as well as investment, ownership and control of enterprises and economic assets.⁸¹ These provisions are also mirrored under some sector specific acts⁸², charters and memorandums of understandings (MoUs).

There is no definition or explanation of what constitutes an "*industrial sector*" but it is interpreted to include both products and services. In relation to international competitiveness what is protected is the ability to compete and not to the ability to become competitive (as in the case of SMMEs and HDIs). These two represent different policy choices. On the one hand, a policy choice to protect national champions existing in the market while on the other hand, engage in the promotion of the underprivileged such as the SMMEs & HDIs. This reflects the prerogative of the competition authorities under the Act, which expands beyond the role of protecting competition to protecting certain interest in not only staying in but also entering the market.

In practice however, a merger can raise two or more of these PICs, whether in the positive or negative sense, or all at once.

2.1 PICs criteria under the SA merger control

The general rule is that for PICs to be considered they must be merger-specific, substantial and unjustifiable on any other grounds. This framework seems similar to the

⁷⁹ Regulation 1(h) of the PREFERENTIAL PROCUREMENT REGULATIONS 2001 provides that: "Historically Disadvantaged Individual (HDI) means a South African citizen (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ("the Interim Constitution"); and/or (2) who is a female; and/or (3) who has a disability. Provided that a person who obtained South African citizenship on or after the coming into effect of the interim Constitution, is deemed not to be an HDI."

⁸⁰ See Media 24 merger *supra* note 28 where many of the small independent community newspaper businesses met the criteria of a small business as defined in the Act and/or of firms controlled or owned by historically disadvantaged persons. This finding was overturned by the CAC finding many of the independent manufacturers fall into the strict definition of a small business.

⁸¹ See Broad Based Black Economic Empowerment Bill of 2003, the Employment Equity Act of 1998 and Section 217 of the Constitution.

⁸² THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT OF 2002.

methodology used in assessing efficiencies in general. What is of interest here is how these familiar notions of an efficiencies defence were remodelled in order to fit each PIC under the Act.

2.2.1 Employment

To be considered as a public interest consideration issue, job losses must be merger-specific, substantial and must not be categorized under any other public interest grounds.⁸³ We will discuss below the factors, which the Tribunal took into consideration in making its assessment.

A. Merger-specific retrenchments

Retrenchment is a matter dealt with under the Labour Act. What concern the merger review process are merger-specific retrenchments. Merger-specific retrenchment is conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new employer.⁸⁴ This is different from an operational employment loss, which only concerns Labour law.⁸⁵ Distinguishing between the two is not simple. It is rather easy for companies to disguise merger-specific retrenchments so that it appears that these would have occurred even in the absence of the merger hence, the emphasis the competition authorities put on transparent and *bona fide* disclosure by the parties of any retrenchment whether they consider it merger-specific or not, for the authorities to decide on the matter.⁸⁶

⁸³ Case no. 20/LM/Mar01 DB Investments SA and De Beers Consolidated Mines Ltd, De Beers Centenary AG.

⁸⁴ The Tribunal resisted the pressure to impose conditions in case of possible hypothetical future job losses in unrelated industries or offering broad undertakings regarding maintaining employment levels into the distant future. Adcock *supra* note 67.

⁸⁵ According to LABOUR RELATIONS ACT (LRA), Act 66 of 1995, employers must consider alternatives to retrenchment. Employers must consult all the relevant parties when considering worker retrenchment. If retrenchment is unavoidable, fair procedures must be followed. For more details see <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/basic-guide-to-retrenchment>. The Labour Court decided that “Implicit in section 189 (2)(a)(i) and (ii) of the Act is an obligation on the employer not to dismiss an employee for operational requirements if it can be avoided. Accordingly, these provisions envisage that the employer will resort to dismissal as a measure of last resort. Such an obligation is understandable because dismissals based on the employer’s operational requirements constitutes the so called no fault terminations.” See Andre Johan Oostehizen v Telkom SA Ltd (2007) ILJ 2531 (LAC), para. 4.

⁸⁶ Case no. 10/LM/Mar03 Daun et Cie AG and Kolosus Holdings Limited.

Merger-specific retrenchment is more prevalent in firms with overlapping activities since “*the nexus is more easily established because the inference of merger specificity is highly probable*”.⁸⁷ In another case, the employment policies of the new acquirer served as an indicator of this nexus.⁸⁸ On the other hand, employment loss may not be seen as merger-specific if they arise from dire financial circumstances of the target firm, which would necessitate retrenchments.⁸⁹ The timing of the retrenchment may also be an indication of whether it was merger-specific or not.⁹⁰ Implementing a merger prior to obtaining the required approvals, i.e., jumping the gun poses problems especially when it comes to retrenchment and deciding on whether it is merger-specific or constitutes an operational loss. This may lead to a determination that the retrenchment is merger-specific.⁹¹ When in doubt the competition authorities seem to take a cautious approach and impose conditions on the retrenchment.⁹²

B. Substantial employment losses:

i. Quantitative factors: number and percentage of employees retrenched

Whilst the Act offers no threshold number for when job losses become substantial, the proper approach is to start by having regard to the number of jobs that will be lost post-merger.⁹³ The Tribunal will also consider the percentage of job losses to the work force when analysing the merger’s impact on employment. The percentage should be based on the acquired firm’s work force that the retrenchments represent.⁹⁴ This is however regarded as a factor far from being conclusive. Reaching the exact number / percentage

⁸⁷ Adcock *supra* note 67.

⁸⁸ In Wal-Mart – Massmart merger, the Tribunal decided that an acquiring firm’s history as being hostile to collective bargaining justified imposing a condition on the merged firm to protect existing collective bargaining rights. See the Wal-Mart – Massmart *supra* note 20.

⁸⁹ Case no. 69/LM/Oct09 Wispeco (Pty) Ltd and the Business of AGI Solutions (Pty) Ltd.

⁹⁰ See the Wal-Mart – Massmart *supra* note 20, para. 140.

⁹¹ In such cases, merging parties are responsible for the fact that the prior implementation has led to a blurring of issues so retrenchments that are merger-specific and those that are operational are impossible to distinguish. See Adcock *supra* note 67. Also it may be considered aggravating circumstance should the parties be prosecuted for implementing the merger without the prior approval. See case no. 71/LM/Dec03 Nedbank Limited and Retail Brands Interafrica (Pty) Ltd and Continental Beverages (Pty) Ltd, Retail Brands Interafrica (Pty) Ltd and 07/LM/Jan02 Caixa Geral de Depositos S. A. and Mercantile Lisbon Bank Holdings Ltd.

⁹² Case no. 09/LM/Feb11 Lexshell 826 Investments (Pty) Ltd and Umcebo Mining (Pty) Ltd and Mopani Coal (Pty) Ltd. “Notwithstanding the Commission having found no nexus between the retrenchments at SISA and the current transaction, it seek the imposition of a condition protecting employment. It was concerned that certain jobs may be duplicated and sought the imposition of a two-year moratorium on retrenchments at both the acquiring and target firm. See case no. 019083 Sun International (SA) Ltd and GPI Slots (Pty) Ltd.

⁹³ Case no. 32/LM/Jun03 Liberty Group Limited and Investec Employee Benefits Limited

⁹⁴ *ibid*

of job losses is not easy. In Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd merger, the unions argued that the number of job losses was 1,414 (including all voluntary retirements and retrenchments) which accounted for 24% of the work force. The parties argued that it was less than 164, which accounted for a 3% loss of the work force however, if job losses were included both forced and voluntary job losses the percentage becomes 24%. Although finding that the latter percentage is indeed a significant number of job losses, the Tribunal emphasized that what matters is the substantial effect on employment, i.e., which depends on the context where despite the high retrenchment percentage, it was mitigated by a privately negotiated retrenchment packages⁹⁵

Given that employment is an internal matter, which is better understood by the parties, the Tribunal would usually take the numbers indicated by them as a basis for any conditions imposed, provided they are derived from a reliable method of estimating job losses.⁹⁶ It is improper for the notification forms to be "*sugar coated*" merely in order to ensure a favourable decision, while later in the process less favourable facts are disclosed.⁹⁷ Generally, the competition authorities will hold the parties accountable for these numbers. In Bidpaper Plus (Pty) Ltd and Pretoria Wholesale Stationers (Pty) Ltd merger, the Tribunal held the parties to their word and imposed a condition on the approval of the merger limiting retrenchment to the number of job losses they have indicated in their submissions.⁹⁸ While in other mergers the Tribunal used the figures submitted by the parties to provide a ceiling on the number of retrenched employees⁹⁹ or a commitment not to retrench.¹⁰⁰

⁹⁵ Distillers and Stellenbosch merger *supra* note 26.

⁹⁶ Case no. 37/AM/Apr11 Aon SA and Glenrand MIB.

⁹⁷ Case no. 10/LM/Mar03 Daun et Cie AG and Kolosus Holdings Limited. Minister Patel represented SACTWU and requested the imposition of three public interest conditions: first, that the same levels of employment prior to the proposed merger should be maintained, second, that the merger parties maintain the pre-merger level of wages and employment conditions; and third, that the Tribunal impose a condition that would oblige the merged entity to continue its membership of the applicable industry-wide centralized collective bargaining system. The Tribunal did not, however, impose these conditions.

⁹⁸ Case no. 03/LM/Jan09.

⁹⁹ Case no. 42/LM/Aug03 Heinz Foods and Today Frozen Foods merger and case no. 33/LM/Mar12 Glencore International Plc and Xstrata Plc.

¹⁰⁰ Case no. 51/LM/May12 (015032) Ferro Industrial Products (Pty) Ltd and NCS Resins (Pty) Ltd.

