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BACKGROUND NOTE TO THE PUBLIC INTEREST GUIDELINE

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NOT FOR COMMENT

NOTE: The Background Note is meant to assist and provide details to the reader on how the Commission developed the guidelines and is not for comment.

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EXECUTIVE SUMMARY

The Competition Act of South Africa, Act no. 89 of 1998 as amended (the Act), provides for the consideration of public interest factors in merger regulation. These factors are employment, the ability of small businesses or those owned by previously disadvantaged individuals to compete, international competitiveness of domestic firms as well as the impact of a merger on an industrial sector or region. Mergers therefore have to be considered not only on their impact on competition, but also on the defined public interest.

In assessing mergers in the context of the public interest dimensions of the Act, there are general principles that have emerged in the 15 years of merger regulation in South Africa. These require that the effect on the public interest must be merger specific, substantial and limited in scope for it to fall within the ambit of the Act.

With respect to employment, the assessment ought to, at least, assess whether the reasons for the proposed job losses are directly linked to the number of job losses and whether the process used in determining the number of job losses is rational and makes sense. Although there is no standard approach specified here, the indication is that the standard must be an exercise that is non-random and non-arbitrary; ensuring that the process followed should be rational.

The public interest ground on the ability of small businesses or those owned by historically disadvantaged persons to compete has largely been achieved, through remedies in mergers aimed at providing access to intermediate goods on fair prices or through divestitures. In the development context of South Africa, as well as the increased focus on small businesses, it is vital that these mergers do not heighten barriers to entry or limit the expansion of small businesses.

With respect to the impact on a particular industrial sector or region, the assessment should consider whether the claimed effects on the particular industrial sector or region firstly falls within the ambit of the Act, and secondly whether it is the result of the merger. To determine the effects of the merger on the industrial sector or region, various types of “effects” have been identified which include a consideration of:

- Whether the merger will have an impact on the productive capacity of the domestic market;

- Whether the target firm is involved in the distribution or sale of goods such that any termination of such contracts with local suppliers would have a negative effect on the sector or region and a wider effect on the economy, or
- Whether the merger results in increased importation rather than the sourcing of locally produced goods or a substitution of locally produced goods with imports, or the movement or diversion of local resources to international markets with dire consequences for local markets and sectors.

The Commission is required to consider the impact of a merger on the ability of national industries to compete in international markets. Although the case precedent is very limited on this ground, the general approach could be to look into the factors relevant to make a determination on whether the merger could enable the competitiveness of firms in the global market. It is often a public interest ground advanced when the merger is likely to lessen competition in the domestic market, but advance the international competitiveness of the merged entity.

There is a surge of competition authorities, particularly on the African continent, with a public interest mandate on merger regulation; South Africa is not alone on this path. It is therefore imperative to determine the contours of public interest in merger regulation for policy certainty.

1. INTRODUCTION

Merger regulation in South Africa provides for the assessment of the impact of mergers not only on competition but also public interest grounds. In recent times, a number of key cases have placed public interest issues in merger regulation under the spotlight.

At the onset of the new competition regime it was recognised that public interest issues had to be included in the Act in order to address the socio-economic inequalities arising from the past.

In the preamble to the Act, it is recognised that the South African economy must be open to greater ownership by a greater number of South Africans and that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans.

The competition authorities are obliged in terms of Section 12A(1) of the Competition Act to consider both the impact that a merger will have on competition and whether the merger can or cannot be justified on substantial public interest grounds. The Act identifies four public interest grounds that the Competition Authorities must consider. These include employment, impact on small, medium enterprises, impact on a particular industrial sector or region, and the impact on the ability of national industries to compete in international markets.

This paper explores the various issues that could be considered when assessing each public interest ground and attempts to identify an approach that can be adopted in future assessments. Key cases are cited and appropriate themes and lessons are drawn from the cases. In the section dealing with employment issues, the paper explores the likely effects that can be identified in the assessment. Further, appropriate standards for the identification and assessment of the likely employment effects are considered. In the section on the impact of a merger on small and medium businesses, the paper explores the scope of the assessment and draws on experience from key cases. In the industrial sector and region section, the document explores the likely effects that may arise on an industry through a merger. Further, appropriate measures for analysis are considered. In the section on international competeiveness, key cases are discussed and an approach to analysis is explored.