The Tribunal addressed the method pertaining to quantitative assessment of job losses in Harmony Gold Mining Company and Gold Fields Limited merger. In this merger, the Tribunal was of the opinion that the parties must ensure that “*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*”.¹⁰¹ This in practice means that when it comes to mergers that will be reviewed by the South African competition authorities, the due diligence / negotiations process requires businesses to be very mindful of their retrenchment plans and to be ready to explain and defend them as they will be subject to a high degree of scrutiny.

ii. Qualitative factors: the type of employees affected and alternative employment opportunities

Competition authorities divide the work force into three main categories: unskilled, semi-skilled and skilled employees.¹⁰² The competition authorities give more weight to the retrenchment of unskilled employees.¹⁰³ The presumption is that skilled and semi-skilled employees are skilled professionals who do not require retraining and should be able to find alternative work opportunities.¹⁰⁴ There is no definition of these three categories however.¹⁰⁵ In Aon South Africa (Pty) Ltd & Glenrand MIB Ltd and The Competition Commission merger, employees were identified by pay scale.¹⁰⁶ Similar to the above factors, the Tribunal will base its findings on the information presented by the parties.¹⁰⁷

The mere fact that retrenchments are merger-specific and substantial does not automatically result in prohibiting the merger. This only constitutes a *prima facie* case that

¹⁰¹ However, due diligence or no, the figure provided to us represents its best effort to detail the scale of merger related retrenchment and this is what we will accept as the maximum permissible level of retrenchment.

¹⁰² Some times use white collar 11/LM/Feb02 OTK Agri Products Trading, a division of OTK Limited and Farm Feed Services, a division of Afribrand Trading (Pty) Limited, 12/LM/Mar03 Tiger Brands Limited and Enterprise Foods (Pty) Ltd and 12/LM/Mar03 Tiger Brands Limited and Enterprise Foods (Pty) Ltd or blue collar 10/LM/Feb04 ABSA Bank Limited and Avena Leaseplan South Africa (Pty) Limited

¹⁰³ 33/LM/Apr06 TIGER FOOD BRANDS LTD and BROMOR FOODS (PTY) LTD

¹⁰⁴ 16/LM/Feb00 Harmony Gold Mining Company Ltd, 32/LM/Jun01 BHP Steel Southern Africa (Pty) Ltd, 35/LM/Jun01, 40/LM/Jul01 BoE Bank Limited and 68/LM/Dec01 Unitrans Motors (Pty) Ltd and The Motor Division of Senwes Ltd

¹⁰⁵ *Supra* note 29 p. 18.

¹⁰⁶ The conditions were based on a cap on number of employees retrenched based on they pay scale. See case no. 37/AM/Apr11

¹⁰⁷ Metropolitan *supra* note 14.

the merger will produce adverse effect on employment. Thus, this shifts the onus to the merging parties in order to justify the retrenchments as not contrary to the public interest.¹⁰⁸ These justifications have been articulated by the Tribunal as saving a failing firm and realizing cost savings / efficiencies. Retrenchments to realize cost saving goals for the benefit of shareholders will not suffice while lowering prices for consumers will, i.e., private gains will not be considered.¹⁰⁹

What we can note here is that the Tribunal adopted a broad interpretation of the employment considerations invoking the general purpose of the Act.¹¹⁰ In practice, employment has been assessed in both the negative (job loss) and positive (job creation) sense.¹¹¹ Protection of employment has extended to any jobs that may be threatened as a result of the merger whether of those employed by the merged parties or not.¹¹² In addition, employment concerns raised did not only relate to job losses, but also to the adverse effect a merger may have on conditions of employment however, without much success.¹¹³ Given it is a measure of last resort, competition authorities should respect the agreement reached between employees and employers.¹¹⁴ In Edgars Consolidated Stores Ltd and Pick n Pay Retailers (Pty) Ltd merger, employees were to be transferred to the new employer as per the terms of the Labour Act. The relevant labour union (Independent Commercial Hospitality and Allied Workers Trade Union (ICHAWU), sought to impose conditions over and above what has been agreed with the old employer.¹¹⁵ The Tribunal

¹⁰⁸ *Ibid* at para.68 and 69.

¹⁰⁹ *Ibid* see also Competition Tribunal, case no. 37/AM/Apr11

¹¹⁰ “promote employment and advance the social and economic welfare of South Africans” Section 2(c) of the Act.

¹¹¹ See for example Unilever merger *supra* note 34 and case no. 93/LM/Sep05 Steinhoff Africa Holdings (Pty) Ltd and North Eastern Cape Forest Joint Venture, Goeiehoop Farming (Pty) Ltd and case no. 82/LM/Sep05 Rustenburg Platinum Mines Ltd and Aquarius Platinum (South Africa) (Pty) Ltd where the transaction is estimated to extend the life of the Marikana mine and the parties estimate that the increase in PGM production would lead to the creation of approximately 900 job opportunities at the Marikana mine.

¹¹² Wal-Mart – Massmart *supra* note 20.

¹¹³ *Ibid* at p. 74. The union requested further the protection of the court from “the adverse effects of what it termed ‘the Wal-Mart model’ on employment levels, particularly terms and conditions of employment and the organisational rights of workers within the merged firm.” The court after discussing the request however stated that a distinction must be made between an interest and a right interest where the former should be dealt with through collective bargaining and the latter through labour courts.

¹¹⁴ 72/LM/Sep04 Multichoice Subscriber Management (Pty) Ltd and Tiscali (Pty) Ltd

¹¹⁵ Case no. Case No: 05/LM/Feb04 Edgars Consolidated Stores Ltd and Pick n Pay Retailers (Pty) Ltd

rejected the request, as “*the Competition Act does not require merging parties to improve on existing collective bargaining rights.*”

The competition authorities are very observant of the duty to notify the merger to employees / labour unions. The notice should provide a summary of the effect of the proposed merger on employment.¹¹⁶ The purpose of these provisions is to ensure that employees’ representatives are provided with the necessary information to enable them to make representations to the competition authorities, if they so wish. The Tribunal considered whether the number of employees who will be retrenched as a result of the merger is considered sensitive business information hence being confidential and should only be disclosed to the parties, the Commission and the unions and their members but not to the non- unionized employees. The Tribunal refused this argument finding such information neither confidential as it didn’t satisfy the definition of the same under the Act nor of economic value like business secrets, which is the type of confidential information the Act seeks to protect.¹¹⁷ Parties to a merger should discuss with their employees / unions the worst-case scenario anticipated for job losses.¹¹⁸ This follows from the legislation with regard to the need for a proper consultation with employees as a high priority in the merger process.¹¹⁹ Thus, failure to consult with labour properly deems retrenchments as not being rationally made. The authorities should conduct this factual enquiry.¹²⁰ Timely disclosure of retrenchment plans is also essential; otherwise the whole

¹¹⁶ Form CC 4(1), Schedule 2 of CC 4(1)

¹¹⁷ Case no. 55/LM/Sep01 Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd, Hudson & Knight, a division of Unilever South Africa (Pty) Ltd, Robertsons Foods (Pty) Ltd, Robertsons Food Service (Pty) Ltd and The Competition Commission of South Africa.

¹¹⁸ The Tribunal was concerned that the parties had not properly notified their employees of the effect of the merger on the employment. While the parties had furnished the Commission with a “worst case scenario” with regard to retrenchments, the Tribunal found that employees had not been sufficiently informed of the potential impact of the transaction. The parties were ordered to inform their employees, in writing, of the potential worst-case scenario. See case no. 04/LM/Jan05 Liberty Group Ltd and Capital Alliance Holdings Ltd

¹¹⁹ See case no. 018713 BB Investment Company (Pty) Ltd and Adcock Ingram Holdings Ltd Super Group v Dlamini and one other 2012. The term consultation here has the same meaning as that of the Labour Appeal Court “to provide the employee or its representatives with relevant and sufficient information that would place them in a position to make the informed representations and suggestions on the subjects specified for the consultation”.

¹²⁰ 69/LM/Oct09 Wispeco (Pty) Ltd and The Business of AGI Solutions (Pty) Ltd In Wispeco (Pty) Ltd and The Business of AGI Solutions (Pty) Ltd, a dispute of fact arose over the adequacy of the consultation process. The Tribunal found that consultation process was not adequate as the parties consulted with NUMSA’s local organizer of the union (NUMSA) and not the head office where merger related issues are handled.

point of the disclosure process may be frustrated.¹²¹ The consultation process should also cover the drafting of the conditions pertaining to employment considerations.¹²² In general, if an agreement has been reached after sharing full information with employees / unions and a consultation process, the Tribunal will respect their agreement.¹²³ The Tribunal also made it possible for individual employees to enforce conditions relevant to their retrenchment.¹²⁴

It is clear from the above that employment as a PIC is a high enforcement priority and competition authorities endeavour to construct objective criteria for its application. Nonetheless, this consideration is the least economics-related compared to the other considerations and in direct contrast to the (current) positions of both the US antitrust and EU competition. For example, in the Wal-Mart and Amigo merger, the issues of labour force maintenance and purchase levels were raised by the Secretary of Justice of the Commonwealth of Puerto Rico.¹²⁵ Despite agreeing to maintain the current number of employees, Wal-Mart was not willing to commit itself not to retrench any of the employees. The court found that the plaintiff will most likely prevail in its claim that such demands are probably unconstitutional and granted the request of preliminary relief to Wal-Mart. This opinion was later vacated based on a settlement reached between the parties. However, it is still indicative of the position of employment considerations under the US antitrust law.

The situation under EU competition law and practice is though, not as clear as under the US antitrust law, yet similar in practice. The EU Merger control rules stipulates SLC as a substantive competition test for the assessment of mergers this however should be within the general framework of the fundamental objectives of the treaties, which opens

¹²¹ Case no.108/LM/Oct08 DCD-Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd

¹²² In case no. 41/LM/May05 Lonmin Plc and Southern Platinum Corp, the parties failed to send copies of the Commission's recommendation to the various unions for them to consider the proposed conditions and make submissions at the relevant hearing.