2. BACKGROUND

The origins of competition policy in South Africa lie with the Regulation of Monopolistic Conditions Act, 1955 (Act No. 24 of 1955). A review of the Act in the 1970s found that it had been unsuccessful in preventing a dramatic increase in oligopolies. As a result, the Maintenance and Promotion of Competition Act, 1979 (Act No.96 of 1979) was introduced and the Competition Board, tasked with administering the Act, was established[1].

The 1979 Act was amended in 1986 to give the Competition Board further powers, including the ability to act not only against new concentrations of economic power but also existing monopolies and oligopolies. Despite the amendments, however, it was widely recognized that technical flaws in the Act prevented the effective application of competition law on both substantive and logistical grounds.

In 1995, the South African government embarked on a project to review competition policy, which process was concluded in September 1998 when Parliament passed the Act into law. The Act introduced new provisions, including the consideration of public interest in merger regulation.

The inclusion of public interest in the Act was motivated by the need to address the socio-economic inequalities arising in society. The government was at the time looking to create an economic strategy that would ensure a competitive and fast growing economy. Competition policy was seen as one such policy that could be used to achieve this objective.

Government envisioned a framework for competition and development supported by a well-structured competition policy to achieve a more competitive and efficient economy. In addition, it was also seen as something that could assist government in promoting particular socio-economic objectives. Hence, while realising the benefits from competition, government realised that competition policy needed to be aligned to broader development and economic policy objectives. This was because in certain instances transactions with a minor pro-competitive gain could result in significant social costs. Hence, competition policy would be in conflict with other development policies.

Competitiveness and development was seeing as mutually supporting objectives. Alignment was seeing in two areas. Firstly, competition policy needed to be aligned with industrial and trade policy in order to synchronise varying domestic and international development tools. This is something that was seen as being important in developing economies.

[1] www.compcom.co.za.

Secondly, competition policy needed to be aligned with government policies that aimed to redress economic distortions, social inequalities, small and medium business development and the spread of ownership.

The alignment of competition policy to these objectives was seen as crucial for its success as a complete neglect of such objectives would result in negative perceptions towards competition policy.

It is widely recognised that small economies like South Africa, may be concentrated and therefore any merger and acquisition activity can create further concentration and social disparities if left unchecked. Mergers may lead to the shedding of jobs, especially where they are driven by cost saving and efficiency goals. Hence, it is important that merger regulation consider the preservation of jobs where these arise as a result of the merger. In an economy with high unemployment rates, it would not serve the public interest to encourage or allow further job losses.

Given the huge social and economic discrepancies left by the legacy of apartheid, the promotion of business ownership and control by historically disadvantaged individuals was seen as important. The competitive process does not ordinarily yield this public interest outcome as in a competitive process resources are aligned to the most efficient outcome irrespective of the social background. To eradicate further disparities and allow equitable participation, this becomes important in merger assessment.

While South Africa's history and legacy is in many respects unique, high concentration levels are common among the Eastern and Southern African countries. In most of these countries, there was high unemployment, excessive government regulation and uninformed consumers, making competition policy very difficult to implement effectively. Hence, while competition policy and, in particular, public interest tests are prevalent throughout Africa, they are not universal. South Africa, Kenya, Botswana, Malawi, Namibia, Swaziland and Zambia include some form of public interest consideration as part of their competition regulation which varies in scope.

In Botswana, public interest factors can be used to exempt certain mergers from review and also form a set of additional considerations in merger investigations, although the scope of public interest factors is not limited. In Malawi, public interest factors including exports and employment are included within an overall assessment of the net effect of a merger, while in Namibia public interest factors including maintaining or promoting exports, 'promoting stability' (albeit only in industries designated by the relevant minister), and even 'obtaining a benefit for the public', can also be used to justify an exemption for otherwise anti-competitive agreements.