¹²³ See for example case no. 0/LM/Oct09 Nedbank Ltd and Imperial Bank Ltd.

¹²⁴ "A condition in the sale agreement is a term of contract between the merging parties, Telkom and TFMC and, as such, is not readily enforceable by the individual employees if not honoured." See case no. 81/LM/Aug00 Telkom SA Ltd, TPI Investments and Praysa Trade 1062 (Pty) Ltd. See also case no. 52/LM/Jul04 Cherry Creek Trading 14 (Pty) Ltd and Northwest Star (Pty) Ltd.

¹²⁵ See Wal-Mart Stores, Inc. v. Rodriguez, 238 F. Supp. 2d 395 (D.P.R. 2002). See also the discussion in

ELEANOR FOX AND DANIEL A. CRANE, FOX AND CRANE'S GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW (West Academic Press 2010) pp.309-311.

the door to non-economic considerations.¹²⁶ Despite that, the Directorate-General for Competition at the EU Commission, in practice does not accept that i.e., inclusion of non-economic considerations in merger reviews process.¹²⁷

2.2.2 The Ability of Small, Micro and Medium Enterprises (SMMEs) and Historically Disadvantaged Individuals (HDI) to Become Competitive

It is not clear how the two requirements for public interest considerations (being merger-specific and substantial) apply in the context of SMMEs. In *Piruto B.V and Optimum Coal Holdings Limited* and other mergers, the Tribunal imposed conditions to address concerns raised regarding SMMEs competitiveness despite these arising from structural problems already present in the coal market, rather than being merger-specific.¹²⁸

In many instances the SMMEs raised were linked to contractual obligations. In a dispute between the Academy of Learning (AOL), a division within the private education firm, Educor, and a number of franchisees, the latter claimed that their franchise conditions have been unilaterally altered and that the new conditions imposed threatened their very existence. They raised SMMEs claims requesting the Tribunal to impose as a condition on the new owners to negotiate new franchise contracts. Although the Tribunal was cautious not to interfere in contractual matters, it did order that the franchisees should be actively engaged by the franchisor, should the latter contemplate introducing

¹²⁶ See Recital 45 of the Treaty on European Union which states that “This Regulation in no way detracts from the collective rights of employees, as recognized in the undertakings concerned, notably with regard to any obligation to inform or consult their recognized representatives under Community and national law” as well as Article 2 of the same.

See CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION (2012). Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN> Last viewed January 15, 2016; See also Jones and Davies *supra* note at 3.

¹²⁷ See Case T-12/93, *Comité Central d'Entreprise de la Société Anonyme Vittel and others v Commission*, [1995] ECR II-2147 The Court of Justice in the Vittel case, ruled following the clearance of the Nestlé and Perrier merger, found that employment must be taken into consideration if the deal will have significant, positive or negative, impact on the same the Court of Justice This however remains as an exception to the rule applied in specific circumstances rather than a factor that should be considered and assessed on an on-going basis.

¹²⁸ See case no. 86/LM/OCT11 *Piruto B.V and Optimum Coal Holdings Limited and others*. Third parties were concerned that Glencore would increase its allocation due to this merger as well as leverage its control of logistics regarding the trading market. This would be to the disadvantage of junior miners. The Commission recommended conditions for phased out port allocation reductions allowing 401,500 tones per annum of port allocations available for junior miners. It also ordered for monitoring purposes, a senior official of the merged entity must provide an affidavit confirming their compliance with the conditions.

any further changes to the franchise arrangement over the next two years.¹²⁹ Furthermore, exclusivity clauses in retail space lease agreements have featured in a number of decisions where the Tribunal imposed conditions on a number of mergers in the retail sector leasing agreements where exclusivity clauses are frequently present. These are not usually merger-specific, i.e., they do not arise as a consequence of the merger.¹³⁰ Typically under such clauses a property developer enters into an exclusive anchor lease agreement with a major retailer for a long period of time, which has the effect of keeping the retailer (and possibly other business) tied to the specific property developer. The Tribunal has found this problematic as it prevents small businesses from gaining access to rentable retail space in a given shopping complex.¹³¹ In that sense, an argument can be made that these conditions raise or present barriers to entry, which may impede the ability of SMMEs to compete. However, it is not clear how substantiality is established in this context, what is their nexus to the merger or how they arise out of it.¹³²

Another set of merger cases is relevant here where the merger jeopardized access of SMMEs to certain resources or products. In the Yara International and Kemira GrowHow merger, concerns were raised over access of “*smaller purchasers*” to the imported urea market following the transaction.¹³³ The Tribunal ordered the parties to supply the purchasers for a period of two years post merger.¹³⁴ In the Pioneer merger, the ACB, a non-profit organization, argued that an increase in maize seed prices, post-

¹²⁹ 45/LM/Apr00 Nasionale Pers Ltd

¹³⁰ In line with the spirit and specific public interest provisions of the Act the potential effects on small businesses, in this case small retail businesses such as spaza shops, small superettes and the like, deserve a larger focus in the Commission’s analysis of potential public interest effects.

¹³¹ The above-mentioned exclusivity clause in the lease agreement raises a public interest concern in terms of section 12A(3)(c) of the Competition Act of 1998 (Act No. 89 of 1998, as amended) and conditions are therefore warranted to address such concern. 20/LM/Mar12 Growthpoint Properties Limited and Liberty Group Limited

¹³² In 2009, the Commission commenced an investigation into the supermarket chains sector in SA. Among the issues raised was a long-term exclusive lease agreement with developers. However, on conclusion of the investigation in 2014 the Commission found that exclusive lease agreements raised barriers to entry into grocery retailing but they found that anti- competitive effects of exclusive lease agreements could not be demonstrated conclusively.

¹³³ Case no. 133/AM/Dec 07. Note that this is an intermediate merger however of relevance to the discussion.

¹³⁴ “In order to assist small players in importing urea the new conditions will apply for a two year period as the Commission considers this a sufficient time to enable small importers to come together and to arrange themselves into a buyers block. Should they not be able to do this within two years the condition allows for the Tribunal to revise the conditions on good cause shown. As mentioned earlier GrowHow supplies a number of small purchasers of urea. In order to maintain the status quo post the transaction the parties have agreed that the merged entity will make available 20% in 2008 and 22% in 2009 of its aggregated imported urea to qualifying customers of GrowHow and Yara.” *Ibid* at p.5

merger- would have a detrimental effect on small-scale commercial and subsistence farmers in South Africa. The Tribunal concurred and found that such increase would result in decreasing the maize yields required to feed small-scale commercial, subsistence farmers, their families, and communities.¹³⁵

In the Wal-Mart and Massmart merger,¹³⁶ the Tribunal was faced with the impact of Global Value Chains (GVCs) on domestic supply chains mainly made of SMMEs where local supplies were substituted with imports. The competition authorities had to weigh consumer welfare (consumers benefiting from lower prices) against the merger impact on the welfare of local supply chains and how they may suffer as a result of switching to imports. Despite acknowledging the former, it approved the merger subject to conditions ensuring the continuity and development of the local value chains and possible greater vertical integration of the same within the GVCs.

2.2.3 The Ability of an Industrial Sector or Region to Compete

There are not many decisions we can draw on for this particular PIC. The Tribunal did not expressly address what would be specific in this context but it did assert that industry-wide concerns are not to be considered merger-specific.¹³⁷

When assessing the substantiality factor, the Tribunal looks at whether the merger would lead to substitution of local supply with imports or directing local resources to international markets. An example of that can be seen in the AGFRI and AgriGroupe merger where the competition authorities examined parties' strategies and sector specific regulations. AGFRI is one of the largest players in the grain supply sector, servicing more than 7000 farmers in South Africa. Concerns were raised regarding whether the merger will result in AgriGroupe exporting/diverting grain to other countries (which would impact negatively on South Africa's food security), and whether the merger may lead to AGFRI

¹³⁵ Case no. 81/LM/Dec10 Pioneer Hi-Bred International Inc. and Pannar Seed (Pty) Ltd and Competition Commission and Pioneer Hi-Bred International Inc. and Another v Competition Commission and Another. See also 113/CAC/NOV11. Note that this was an intermediate merger however we include it in our discussion for relevance.

¹³⁶ Wal-Mart – Massmart *supra* note 20. See also Ioannis Lianos & Claudio Lombardi, Superior bargaining power and the global food value chain: The wuthering heights of holistic competition law?, *Concurrences* I-2016, pp. 22-35.

¹³⁷ Case no. 33/LM/Mar12 Glencore International PLC and Xstrata PLC

and AgriGroupe having the ability and incentive to foreclose or deny access to key strategic resources such as railway infrastructure and services for farmers.¹³⁸ They concluded that the merged entity would not have the ability or incentive to transfer grain to other countries to the detriment of food security in South Africa. Another example is the Industrial Development Corporation of South Africa Limited (IDC), Hebei Iron & Steel Group Co Limited, and Mauritius SPV and Rio Tinto South Africa Limited merger. In this merger the Tribunal was concerned that the proposed transaction would result in the diversion of locally produced DMS iron ore volumes to the merging parties, or entities in which they have an interest to the detriment of domestic customers of DMS iron ore.¹³⁹ In this merger, the Tribunal dealt with concerns over access to input, which is crucial for any given sector.¹⁴⁰

Also, the strategic nature of a sector or a product is a major factor in the substantiality analysis.¹⁴¹ Accordingly, the Tribunal adopted, occasionally, a broad interpretation of this provision extending it to the education sector and telecom, which are not *per se* industrial in nature.¹⁴² In both these merges the impact was considered to be far-reaching to the broader economy (for telecom) and societal welfare (for education), which warrants the intervention.

The impact of a proposed merger on a given region may function as a mitigating factor for a finding of lessening of competition and a decision to approve a merger conditionally.¹⁴³ In Iscor Limited and Saldanha Steel (Pty) Limited merger, the Tribunal

¹³⁸ Raised by SACP and included concern over relocation of operations outside SA. To reach a decision on the matter, the competition authorities went through an analysis of how grains were traded in this sector and how this platform could be affected by the proposed merger and found that AFGRI and AgriGroupe have no ability to influence prices as they were subject to supply and demand forces nor it is able to influence whether and to which markets grain is exported. *AgriGroupe Holdings (Pty) Ltd v Afgri Ltd (017939)* [2014].

¹³⁹ *Industrial Development Corporation of South Africa Ltd and Another v Rio Tinto South Africa Ltd (016329)*

¹⁴⁰ The inability to access a secured source of DMS iron ore will have a detrimental impact on (i) overall local coal production levels; (ii) the ability to supply local coal customers, specifically Eskom; and (iii) the ability to export coal, and as a result potentially the viability of certain coal producers which in turn will affect the supply of electricity in South Africa. *Ibid*

¹⁴¹ Case no. 51/LM/June 06.

¹⁴² Both are not industrial sectors. Case no. 45/LM/Apr00 *Nasionale Pers Ltd* The Tribunal explained that the potentially pervasive economic and social consequences of monopolistic structures and conduct in the education sector demand that the Tribunal pays particularly close attention to its public interest mandate. See also case no. 51/LM/June 06.

¹⁴³ *Ibid*

examined the impact absent the merger on the West Coast region and found adverse effect on the particular region (and employment).¹⁴⁴ However, for such claim to succeed, the impact on the region should be substantial and may only be realized through the merger, i.e., being merger specific.¹⁴⁵

2.2.4 *The Ability of National Industries to Compete on the International Level*

This consideration is very relevant to the concept of national champions. In general, an increase in production and subsequently exports constitute grounds for finding positive impact of the merger on the ability to compete internationally.¹⁴⁶ This does not however mean that a merger that will increase production capacities so that the entity will be able to compete internationally should be approved even if it was on the expense of local competition. This approach was rejected by the Tribunal emphasizing, “*International competitiveness does not mean domination of domestic markets.*”¹⁴⁷ This consideration has been sometimes tied to the impact of the merger on a given sector where its impact maybe so grave that it may also affect the international competitiveness of the country.¹⁴⁸ In general, enforcement in this area has been less frequent and thus provides very few cases to consider.

2.3 *Evidence and expert testimony about PICs*

Economic evidence and expert testimony play a paramount role in merger analysis. As the ICN explains “(e)conomics provides competition agencies with the conceptual framework and tools to distinguish between mergers that are unlikely to have significant anticompetitive effects from those that may, and require further analysis.”¹⁴⁹ Among the

¹⁴⁴Parties also argued failing firm. In this particular case the facts were somewhat different than in typical failing firm cases, as the buyer was an existing shareholder. The Tribunal found that the failing firm concerns outweigh the loss to potential competition that might otherwise arise from the transaction.

¹⁴⁵ Case No. 67/LM/Dec01. The Tribunal did not find that the benefits to the Mpumalanga region driven from the merger was substantial enough to countervail the anti-competitive impact of the merger questioning that these benefits will not occur with or without the merger.

¹⁴⁶ Case no. 61/LM/Aug02 Toyota Motor Corporation (Japan) and Toyota South Africa (Pty) Ltd

¹⁴⁷ Tongaat merger *supra* note 22.

¹⁴⁸ See Telkom and BCX merger *supra* note 20 and Saldanha merger *supra* note 149.

¹⁴⁹ The Merger Working Group at the ICN, *The Role of Economists and Economic Evidence in Merger Analysis*, Updated Chapter 4 of the ICN Investigative Techniques Handbook for Merger Review, presented at the 12th Annual Conference of the ICN Warsaw, Poland April 24-26, 2013, p. 2. Available at <http://internationalcompetitionnetwork.org/uploads/library/doc903.pdf> last viewed October 10, 2015.

main criticism to the inclusion of PICs in the merger review process is the difficulty in administering such rules, in terms of the balancing test required, and subsequently the types of evidence the court/authority will hear. For this reason, the SA experience may be particularly interesting, in view also of the fact that this occurs in an emerging economy with a less experienced judicial/administrative system than, for example, the EU/US.

In the SA context, the Tribunal assumes an inquisitorial role examining evidence submitted by parties to the proceedings and cross-examining witnesses. The Tribunal consists of three members one of which is an economist. There are no guidelines pertaining to submission of evidence to the competition authorities.¹⁵⁰ This leaves room for unnecessary lengthening of the process and a possible abuse by the various parties to the proceedings. As one member of the Tribunal notes, the Act, being an effects-based law, is heavily dependent on economic analysis.¹⁵¹ Without such rules on economic evidence the Tribunal is faced with infinite (and some times baseless) economic arguments, which exhausts the scarce time, and resources it disposes of. This is a painstaking approach to understand all the issues raised by the different parties and is evidently time-consuming.

The matter is amplified with the consideration of PICs and the lowered standing requirements for intervention.¹⁵² For example, in Aspen and Pfizer Nutrition merger, the Tribunal heard sixteen witnesses including customers, competitors, industry experts and economic experts over a period of five days.¹⁵³ Another example is the Sasol and Engen merger, where seventeen witnesses gave oral testimony, another fifteen gave written

¹⁵⁰ There is however a non-exhaustive list under the Act of factors pertaining to the SLC test. See Article 12 (2) of the Act.

¹⁵¹ Presentation at the workshop preceding the BRICS conference by HJ. On the use of economic evidence in the South Africa merger analysis see OECD, SOUTH AFRICA CONTRIBUTION TO THE OECD POLICY ROUNDTABLE ON ECONOMIC EVIDENCE, DAF/COMP (2011) 23, p. 279-287. Available at <http://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf> Last viewed October 10, 2015.

¹⁵² As explained above, material substantial interest is not required. Case no. 44/CAC/Feb05 Community Healthcare Holdings (Pty) Ltd.

¹⁵³ The principle of 'closeness of competition' of the major players in the South African market are Nestlé, Aspen and Pfizer, with Nestlé and Aspen being the only local manufacturers of infant formula products. The merger was approved subject to the condition that Nestlé divest of Pfizer Nutrition SA to a purchaser to be approved by the Commission under certain licensing arrangements. See Jocelyn Katz and Wade Graaff, *South Africa: Mergers*, Global Competition Review and EnSafrica, *The African and Middle Eastern Antitrust Review 2015* (2015) pp.55-59.

evidence and around eleven economists or statisticians gave evidence of one kind or another.¹⁵⁴ The Tribunal endeavours to control the proceedings and the production of evidence by holding a pre-hearing session with the relevant parties based on which it issues directions for the conduct of future hearings. A look at the Glencore and Xstrata merger where employment concerns were expressed gives us an idea of how this is done. Based on the pre-hearing, the Tribunal was to hear factual evidence from the two relevant labour unions, NUM and NUMSA.¹⁵⁵ In such cases, in addition to written submissions by the relevant parties / stakeholders, the merging parties are expected to provide witness on employment issues who in turn will be cross-examined by the representative of the labour union and visa versa.¹⁵⁶

Consideration of non-economic issues arising of a proposed merger opens the door to new types of evidence not traditionally present in merger analysis, which compounds this problem. The Tribunal should base its decisions on both quantitative economic evidence and factual qualitative evidence.¹⁵⁷ In relation to employment for example, labour unions may make written submissions and provide expert witness testimonies.¹⁵⁸ Evidence submitted in that regard is in essence factual; whether there are any merger specific retrenchments, types of employees impacted, timing of retrenchments...etc. The flip side of this is that the categories of individuals from the merging parties providing evidence may extend beyond the top management and business operation staff to other departments such as human resources.¹⁵⁹ Labour unions however are not precluded from presenting evidence pertaining to economic analysis such as market definition, a matter worthy of ex post evaluation and possibly reconsideration by the competition authorities. In relation to SMMEs / HDI and impact on specific sector, arguments are mainly in relation to foreclosure (vertical in case of SMMEs) and access to resources, which overlaps with the competition analysis of the

¹⁵⁴ Matthew O. 'regan, *MERGER CONTROL IN SOUTH AFRICA: Some Thoughts from an Overseas Perspective*, (Advocate, August 2007). Available at <http://www.sabar.co.za/law-journals/2007/august/2007-august-vol020-no2-pp34-37.pdf> last viewed October 10, 2015.

¹⁵⁵ In addition to the Commission, the merging parties and Eskom.

¹⁵⁶ *Written Submissions and Witness Statements* (2012). Available at <http://www.comptrib.co.za/assets/Uploads/Glenstrata/Pre-hearing-directions-06-December-2012-3.pdf> last viewed October 10, 2015.

¹⁵⁷ See 04/LM/Jan09 Masscash Holdings (Pty) Ltd and Finro Enterprises (Pty) Ltd T/A Finro Cash and Carry

¹⁵⁸ Wal-Mart and Massmart merger *supra* note 20.