In Swaziland, public interest factors form part of an unlimited list of potential considerations in merger investigations and include international competitiveness, the competitiveness of a sector or region, and the ability of small enterprises to become competitive. In Zambia, the scope of potential factors for consideration is essentially unlimited, including not only employment, exports, and international competitiveness, but also 'socioeconomic factors as may be appropriate; and any other factor that bears upon the public interest'.

Other jurisdictions such as Canada share the same policy goals as South Africa in this regard. For example, section 1.1 of the Canadian Competition Act states:

> *The purpose of this Act is maintain and encourage competition in Canada … <u>in order to ensure that small and medium sized enterprises have an equitable opportunity to participate in the Canadian economy</u> (our emphasis) and in order to provide consumers with competitive prices and product choices.*

In the United States, United Kingdom and Canada, public interest in mergers have mainly focussed on mergers in the media and banking sectors respectively.

A brief overview of public interest consideration in mergers in the United Kingdom show that public interest is primarily the domain of the Secretary of State for Trade and Industry and this is limited to the following:

- National security which includes public security;
- Plurality of media; and
- Stability of the UK financial system.

Many jurisdictions in the Asia-Pacific also have public interest provisions or at least some form of public interest consideration in their merger control legislation. Japan and South Korea have since amended their merger control legislation to enable special consideration of cross-border mergers that may negatively impact on their domestic markets.[2] China has incorporated specific provisions for public interest in their merger control regulation. These include assessing a merger's effect on national security.[3]

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[2] See http://www.jftc.go.jp/epage/policyupdates/speeches/Cross_border_merger_control_in_Japan.pdf and http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=52&pageId=0201 (hotlink: KFTC announced its 2011 Work Plans, Press Release 272).

[3] See tp://www.globalcompetitionreview.com/news/article/29833/mofcom-issues-new-regulations-foreign-acquisitions/; <u>http://www.globalcompetitionreview.com/news/article/29748/china-give-foreign-takeovers-greater-scrutiny/</u>.

Australia and New Zealand adopt a more or less similar approach to public interest during merger review. They, respectively, have a process of merger 'authorisation' which enables firms to apply to the competition authority for an approval of mergers that are deemed anti-competitive if the public benefit outweighs these.[4]

3. PROBLEM STATEMENT

Over the past five years, there has been an increased focus on cases dealing with public interest issues. Certain key cases brought before the competition authorities sparked debate on the assessment standard for public interest issues. While the competition authorities have always been cognisant of their mandate in terms of the Act, recently there has arguably been more interest in public interest issues sparked by the increased interest and participation of stakeholders in the merger review processes. Of note, are the Walmart and Massmart and the Kansai and Freeworld mergers. These cases saw the participation of various government departments including the Economic Development Department ("EDD"), the Department of Trade and Industry ("DTI") and the Department of Agriculture, Forestry and Fisheries, and various trade unions including the South African Commercial Catering and Allied Workers Union ("SACCAWU"); the Congress of South African Trade Unions ("COSATU"), and the National Union of Metal Workers in South Africa ("NUMSA") who intervened on public interest grounds. This greater focus and participation in the public interest evaluation appears to be sparked by the economic downturn and the new growth path economic development framework which targeted economic development and job creation as main goals. Competition policy is recognised as a tool which can be used to achieve this objective.

The absence of a guideline for assessing public interest factors in merger investigations has presented challenges both for the competition authorities and stakeholders. There is thus a misalignment in understanding the remit of public interest in merger regulation. For instance, trade unions have expressed dissatisfaction and highlighted inconsistencies in the Competition Commission's approach to public interest assessment. Business, on the other hand, have also criticized the Commission's approach to public interest and employment in particular, indicating that it is "vague" and "interventionist" and not achieving the desired effect that the remedy is expected to achieve.

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[4] See http://www.accc.gov.au/content/index.phtml/itemId/774442 and http://www.comcom.govt.nz/authorisations/.

In order to achieve the required economic outcome that the Act stipulates, there has to be a rigorous and standard approach in assessing public interest issues in merger investigations.

4. METHODOLOGY

This paper has mainly drawn from South African case law on public interest available since the inception of the Competition Act. This includes cases decided by the Competition Commission, the Competition Tribunal and the Competition Appeal Court. Guidance was taken from case precedent to formulate the approach that the Commission could adopt in its analysis. Where sufficient precedent was not available from the Tribunal and CAC cases, the paper relied on experience and knowledge within the Commission.