¹⁵⁹ See for example 70/LM/Oct09 Nedbank Ltd and Imperial Bank Ltd

merger.¹⁶⁰ Impact on a specific region seems to be based on factual findings. As evidence, to demonstrate the positive impact on the region, the Tribunal has used numbers of the gross regional product during the construction phase of the project and compared it to the small number of existing industries in the region.¹⁶¹ There are a few mergers where evidence on international competitiveness has been addressed. These mainly evolved around claims of increased efficiencies resulting in ability to export or an increase in exports as a proxy to measure international competitiveness.¹⁶²

Evidence - factual and economics - is not only required to decide on the merger but also to determine the conditions imposed. In general, it is the Commission's responsibility to demonstrate the necessity of conditions adapted to the Tribunal. It is the party who is calling for a more stringent condition to be imposed that bears the responsibility to present evidence for such request. In the Wal-Mart and Massmart merger, a high profile expert panel of economists was tasked with answering the question on how a fund should be designed to support SMMEs and what size it should have.¹⁶³ The CAC received two reports, one prepared by Professor Morris, who had been nominated by the merging parties, and the other by Professor Stiglitz and Mr.Hodge who had been nominated by the Ministers and the union respectively. The experts disagreed fundamentally on the function

¹⁶⁰ See 15/LM/Mar11 Media 24 Limited and Paarl Coldset (Pty) Ltd and The Natal Witness Printing and Publishing Company (Pty) Ltd23/AM/May10 Bedrock Mining Support (Pty) Ltd and Mondi Ltd. "Our examination has focused on those elements that materially impact on the prospects for foreclosure, on rates of growth in demand, on additional significant logistical infrastructure such as the possibility of conveying refined product in the underutilised crude oil pipeline, and on the strategic responses available to the OOCs should the merged entity attempt to foreclose." In 10/AM/Jan12 (013946) Thaba Chueu Mining (Pty) Ltd and Samquarz (Pty) Ltd merger, the Tribunal discussed "non-competitive foreclosure" finding it to be directly related to public interest "the Commission's concern is that the merged entity would convert one of its existing ferrosilicon furnaces in order to produce silicon metal because margins are higher in the production of silicon metal, and then divert supplies of silica from existing customers in order to boost its of silicon metal."

¹⁶¹ "There is evidence that the Saldanha Steel plant is a vital part of the town's economic life. If the plant was to be shutdown or be mothballed for a period this would not only have a substantial impact on the employees of the plant who would be retrenched, but also on all the firms and individuals in the West coast region whose livelihoods are so dependent on the plants functioning. Saldanha merger *supra* note 149.

¹⁶² "The evidence on capacity and Globe's complementary skills base and infrastructure did seem to indicate that the merger will provide the merged entity with the necessary critical mass, financial capabilities and skills to become an international player in this highly competitive international market. Accordingly, it is expected that the merger will yield more work for the merged entity in the international market, and that it will bring a considerable amount of work into the Cape Town harbour, benefiting the local industry as a whole."

¹⁶³ The CAC ordered the commission of a study 'to determine the most appropriate means together with the mechanism by which local suppliers may be empowered to respond to the challenges posed by the merger. Wal-Mart – Massmart *supra* note 20.

of the fund and amount thereof. On the one hand, the two experts, including Stiglitz, focused on the punitive nature of the fund and broader issues of the impact of globalization on local value chains, arriving at the recommendation to increase the amount of the fund between R 500 million to R 2 billion allocated over five to ten years for the benefit of existing and potential suppliers of Massmart. The third member of the panel was of the view that the fund should focus on certain affected local suppliers and excluded large enterprises without indicating an alternative amount for the fund. The CAC was more in favour of a focused remedy finding the approach of Stiglitz and Hodge to be more of a “*comprehensive policy initiative*” which goes beyond the intended role of PICs under the Act.¹⁶⁴ The CAC considered that the fund should operate for at least five years not three years to achieve its goals and that a maximum amount of R 200 million should be contributed by the merged entity during this period in order to ensure the success of the fund, emphasising that the “*the quantum is not the sole touchstone; integration of local SMSE’s into the global value chain of Walmart is the core objective.*”¹⁶⁵ This shows that in such model, economists are faced with different sets of questions that deal with broader policy goals, which goes beyond traditional competition (partial equilibrium) analysis for which new hybrid models of economic analysis may be needed.¹⁶⁶

Having limited regulatory advice on what constitutes admissible economic evidence demonstrates the need to adopt some guidance by the competition authorities not only on economic evidence but also on evidence pertaining to PICs, which they consider to be relevant and significant to their decision-making process.

2.4 Undertakings and conditions

Another area of innovation that accompanies the analysis of PICs consists in finding and tailoring an appropriate, proportionate and enforceable remedy. This is amplified since remedies have been heavily utilized to address PICs rather than an outright prohibition of mergers. To date, no merger in SA has been prohibited solely on PICs. In case the above

¹⁶⁴ Section 12A(3) of the Act can assist to deal with downside risks and seek to exploit the possibilities posed by upside risks created by the merger but the broader problems set out in the Stiglitz/Hodge report must wait for more comprehensive policy initiatives.

¹⁶⁵ Wal-Mart – Massmart *supra* note 20, para 45 p. 28

¹⁶⁶ Possibly between development economics and competition. For further discussion on the relation between development economics and competition policy see Ioannis Lianos, Abel Mateus and Azza Raslan, *Is there a Tension Between Development Economics and Competition?*, in COMPETITION LAW AND DEVELOPMENT edited by D. Sokol et al., (2013), p.35-52.

factors are satisfied, the parties may offer undertakings and /or the competition authorities may intervene to impose conditions to mitigate the effect on the PICs.¹⁶⁷

Standard undertakings / conditions pertain to a quantification of retrenchment and job retention conditions with a moratorium period. The Tribunal often orders a cap to be set on merger-specific retrenchments usually using the retrenchment figures that the merging parties originally communicated to the unions. In earlier cases the competition authorities seemed more critical of imposing such conditions.¹⁶⁸ In more recent cases where parties have indicated that no job losses are anticipated conditions on job retrenchment were still adopted. A moratorium period can run from 12 to 36 months, decided on a case-by-case basis.¹⁶⁹ Such determination involves a complicated balancing exercise. On the one hand, there is a clear consumer benefit in allowing these retrenchments to occur and save costs, which will be passed on in the form of better pricing to customers, promoting consumer welfare. However on the other hand, there is a detriment to the interest of the employees. The CAC held that the ultimate onus lies with the Commission, which must be in a position to persuade the Tribunal that the condition that it seeks to impose is necessary to address the public interest. There must thus be evidence to support a more extensive moratorium and it is the parties requesting prolonged periods that carry the burden of proof.¹⁷⁰

The undertaking / conditions may also be accompanied by a duty to report to the Commission on the matter for a given period of time.¹⁷¹ They may include a promise of

¹⁶⁷ In most cases, to insure compliance, undertakings are later stipulated in the merger decision as conditions.

¹⁶⁸ In 2004, SACTWU sought the Tribunal to impose a condition precluding the merging parties from retrenching any employees for 24 months post the date of the approval of the merger. SACTWU could not provide any evidence that the merger would lead to retrenchments. The Tribunal accordingly did not impose any condition on the transaction. Case no. 58/LM/Aug04 Bid Industrial Holdings (Pty) Limited and G. Fox & Company (Pty) Limited.

¹⁶⁹ For example see case no. 018929 Arrowhead Properties Ltd and Vividend Income Fund Ltd where the moratorium was imposed for 3 years.

¹⁷⁰ In the Wal-Mart decision which eventually imposed 2 year moratorium, there was no reason in the circumstances to go for a more extensive remedy as proposed by the trade unions and by the Minister. Wal-Mart – Massmart *supra* note 20. Although the Food and Allied Workers Union (Fawu) wrote a letter to the Commission subsequent to its recommendation in which it sought the imposition of a moratorium on retrenchments for a period of 48 months subsequent to the merger, it failed to lay a basis for why such a condition should be imposed. See case no. 74/LM/Sep06 KWV LTD and NMK SCHULZ FINE WINE AND SPIRITS (PTY) LTD.

¹⁷¹ See for example case no. 42/LM/Aug03. Also monitoring mechanisms that are imposed as part of the conditions. See 93/LM/Nov04

redeployment (usually for unskilled workers) and giving priority to the retrenched employees to apply for the created positions subject to them possessing the necessary qualifications and skills.¹⁷² Undertakings/ conditions have evolved to cover other venues beyond job retention to include establishing a support structure which provides affected employees with, psychological and financial counselling, assistance in updating their curricula vitae, having their curricula vitae circulated within the acquirer and afforded preferential consideration in the event of vacancies arising; and letters of reference.¹⁷³

Providing for training funds has become a familiar condition.¹⁷⁴ In Tiger Brands Ltd and Ashton Canning Company Ltd and Others merger, the Tribunal ordered the merged parties to fund skills training in the amount of R2 million for retrenched seasonal farm workers in the Ashton community.¹⁷⁵ While in Glencore and Xstrata merger, a condition was imposed to establish a training fund to enable any retrenched employees to receive R10,000 (USD 1000) each towards an approved training course.¹⁷⁶ Training however is not expected in case of skilled & highly skilled workers. The purpose of these conditions was mainly to train workers in new skills in order to increase their economic value in the job market.¹⁷⁷

The most common condition in SMMEs cases involving an exclusivity clause in the retail space lease agreements is to order the parties to negotiate with their (more powerful) lessees to have the exclusivity clause in the lease agreement removed at the

¹⁷² The merging parties have also undertaken that a total of 126 new positions comprising of drivers and assistant drivers will be created at the 63 stores. See case no. 019893 Lewis Stores (Pty) Ltd and Ellerine Furnishers (Pty) Trading as Beares Stores.

¹⁷³ Case no. 019018 Mobile Telephone Networks (Pty) Ltd and Nashia Mobile (Pty) Ltd in respect of its Mobile Telephone Networks (Pty) Ltd subscriber base. In addition to a severance packages to all of its employees between three and five times more than they would be in terms of the Labour Relations Act.

¹⁷⁴ Case no. 67/LM/Oct10 AECI Limited and Qwemico Distributors (Pty) Ltd

¹⁷⁵ The consequence of the merger was the loss of 45 permanent jobs and 1000 seasonal jobs. That the merging parties undertook not to retrench more than 45 employees from the aggregate number of employees employed by both firms immediately prior to the order; and that the merging parties make available an amount of R2 million for the purpose of training all effected persons. Case no. 46/LM/May05 Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd and Others

¹⁷⁶ Case no. 33/LM/Mar12 Glencore International PLC and Xstrata PLC. A similar employment training fund was imposed in Case 2012May0258 Reutech Limited and The Tactical Communications Business of SAAB Grintek Defence (Pty) Ltd for ZAR 1 million.