For the assessment on employment, the following key merger cases were considered: the Momentum/Metropolitan merger *(case no. 41/LM/Jul10);* Walmart/Massmart merger (*case no. 73/LM/Dec10; and case no*: *110/CAC/Jul11; and 111/CAC/Jun11*); Unilever/Robertsons merger *(case no. 55/LM/Sep01*); Ashton Canning and Tiger Brands merger (*Case no. 46/LM/May05)*; Aon and Glenrand merger (*case no. 37/AM/Apr11);* the Nedbank/Imperial Bank merger *(case no. 70/LM/Oct09*), the Bucket Full/Cartons and Labels Business of Nampak Products Ltd *(case no. 018457),* and the BB Investment Company/Adcock Ingram Holdings merger *(case no. 018713),* among others.

The Metropolitan and Momentum merger laid out the legal standards that a public interest assessment on employment must meet. This case introduced the principles of "justification in terms of "rationality" and justification in terms of "public interest". In the Aon and Glenrand merger, the analysis proposed in the Momentum case was tested and accepted again as the legal standard for assessment.

The Walmart/Massmart merger dealt with pre-merger retrenchments and with the evaluation of employment effects occurring within the broader economy. The Unilever/Robertsons case dealt with the rights conferred upon employees and their representatives in terms of the Act. The Nedbank/Imperial Bank merger suggested that a quantitative approach to establishing substantiality was not sufficient. The Ashton Canning and Tiger Brands merger dealt with issues around different skills and which skill types the competition authorities should be most concerned about. It also suggests the type of qualitative analysis that ought to be performed in order to determine whether the impact of the merger on employment is substantial or not. This case raised issues around the employees' ability to be re-employed in the short term, seasonality in jobs, employment opportunities within particular regions and sectors. The

Bucket Full/ Cartons and Labels Business of Nampak Products Ltd transaction dealt with the issue of merger specific retrenchments. The BB Investment and Adcock Ingram merger dealt with the issues of merger specific retrenchments and justification in terms of complete information requirements.

In the assessment of the likely effect of a merger on firms owned or controlled by historically disadvantaged individuals in becoming competitive ("BEE and SMMEs"), the following key cases were considered: the AgriGroupe/AFGRI merger *(case number 017939,)* the Walmart/Massmart merger and the Media24/Natal Witness merger *(Case no. 15/LM/Jun11).* The AgriGroupe/AFGRI merger dealt with the impact that the merger had on small farmers in the agriculture sector. In this case, the key issue was whether the target firm would continue providing key support services and assistance to farmers post-merger. It suggests an approach where the strategy and supply/procurement patterns of firms must be considered.

With respect to the third public interest ground, impact on a particular industrial sector or region, the following key merger cases were considered: Telkom /Business Connexion merger (*case No: 51/LM/Jun06)*, Glencore/Xstrata merger (*case no. 33/LM/Mar12);* Walmart/Massmart merger; and the Thaba Chueu/SamQuarz merger *(case no. 10/AM/Jan12, among others.*

The Telkom/BCX merger dealt with issues around substantiality of impact. The Glencore/Xstrata merger dealt with merger specific concerns and concerns that arise outside of the merger. The Walmart/Massmart and the Thaba Chueu/Samquarz mergers dealt with the kind of effects that must be considered in the merger assessment. The IDC/Rio Tinto and Kansai/Freeworld mergers also suggest the type of effects that could arise from a merger on an industry.

In assessing the likely impact of a merger on the ability of national industries to compete in international markets, the key cases considered include the Tongaat Hulett Group Ltd/TSB merger *(Case no 83/LM/Jul00),* the Telkom/BCX merger, and the Iscor/Saldanah Steel merger (*Case No: 67/LM/Dec01*), among others

The Tongaat Hulett merger dealt with issues around whether the ability to become competitive is merger specific or can be attained outside the merger. Further, it also considered whether there are other avenues through which firms could attain this ability. The Telkom/BCX merger dealt with the effects on the ability of firms to compete in international markets and the substantiality of such effects.