¹⁷⁷ Case no. 31/LM/Mar09 Imperial Group (Pty) Ltd and Midas Group (Pty) Ltd

renewal of the lease.¹⁷⁸ In case the renewal period was not close, the merging parties undertook to negotiate with the relevant tenants to have the exclusivity clauses in the lease agreements removed within a specified period from the Tribunal's order, i.e., well in advance of the renewal dates contained in the lease agreements.¹⁷⁹ Factual circumstances in some cases precluded the adoption of such conditions from being effective such as in case there was no available retail space at the relevant shopping centre to offer to new tenants and no prospect of it expanding beyond its present size.¹⁸⁰ However, the value of these conditions has come under scrutiny.¹⁸¹ In this particular merger, it was also concluded that these clauses can only be invoked against tenants below a certain size, so it is not small businesses they are aimed at, but larger and thus more threatening competitors. Further, in fact in every case, the relevant lessor request to the tenant to waive the exclusionary clause had been rejected or been met with a dismissive response which renders such conditions ineffective. With the power dynamics of the retail space developers and their tenants, where the scale tips in favour of the latter, attempting to impose these conditions is not met with much success.¹⁸² Another alternative to imposing conditions was adopted by the Tribunal in the DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings (Pty) Ltd merger, where it ordered the Commission to use advocacy and engage with the Transnet National Ports Authority (TNPA) to highlight the competition- and/or public interest-related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities.¹⁸³

¹⁷⁸ Case nos. 84/LM/Aug12, 015610 Fairvest Property Holdings Ltd and Portfolio of Commercial Properties of SA Corporate Real Estate Fund see also Accelerate Property Fund Limited, 016170, 015610, 014993, 014415, 016519 and 019059.

¹⁷⁹ Case no. 016170 Accelerate Property Fund Ltd and Fourways Precinct (Pty) Ltd

¹⁸⁰ See case nos. 016519 Fortress Income 2 (Pty) Ltd and The Immovable proprietary and property letting enterprises of Pick 'n Pay Rustenburg, Central Park Bloemfontein, Nespruit Plaza, New Redruth Alberton, Sterkspruit Plaza and Tzaneen Centre, 016683 Hyprop Investments Limited and Sycom Property Fund Managers Limited and 016659 Sycom Property Fund Collective Investment Scheme in Property and AECI Pension Fund.

¹⁸¹ The clauses in the lease exist pre-merger and the implementation of the merger does not alter that situation. The practice is not consistence see subsequent merger. See case nos. 019042 Octodec Investments Ltd and Premium Properties Ltd and 11/AM/Jan12 Synergy Income Fund Ltd and Khuthala Alliance (Pty) Ltd.

¹⁸² Case no. 019216 Resilient Properties (Pty) Ltd and Jubilee Mall, The Immovable Property and The Property Letting Enterprise see also 019729 Fortress Income 2 (Pty) Ltd and Weskus Mall.

¹⁸³ Case no. 53/AM/May12 (015057) DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings(Pty) Ltd.

Wal-Mart /Massmart merger is a landmark decision for many reasons, one of which being the conditions adopted to address the various public policy considerations raised by the merger.¹⁸⁴ Among the requests made to the Tribunal under the premise of SMMEs consideration was to impose a form of quota of mandatory domestic purchases on the merged entity. The Tribunal rejected such condition finding that it may violate the country's trade obligations and that it may be anti-competitive or incapable of practical implementation. Unable to reach an appropriate remedy, the CAC ordered the merged entity to commission a study "*to determine the most appropriate means together with a mechanism by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby.*" Pursuant to the findings of the study, it ordered the establishment of an investment fund for the benefit of the existing and potential body of suppliers of the Massmart supply chain and the creation and facilitation of highly focused clusters of micro enterprises which would be sourced in historically disadvantaged communities. The amount of the fund was set at a maximum amount of R 200 million and will operate for at least five years.¹⁸⁵

In some cases BEE factors are evident such as in the case of merger leading to BEE through representation in management or ownership.¹⁸⁶ In other cases, the merger parties sought to use the BEE as a means to approve an otherwise anti-competitive merger, an objective whose realization was frustrated by the Tribunal.¹⁸⁷ In other mergers the boundaries of the BEE considerations were put to the test. In Anglo American Holdings Ltd and Kumba Resources Ltd, with the Industrial Development Corporation (IDC) intervening, the IDC, a state-owned national development finance institution

¹⁸⁴ Wal-Mart – Massmart *supra* note 20.

¹⁸⁵ *Ibid*

¹⁸⁶ Case no. 59/LM/Oct01 Clidet 323 (Pty) Ltd and MCG Industries (Pty) Ltd BEE consortia operating in the financial services sector aspired to acquire a manufacturer of plastic and aluminium. The Tribunal approved the proposed merger based on the lack of competition concerns and positive empowerment opportunities. See also case nos. 31/LM/May02 Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited, Khumo Bathong Holdings (Pty) Ltd, 55/LM/AUG02 Rustenburg Platinum Mines, Eastern Platinum Mines Ltd, "Pandora Joint Venture" and Rustenburg Platinum Mines Ltd, 22/LM/Apr04 Main Street No 188 (Pty) Ltd and Mondi Limited's Newsprint Business, 25/LM/Apr04 Tsebo Outsourcing Group (Pty) Ltd and Drake & Scull FM (SA) (Pty) Ltd and 32/LM/May05 Santam Ltd, Kagiso Newco and Nova Group Holdings Ltd, 57/LM/Oct03 Sasol Oil (Pty) Ltd and Exel Petroleum (Pty) Ltd.

¹⁸⁷ The merging parties at first used the BEE partners to attempt to mask the actual acquisition of control by Medi-Clinic. When this was exposed, Medi-Clinic withdrew, and the acquisition by the BEE entity of Afrox was approved. 105/LM/Dec04 Business Venture Investments 790 (Pty) Ltd and Afrox Healthcare Limited

mandated to promote, economic growth, industrial development and economic empowerment, argued that the BEE should be interpreted in accordance with section 2(f) of the Act to promote a greater spread of ownership. The Tribunal however found this interpretation over-reaching as it would have transformed the Act “*from an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle for redistribution*”.¹⁸⁸ Also in the Shell and Tepco merger, the Tribunal rejected the Commission’s decision to impose a condition on a merger where a black-owned firm sold a struggling wholly owned subsidiary to Shell in exchange for a minority shareholding in Shell’s distribution arm. The argument of the Commission was that the remedy should prevent the elimination of the empowerment firm’s brand and business from the market. The Tribunal explained that “*empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine*”¹⁸⁹ pointing out that the owner of the target firm was itself a BEE entity that had decided that its best commercial course laid in selling its subsidiary. This logic still stands: in a recent merger decision, the Tribunal emphasized that their job is not to second-guess decisions by BEE investors to sell.¹⁹⁰ It is the ability of firms controlled or owned by HDIs to become competitive that must be considered and not the protection of BEE controlled firms against contractual obligations that were freely entered into.¹⁹¹ The Tribunal also refused to second-guess the seller’s decision on buyer selection favouring BEE over others.¹⁹² Hence, it is not the mere existence of HDI in the market but their ability to compete that is protected.

Undertakings and conditions adopted in relation to HDI/ BEE included continuing a commercial agreement to supply a BEE company as part of the conditions.¹⁹³ When a merger raises competition concerns that requires structural remedies, this may be used to

¹⁸⁸ The preamble and section 2(f) of the Act, Anglo argues, speak broadly of the overall impact of the legislation on society, including the indirect benefits that the legislation may bring, they are not meant to be given effect to in interpreting an operational section such as 12A(3)(c) of the Act, which has language carefully chosen for a limited purpose which, cannot be read away. Case no. 46/LM/Jun02

¹⁸⁹ We would however go further and insist that even if Tepco had been a company in perfect health, the Commission should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as investor. Case no. 66/LM/Oct01 Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd

¹⁹⁰ Case no. 019125 Grindrod Holdings South Africa (Pty) Ltd and Sturrock Grindrod Maritime Holdings (Pty) Ltd.

¹⁹¹ Case no. 99/LM/Nov11 Government Employees Pension Fund represented by Public Investment Corporation Ltd and Afrisam Consortium (Pty) Ltd.

¹⁹² Case nos. 110/LM/NOV05, 59/CAC/Feb06 Mybico and Vodafone P10 and 110/LM/Oct07 Pamodzi Gold Ltd and President Steyn Gold Mines (Free State) (Pty) Ltd.

¹⁹³ Case no. 23/AM/May10 Bedrock Mining Support (Pty) Ltd and Mondi Ltd.

realize BEE such as undertaking (became order) to dispose of part of the business to a black empowerment partner(s) acceptable to the buyer within a specific timeframe.¹⁹⁴

Input foreclosure was raised under SMMEs concerns and industrial sector ability to compete. In the Pioneer merger, the parties undertook to adopt a time-limited price cap, a commitment to offer certain products in sufficient commercial quantities to meet demand and to ensure that such seed is accessible. The conditions also extended to establishing a research hub in South Africa by 2016 and a partnership with the Government to invest in programs in the interests of developing farmers.¹⁹⁵ In an impact on industrial sector merger, the Tribunal imposed a condition to provide local customers post-merger with access to sufficient volumes to satisfy the annual demand of the South African companies.¹⁹⁶

Based on the cases reviewed, to date, no remedies have been imposed in relation to international competitiveness, i.e., this PIC mainly operates in the positives sense.

III. PICs UNDER MERGER CONTROL AND MIXED POLICY OBJECTIVES

A deferential competition model is emerging as the preferred approach in addressing societal and developmental needs. This approach is however pursued in varying degrees by each country. In any case, this unchartered path, in its different variations, raises a number of challenges which if not contemplated and addressed may render such merger control models a stumbling block for development rather than a catalyst thereof.¹⁹⁷

The first challenge in applying the PICs test we identified is setting parameters to know when a certain interest should be addressed under the merger review process. In the case law reviewed, the competition authorities borrowed the analytical process in

¹⁹⁴ Case no.75/LM/Oct02 Coleus Packaging (Pty) Ltd and Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited. SAB's rationale for the merger was to turn the company around for the purpose of selling it on to an empowerment group. This was in the context of vertical foreclosure claim by a BEE company.

¹⁹⁵ Pioneer merger *supra* note 130

¹⁹⁶ Case no. 016329 Industrial Development Corporation of South Africa Limited; Hebei Iron & Steel Group Co Limited; and Mauritius SPV and Rio Tinto South Africa Limited.

¹⁹⁷ However, we note that public interest considerations is taken into account under, for example, Article 21(4) EU Merger Regulations which allows Member States to protect certain public interests and Australian authorization system, however, in all cases nothing as systematic as this approach.

evaluating efficiencies under comparative merger control regimes and applied it to PICs requiring them to be merger-specific and substantial.¹⁹⁸ Nevertheless, how they have established these two elements under each PIC has not always been clear and /or consistent. For example, in employment, a nexus must be shown between retrenchment and the proposed merger to evidence specificity; however, when in doubt the competition authorities seem to take a cautious approach and impose conditions on retrenchment.¹⁹⁹ Exclusivity clauses in the retail space lease agreements are not merger-specific but they are still addressed by imposing conditions. Admittedly, the law, regulations and enforcement in that regard are developing with more intensity for some (like employment) than others. As a welcome step, SA issued draft guidelines for PICs, which should promote the knowledge and understanding of how they would be applied and hopefully to a higher level of certainty and clarity for businesses.²⁰⁰

The second challenge is the procedural framework for intervention and the stand the competition authorities take on intervention. It follows the logic that in order to be informed about all these considerations (economic and non-economic ones), relevant stakeholders have to be able to participate to illuminate the competition authorities' way in reaching a decision, may open the door to various persons to participate in the merger proceedings.²⁰¹ There are a few obvious problems steaming out of this open door policy: (a) the possibility of prolonging the process due to the overzealous participation in the proceeding resulting in excessive amount of information provided from the different stakeholders that needs to be reviewed by the competition authorities, and (b) the quality of the information regarding the relevance of the specific PICs claimed to the merger and whether the information is actually representative of all relevant facts. Stakeholders may,

¹⁹⁸ See William J. Kolasky and Andrew R. Dick, *THE MERGER GUIDELINES AND THE INTEGRATION OF EFFICIENCIES INTO ANTITRUST REVIEW OF HORIZONTAL MERGERS*, 71 *Antitrust Law Journals* 207 (American Bar Association 2003). Substantiality is also an express requirement under the Act.

¹⁹⁹ Case no. 09/LM/Feb11 Lexshell 826 Investments (Pty) Ltd and Umcebo Mining (Pty) Ltd and Mopani Coal (Pty) Ltd. "Notwithstanding the Commission having found no nexus between the retrenchments at SISA and the current transaction, it seek the imposition of a condition protecting employment. It was concerned that certain jobs may be duplicated and sought the imposition of a two year moratorium on retrenchments at both the acquiring and target firm." Case no. 019083 Sun International (SA) Ltd and GPI Slots (Pty) Ltd

²⁰⁰ See Draft Guideline *supra* note 25.

²⁰¹ Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries- intervened in the proceedings requesting the merger be approved subject to conditions to protect the public interest, which led to criticism of undue government involvement, and over-reaching of public policy in competition matters. Wal-Mart – Massmart *supra* note 20.

intentionally or unintentionally, provide the authorities with mixed bag information reflecting various PICs whether merger-specific and substantial to the merger or not. Also, the level of sophistication and development of stakeholders will affect the quality of the information provided and the ability to partake in this process. It is expected that businesses, having access to resources and familiarity with the process, will be more capable of engaging in the process than may be unions or civil society.

The SA Tribunal faced the first issue by imposing strict timelines to present evidence, which mainly addresses the threat of abuse (by dragging the process for longer than it should), and the CAC concurred with its approach. But for the sake of procedural fairness, to insure participation of the stakeholders the Tribunal took into account intervention that occurred at the eleventh hour and took it upon itself to insure the participation of stakeholders (in this example, unions).

On the quality of information concerns, given the duty of fairness towards the stakeholders, this will probably require significant time and effort from the end of the competition authorities to sort through the information provided. As per the Tribunal Rules, this screening process should be done in 10 days from receiving a “*Notice of Motion*” to intervene. The form in question (Form CT6) informs the Tribunal about the person’s intention to intervene accompanied by a brief statement of that person’s interest in the proceedings.²⁰² Pursuant to Anglo, Kumba and IDC decision, the applicant need not have material interest and no obligation to show that the interest in question is not yet represented by another party to the proceeding. It is understandable that given the various PICs the Tribunal has to consider that the threshold for intervention is reduced. However, after years of enforcement it may be beneficial to contemplate a mechanism to facilitate the screening process based on the criteria of PICs test through, maybe, adopting a more structured special form for notice of intervention in merger proceedings.

Ensuring the accessibility of the various stakeholders’ participation in the process is integral for the competition authorities to pursue their fact-finding mission. A “*build it and they’ll come*” approach to participation is not guaranteed. This may result in unequal representation of the various stakeholders. In the context of SA, advocacy was used to

²⁰² Rule 46 of the Tribunal Rules.

inform unions about the right to intervene and how it can be utilized. This, although proved to be an effective cure to modest participation of stakeholders, adding another dimension to the advocacy activities of competition authorities, which are usually focused on preaching benefits of competition to mainly consumers, businesses and the government.

Thus, intervention in merger proceedings requires another balancing act that competition authorities need to perform between maintaining procedural fairness, providing an open platform within a specific scope relevant to the PICs in question and reaching their decisions in a timely manner.

The third and arguably the principal challenge is weighing conflicting competition and non-competition arguments presented in complex mergers against each other. The competition authorities are required to perform “*an exercise of proportionality*”. The outcome of the exercise should be supported by evidence justifying it. This means that outcomes may differ (drastically) based on evidence provided and what weight said authorities attach to them.²⁰³ Following the global nature of trade nowadays, in reaching their findings the competition authorities utilize comparative evidence from other jurisdictions.²⁰⁴ In Wal-Mart and Massmart merger, the Commission recommended approving the merger unconditionally, while the Tribunal gave more weight to consumer welfare over job losses and conditionally approved the merger, and the CAC disagreed with Tribunal on the appropriate conditions.²⁰⁵ This follows the inherent nature of the proportionality exercise, which even if it may allow a few principles to form around it is essentially decided on a case-by-case basis.²⁰⁶ Accordingly, the approach in assessing PICs is very dynamic. For employment, the general rule is that consideration of

²⁰³ Regarding the main reasons why competition authorities’ decisions are overturned, Table 3 shows that the most quoted answer in the survey is that there are divergences in the way competition authorities and the judiciary interpret competition rules. ICN Report on Competition and the Judiciary, p.8. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf> last viewed October 10, 2015.

²⁰⁴ Evidence from post merger effect of Wal-Mart merger in Chile (among other countries) was used. Wal-Mart – Massmart *supra* note 20.

²⁰⁶“Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.” See Case No. CCT/3/94, S v Makwanyane and Another, para. 104, p. 69. Available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf> last viewed October 15, 2015.

quantifiable short-term losses trumps long-term ones, except for in the case of failing firm. In weighing the harm to local supply chains against the benefit of lower prices for consumers, the SA Tribunal seem to have opted for the former over consumer welfare. Since it is an exercise made on a case-by-case basis, we may face a different outcome in the next GVCs merger in the same sector.

Hence, context matters significantly in PICs analysis. This, as noted by many opponents of the mixed objectives model, raises issues of certainty and consistency for businesses. We think that this criticism is somewhat exaggerated. Rule of reason analysis (RoR) of competition violations introduced a balancing exercise as a method to verify unreasonable restraint, which warrants prohibition.²⁰⁷ What constitutes unreasonable restraint is arrived at on the basis of economic analysis, which is set within certain boundaries. Here too the competition authorities engage in a balancing act between the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited.²⁰⁸ Hence, it is difficult to explain why RoR in competition analysis is, more or less, accepted despite its effect on judicial certainty while the same treatment is not afforded to issues a country finds of equal importance to efficiency. It is, in our view that rather the requirement that PICs analysis be transparent which would result in legal certainty is more essential in this regard.

It is worth pointing out that despite the careful attention to PICs, the Tribunal endeavours not to engage with the proportionality exercise if a decision can be reached without the need to apply it.²⁰⁹ They also have shown reluctance in prohibiting a merger just on these bases. Nevertheless, in order not to ignore the detrimental impact on public interest they had to innovate tailor-made remedies to rectify the negative impact on public interest.²¹⁰ Undertakings / conditions to cure the negative impact on employment have

²⁰⁷ Following the historic judgement in Standard Oil in the US antitrust, only unreasonable restraints should be prohibited In Areeda and Turner

²⁰⁸ See OECD glossary <https://stats.oecd.org/glossary/detail.asp?ID=3305> Last viewed October 10, 2015.

²⁰⁹ If through scrutinizing the evidence a claim of harm to public interest can be overruled for example. See Distillers and Stellenbosch *supra* note 26 and Anglo American and Kumba mergers *supra* note 18.