The cases considered are those that are largely landmark cases and have contributed largely to the development of precedent on these issues. For these reasons, the methodology adopted is considered effective.

5. OVERVIEW OF THE PUBLIC INTEREST PROVISIONS WITHIN THE ACT

Section 12A of the Act states:

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

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

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

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

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

In the Walmart and Massmart merger[5], the CAC accepted the Tribunal's view that Section 12A (1) above sets out three separate but interrelated enquiries that must be considered:

(i) Whether the merger is likely to substantially prevent or lessen competition;

(ii) If the enquiry reveals a substantial lessening of competition, then determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative competitive effects and whether there are any public interest considerations that would outweigh the negative competition effects;

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[5] Competition Appeal Court, Case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

(iii) Notwithstanding the conclusion of the enquiry in (i) or (ii) above, the assessment of whether the merger would have a substantial positive or negative impact on any of the public interest grounds as set in Section 12A (3) of the Act.

Section 12 A (1)(b) above implies that the Commission must consider the public interest effects of a merger irrespective of their conclusion on the competition test. In terms of the assessment required by the Act, an assessment on the public interest grounds, may lead to the prohibition of a merger that is pro-competitive or an approval with conditions of a merger that is pro-competitive. Or it may lead to the approval of an anti-competitive merger if the public interest benefits from the merger outweigh the negative competition effects. Hence in balancing the public interest and competition assessment, the competition authorities are obliged to consider whether a merger that passes the competition test, would fail the public interest test by considering whether the merger has any negative impact on any of the factors set out in the Act. Conversely, the authorities must also consider whether an anti-competitive merger could be approved on the grounds of substantial public interest benefits. However, the Act does not grant any further guidance on how the public interest and competition issues must be balanced save to say that it must be substantial.

Section 12A (3) of the Act states:

> "When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –
>
> (a) Particular industrial sector or region;
>
> (b) Employment;
>
> (c) The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
>
> (d) The ability of national industries to compete in international markets".

The public interest ground that must be assessed is not open ended but limited to the four grounds specified above. These are further limited by each being merger specific. The Tribunal has previously highlighted that the public interest enquiry is limited by subject as above, substantiality and merger specificity.[6]

[6] Competition Tribunal, Walmart and Massmart merger, case no. 73/LM/Dec10.

The Tribunal has also previously held that the public interest mandate is linked to its competition analysis. The context or positioning of the public interest analysis required by the Act has been explained by the Tribunal in the proposed hostile merger between Harmony Gold Mining Company and Gold Fields[7] where the Tribunal was confronted with various views on the interpretation and application of the public interest analysis. The following quotation provides a helpful perspective on the positioning of the public interest enquiry[8]:

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

Against the backdrop of the legal framework, an approach on how to assess each of the public interest issues mentioned above can be explored. In the sections that follow, key cases will be considered and examined to assess the main points that can be drawn for the approach to analysis.

The first Section under 5.1. deals with employment. Here, a sequential approach is considered starting with (i) the role and rights of employees in the merger investigation process, the standard of analysis and the sequence of analysis. The approach adopted is based largely on the precedent set down in the large merger between Momentum Holdings Ltd and Metropolitan Ltd.[9]

[7] Competition Tribunal, Case no. 43/LM/Nov04.

[9] Competition Tribunal, case no. 41/LM/Jul10.

5.1. Employment

5.1.1. The Role and Rights of Employees in Merger Investigations

The rights granted to employees and trade unions were clearly defined in the Unilever and Robertsons merger by the Tribunal.[10] The Act recognizes that employees are the most vulnerable when it comes to mergers as too often transactions have a powerful impact on employees' interests without prior warnings. The provisions of the Act[11] are therefore included to ensure that employees are given proper information about the effects of a merger on their direct interests.

The Act grants employees and trade unions the following rights:

(i) right to access meaningful information (Section 13A(2));
(ii) right to timeous information (Section 13A(2)); and
(iii) right to make meaningful representations to the Commission (Rule 37).

This means that trade unions and employees have a right to participate in the merger review process on issues that directly affect their interests. The Unilever and Robertsons merger[12] also highlighted that merging parties must serve a copy of the merger notice on the registered trade union, employee representatives, or failing any of them, the employees themselves.

The merger notice contains Schedule 2 which requires parties to the merger to provide a summary of the effect of the merger on employment. The Tribunal reiterated in this case, that the purpose of having these provisions in the form is to ensure that employee representatives are provided with the necessary information to enable them to make representations to the Competition authorities if they so wish.

The Tribunal also indicated that the information contained in the Form CC4 (1) and the summary of the effect on employment cannot be confidential as it is this information that indicates the effect on employment. Keeping it confidential would deprive labour of its right to access to information and its right to make meaningful representations to the Commission. In this particular case, the Tribunal indicated that "the number of employees which the merging parties contemplate retrenching does not constitute confidential information". In the recent merger involving BB Investment and Adcock Ingram[13], the Tribunal said that "the right to consultation is the right to receive proper information about the proposed retrenchments and

[10] Competition Tribunal, case no. 55/LM/Sep01.
[11] Section 13A of the Competition Act.
[12] Competition Tribunal, case no. 55/LM/Sep01.
[13] Competition Tribunal, case no 018713.

this should even extend to whether the firm considers contemplated retrenchments as operational as the employees have the right to dispute this and the opportunity to make submissions on this point to the Commission and Tribunal, if they hold a contrary view."

The important consideration here is that the Tribunal has highlighted that merging parties should declare all retrenchments to the Commission even if they believe that they are not merger related. Without full disclosure there cannot be proper consultation.

Notification of the merger and its impact on employment will not be sufficient to have complied with the provisions of the Act. The merging parties must therefore consult where trade unions have indicated their intention to do so and to participate in the merger review process.

5.1.2. Analysis

The legal principles for assessing merger related retrenchments were laid out in the large merger between Metropolitan and Momentum.[14] This was also tested in the Tribunal's decision in the Aon and Glenrand merger.[15] In these cases, the Tribunal identified two key steps: (i) the Commission must establish whether a p*rima facie* case exists for substantial job losses and (ii) once a *prima facie* case has been established for substantial employment effects, the evidential burden shifts to the merging parties to justify the job losses. The merging parties must then satisfy two criteria to meet the evidentiary burden:

(i) A rational process has been followed to arrive at the determination of the number of jobs to be lost, that is, the reason for the job reduction and the number of jobs proposed to be shed are rationally connected; and

(ii) The public interest in preventing employment loss is balanced by an equally weighty, but countervailing public interest, justifying the job loss and which is cognisable under the Act.

If there is no rational or public interest justification for the job losses, then remedies would be considered.

More recently, in the BB Investments and Adcock Ingram merger,[16] the Tribunal also confirmed the steps that one should follow when assessing employment issues. In this case,

14 Competition Tribunal, case no. [41/LM/Jul10.]

15 Competition Tribunal, case no. 37/AM/Apr11.
16 Competition Tribunal, case no. 018713.

the Tribunal considered whether the planned retrenchments were merger specific and substantial and thereafter whether they were justified.

The Tribunal in this case said that “The mere fact that retrenchments are merger specific does not condemn them. As we held in *Metropolitan,* once substantiality and merger specificity are established, the onus shifts to the merging parties to justify the retrenchments as not being contrary to the public interest”.

The above approach tends to suggest a particular sequence in which the analysis must be conducted.

i. Determine the likely effect on employment.
ii. Determine whether the effect is substantial.
iii. Determine whether the job losses are justified to be rational and;
iv. Whether it is justified in terms of the public interest.

(i) Determining the likely effect of a merger on employment

Mergers generally have a positive, negative or neutral effect on employment. This can be determined by assessing the nature of the transaction.

In the AgriGroupe and AFGRI merger[17], the Tribunal had indicated that the merger was a “no overlap merger” and therefore was unlikely to lead to any duplication and hence job losses arising from duplication. Further, that the concerns raised by third parties with respect to employment stemmed from a concern that AFGRI would relocate its offices post-merger outside the country.