²¹⁰ In competition law, remedies are conventionally classified as either structural or behavioural. They should be appropriate, proportional and enforceable.

mainly taken the form of behavioural remedies of caps on number of retrenchments, moratoriums on retrenchments, offering re-employment opportunities and training funds. These have also been designed to provide short-term remedies addressing employment concerns with the least impact possible on the competition conditions in the market. Conditions pertaining to SMMEs ranged from obligations to change market practices through negotiations and in recent years, price caps to ensure continued access to sensitive products and establishing investment funds for the development of SMMEs chains. These conditions, especially the allocation of funds, may be better understood in light of the announced policy goals for SMMEs promotion under the various government development plans. Some cases warranted the use of structural remedies (and these are usually ones that affect BEE). Behavioural remedies raise challenges of operation, effectiveness, and requirements for on-going monitoring and compliance hence compounding the burden of enforcement. In the SA Competition report celebrating fifteen years of enforcement, the competition watchdog went back to examine the effectiveness and impact employment conditions have on addressing the PIC in question. Their initial examination revealed that training funds have been utilized by 50% of affected employees, and that is in the best-case scenario.²¹¹ The parties then, in agreement with the Commission agreed on directing the funds to establish an education and training fund for the benefit of the relevant community. How these undertakings are reached is also a matter that warrants contemplation. Technically, the competition authorities have a hold-up power over businesses in that regard. Procedural measures to insure these conditions are negotiated and agreed upon in a transparent and fair manner is of vital importance for the efficacy of this model.

Further, the competition authorities have dealt with difficult issues arising out of globalization such as GVCs, which are of special significance for emerging economies and developing countries.²¹² In that sense, they acknowledged that competition

²¹¹ See 15 Years of Competition Enforcement, A People's Account, A Joint Report by the South African Competition Commission and Tribunal. Available at <http://compcom.co.za/www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf> last viewed October 10, 2015.

²¹² See Implications of Global Value Chains for Trade, Investment, Development and Jobs, a joint report by the OECD, WTO and UNCTAD prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014 http://unctad.org/en/PublicationsLibrary/unctad_oecd_wto_2013d1_en.pdf Last viewed October 10, 2015.

enforcement should not become a “*surrogate for a coherent industrial policy*”.²¹³ They nevertheless engaged in an exercise to quantify the damage arising out of GVCs, and devise remedies to mitigate its long-term effect on the market.²¹⁴ The Wal-Mart - Massmart merger across the various jurisdictions raises important issues to consider for GVCs. In the OECD Economic Survey of South Africa, 2015 it is noted that the said merger “*prevented economic efficiencies through the streamlining of operations and slowed down the introduction of new (retail) operations and supply chain techniques.*”²¹⁵ The decision of the SA Tribunal indicates that there is an understanding of the importance of such GVCs for developing economies however; they want such FDIs under different terms of engagement. The first remark here is that these decisions were advised by the desire to direct the GVCs away from their labour policies and supply chain models towards more local engagement and vertical integration with existing local networks. In this regard, it is interesting to explore this process from the business side and whether this model will impact how companies perceive these conditions and possibly creating new synergies between competition enforcement and corporate social responsibility.²¹⁶ Another element that has to be noted here is the risk of a race to the top in the context of such global and regional mergers where each competition authority imposes similar conditions, possibly increasing the cost and level of engagement post-merger for businesses and may lead to abandoning the transaction in whole or in part which would result in losing the opportunity of FDI possibly where it is most needed.

Also, following comparative institutional analysis of the EU competition law²¹⁷, social decision-making processes maybe carried out by the government (the political realm), the courts (adjudicators) or the markets. Recent research looking at methods of accommodating PICs in 75 different developing and developed countries and their choice of PI decision-maker (either national competition authorities (NCAs), politicians, regulator

²¹³ “[A] comprehensive policy designed by the State is the best way to deal with the challenges that globalisation in general and global value chains in particular posed to the domestic South African economy.” Wal-Mart – Massmart *supra* note 20.

²¹⁴ *Ibid*

²¹⁵ *ibid* p. 81

²¹⁶ For example, in the regional context, Woolworths merger in Botswana to submit within one year from the date of approval, a program of how they intend to roll out their “Good Business Journey Strategy” in Botswana facilitating citizen participation in the group’s business. See above page

²¹⁷ See discussion of on institutional choice as the selection of the social decision-making process that would dispose the residual right of decision-making in a specific context in Lianos and Gardner *supra* note 5 at p. 72.

or a combination of sorts) showed that developing countries slightly prefer NCAs over politicians as PI decision makers while developed countries prefer politicians over NCA in that regard.²¹⁸ When deciding which of the three will be responsible to apply a mixed objective model of competition law it is important to compare the various institutional alternative under the particular circumstances in a given country to choose the one most suitable to your context. On the one hand, incorporating public interest considerations denotes distrust in the market's ability to address these PICs and require government intervention. On the other hand, a comparative analysis of who the system should entrust with undertaking the proportionality test, whether an independent technocratic entity such as the competition authority subject to judicial review or a political body such as a minister or council of ministers, should be performed in the context of each developing / emerging economy to identify its best alternative.

On the macro-level, competition authorities do not exist in a vacuum. Various government strategies articulate the development challenges they are facing and the plans they hope to implement in that regard.²¹⁹ All these policies should then direct the work of government and administrative agencies' activities, among which the competition authorities.²²⁰ Competition authorities are in such models not only gatekeepers for competition but they have to ensure that competition enforcement is in sync with other relevant economic, societal and developmental policies. In SA, for example, the Department for Economic Development (EDD) was established in 2009 to realize this goal. It is now responsible for overseeing the work of the Commission and Tribunal. One of the EDD's tasks is to ensure the alignment of competition enforcement with the national development strategy. The review process of the work of the Commission and the Tribunal includes assessing the positive /negative effects of their decisions on employment.²²¹ This will *de facto* raise the pressure on these authorities to perform well as per the standards of the EDD, adding yet

²¹⁹ Such as the National Development Plan to eliminate poverty and reduce inequality by 2030 (NDP), the National Growth Path (NGP) which emphasizes job creation and retention aspiring to create 5 million jobs by 2020 and the Medium Term Strategic Framework which promotes among others "decent employment through inclusive growth. NDP is a broad long term plans while the NGP is complementary to NDP.

²²⁰ For example see the Kenya 2030 vision. Available at <http://www.vision2030.go.ke/index.php/vision/>. Last viewed October 15, 2015.

²²¹ In the past 15 years the Tribunal has placed employment related conditions on more than 29 mergers and prevented more than 3,803 job losses as a result of the conditions placed." See the EDD annual report of 2013-2014. Available at <http://www.economic.gov.za/communications/annual-reports> last viewed October 15, 2015.

another matter to balance between their mandate under the Act and the EDD's expectations. If not careful about this slippery slope, they may be dragged into meeting success criteria that are broader than their competition function. This is again applicable in relation to all other developing countries and their adopted blue print for success, i.e., policy goals under their development plans.²²²

IV. CONCLUSION

In *The Antitrust Paradox*, Bork wrote about a "revolution" in antitrust (competition) law that transformed it from "social policy" to "merely law."²²³ However, the needs of developing countries are adding back an element of social policy to competition (antitrust) law.

Looking closely at SA merger control model, one finds that PICs address a mixture of societal and industrial policy concerns represented in the protection offered to, on the one hand, employment, marginalized regions and equality for disadvantaged individuals and, on the other hand, to SMMEs's, sector or region ability to compete and international competitiveness. Employment considerations are of vital importance under the SA competition enforcement. The relation between competition and employment has been a contentious one. The general belief is that more competition leads to job losses and import substitution.²²⁴ In that sense, it is important to note that the SA model has opted to address only the negative short-term impact on employment of unskilled labour without engaging with the broader employment policy concerns.²²⁵ Social equality considerations are not easy to quantify while industrial policy considerations should be pursued within the parameters of the Act. The SA competition authorities are trying to strike a balance between their statutory duties under the Act and SA's international commitments to free

²²² See also for the possible implications with regard to the interplay between competition law and regulation, *A Bureaucracy Theory of the Interaction Between Competition Law and State Activities* in *COMPETITION AND THE STATE*, Daniel D. Sokol et al. eds., Stanford University Press (2014)

²²³ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Simon & Schuster Adult Publishing Group, 10th ed.v1993 p. x This was in the context of US antitrust law, however this approach is widely accepted now.

²²⁴ Recent research has shown that competition may have positive long-term effects on employment on the macro level "*the final impact on employment from increased competition is more job creation, possibly associated with higher real wages (as prices are reduced).*" Negative impact on employment may however be expected in the short-term (up to three years). See OECD, *DOES COMPETITION KILL OR CREATE JOBS? BACKGROUND NOTE BY THE SECRETARIAT, GLOBAL FORUM ON COMPETITION TO DAF/COMP/GF (2015) 9 p. 4*. Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2015\)9&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2015)9&docLanguage=En). Last viewed January 10, 2016.

²²⁵ Further *ex post* research is needed to test the impact of this approach on the relevant sector and the economy as a whole.

trade and conformity with international best practices. This nonetheless does not alter the significance given to these considerations within a set of parameters, some of which are still under development.

Applying such deferential competition law model is not easy since it falls outside standard competition law and advice of international best practices. The choices competition authorities have to make under this model put them between the hammer of their duty to upholding competition and the anvil of respecting public interest considerations stipulated under their respective competition laws. These are, however, choices developing countries cannot afford to shy away from. In this context, the role of competition authorities, compared to their counterparts in developed countries, surpasses the traditional function of enforcing competition law, to pursuing an active role in generating competition and deciding how different policy considerations relate to each other. This calls for on the one hand, identifying the unique challenges faced by these authorities in this regard, and on the other hand, continuing our research into these deferential models to better understand their priorities, needs and methods.