In assessing the likely negative effects arising from a merger, the Tribunal in the Metropolitan and Momentum[18] merger said that “even with the condition imposed, the merger still had a negative effect on employment, as the number of jobs in existence in both companies after the two year period would have still declined from the level at which it was had the merger not gone ahead”.

The Tribunal said that the conditions did not fully mitigate the effects of the merger and that there was a longer term decline in opportunities as a result of the merger.

[17] Competition Tribunal, case no. 017939.
[18] Competition Tribunal, case no. 41/LM/Jul10.

In the Walmart and Massmart[19] merger, in considering the likely effects of the merger on a particular industrial sector or region, the CAC also recognised that while imports could have a devastating effect on local suppliers they could also lead to widespread job losses across various sectors.

The Walmart case, also presented a scenario where there were multiple effects on employment. That is, the merger brought about a direct effect on Massmart employment levels and also an indirect effect through the impact on local suppliers.

In the Walmart and Massmart[20] merger, SACCAWU had raised concerns around Walmart's employment practices, policies, wages and its terms and conditions of employment. The CAC had indicated that "the law deals with rights and not interests that are to be resolved by the exercise of collective power." Further, the CAC went on to state that "The negative evidence concerning the 'Walmart model' notwithstanding, this principle should still apply within the context of the merger, even when the consideration of s 12A (3) read together with the balance of s 12 A is taken into account."

The CAC also indicated that the Tribunal had confirmed the parties agreed conditions relating to no retrenchments for operational reasons for two years and that SACCAWU's current position in Massmart is guaranteed for a period of three years. Beyond these protections, SACCAWU must use either its bargaining power or, where applicable, rights guaranteed to workers under existing labour law, to protect its members. In summary, the CAC said that "it is not the role of competition law to provide legal protection to potential disputes of interest which stands to be resolved by the exercise of collective power." To the extent that the merging parties would seek to erode union or employee rights guaranteed under existing labour law, these will be protected by the labour courts, which are set up to deal with disputes of rights."

The CAC order in Walmart supports the view presented by the Tribunal in many previous cases. The Tribunal has previously said that "it cannot intervene to impose new benefits but only to protect what already exists and that which is being threatened by the merger", suggesting that these must be merger specific. There must be a real threat that the merger will erode the benefits or employment rights that the employees' had at the time of the merger. Further, the Tribunal has also recognized that other more appropriate fora exist for the resolution of employment rights.

[19] Competition Tribunal, case no. 73/LM/Dec10.
[20] Competition Appeal Court, case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

Hence, while the Commission can consider the effect of the merger on employment by looking at the likely effect on employee's rights, its mandate is limited to only that which the merger erodes and which cannot be remedied through other labour channels.

(ii) Determining whether the likely effect of the merger on employment is substantial

There are various approaches to determine what a "substantial" employment effect is. However, the Tribunal has alluded to certain approaches considered more appropriate than others.

When determining whether a merger has a substantial effect on employment, the Tribunal has stated that "it is not just the number of jobs that we are looking at, but whether the effect on employment is significant". The Commission was criticised for determining substantiality by expressing the number of jobs lost as a percentage of the total combined workforce. In the merger between Nedbank and Imperial Bank, the Commission came to the conclusion that this was insignificant as it would constitute less than 1% of the combined workforce, even though a total of 464 employees were to lose their jobs. The Tribunal has said that "this approach is erroneous and unconnected with the purpose of the Act". Further, that a "percentage based approach is not a conclusive exercise on its own". If one were to rely on such an approach then it is more meaningful to consider the impact on the workforce that the retrenchments represent, that is either, of the acquired firm or target firm than on the entire merged entity itself". Even this, the Tribunal said, cannot be relied on its own.[21]

Given the Tribunal precedent, assessing substantiality should not be merely a quantitative exercise of determining the number of jobs to be lost or the percentage of the workforce that is affected. It is also a qualitative assessment of the likely effect of a merger on the level of employment.

In the Ashton Canning and Langeberg Foods[22] merger, the Tribunal considered that "unskilled employees were unlikely to find alternative employment not only due to their skills but also due to the economic region and the prospects of alternatives for those skills in that region."

The substantiality test should therefore involve an assessment of the following factors:

- The <u>number of employees</u> that are likely to be affected;

[21] Competition Tribunal, case no. 70/LM/Oct09.
[22] Competition Tribunal, case no. 46/LM/May05;

- The <u>percentage of the affected workforce</u>;
- The <u>affected employees skill levels</u> and;
- The <u>likelihood of the employees being able to obtain alternative employment in the short term considering various factors</u>.

<u>Determine the number of job losses</u>

There is no benchmark on what number of job losses would raise concerns. This therefore remains open and must be addressed on a case by case basis. In the Momentum[23] case, the Tribunal looked at job losses of 1000 and said that this was substantial but it also looked at the prospects for re-employment in the short term, suggesting that the number alone is not the correct approach.

<u>Determine the percentage of the affected workforce</u>

This should essentially entail a numerical exercise of expressing the total number of job losses as a percentage of the workforce that is affected.

<u>Determine the skill levels</u>

Generally, three skill levels have been accepted in the analysis of employment issues over the years, namely: skilled, semi-skilled or unskilled. Skilled employees are typically those employed at managerial positions or with tertiary qualifications; semi-skilled employees may possess some post matric training or certification and are typically employed as receptionists, drivers, or administration assistants. Unskilled employees are typically factory or mine workers with no formal qualification.

There is no legal or fixed definition for the skills categorization. This would vary amongst jobs and companies. The proxy for skills level can be employees' qualifications, job description and level within the organization. The job description may be used to cross check whether the parties have correctly defined the skills of the affected employees.

Where employees are unskilled or semi-skilled, there is a presumption that these employees would find it difficult to find employment in the short term. Where employees are skilled or highly skilled, the presumption is that they are generally less of a concern as they are regarded to be more easily employable than semi or unskilled employees in the short-term. Therefore job losses involving these categories are less likely to impact negatively on the

[23] Competition Tribunal case no. 41/LM/Jul10.

level of employment. However, the ability to be re-employed in the short-term must still be considered.

Determine the short-term employment prospects

When looking at short-term re-employment, the Commission should assess the type of skills and the economics of the region to determine whether re-employment would be possible.

(iii) Justification for the job losses

This approach was laid out in the Momentum and Metropolitan merger.[24] The Tribunal noted that once job losses are found to be merger specific and substantial, the evidential burden shifts to the parties and they must then satisfy two criteria:

1. Rational process has been followed to arrive at the determination of the number of jobs to be lost.
2. The Public Interest Justification for the job losses, that is, the job losses are justified by an equally weight and countervailing public interest argument which is cognizable under the Act.

In the Walmart and Massmart merger,[25] the Tribunal said that "although in Metropolitan we held that the burden of justifying merger specific retrenchments fell to the merging parties in this case the burden has not yet shifted." This is because the retrenchments took place prior to the merger. The union would first need to show that retrenchments were merger specific. Only then would the burden of justification shift to the merging parties."

The CAC order relating to the Walmart and Massmart merger, indicated that "A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would accordingly be sufficiently closely related to the merger in order to demand that the merging parties justify their retrenchment decision."

The CAC decision therefore suggests that the Commission needs to go through an exercise of establishing merger specificity, by requesting parties to explain retrenchments close to the merger[26].

[24] Competition Tribunal, case no. 41/LM/Jul10.
[25] Competition Tribunal, case no. 73/LM/Dec10.
[26] Competition Appeal Court, case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

Determining Rationality

In the merger between Momentum Holdings and Metropolitan Holdings Ltd,[27] the Tribunal said that there must be a "Rational determination of the number of job losses and a rational link between reasons for the job losses and the figure arrived at."

In the *Momentum* case, the parties could not justify how they had arrived at the employment figures or why they could not arrive at more precise figures. The Tribunal had referred to the parties approach as "being inconsistent and arbitrary. The parties were determined to attain a pre-determined level of cost savings but could not justify how these could come about through reduction in employment. The parties' figures were based on assumptions from past integration experience but could not show how these could constitute a reliable method for estimating employment outcomes in the merger". The Tribunal concluded on this merger, that "the parties could not show a rational connection between the claimed efficiencies and the number of jobs to be lost to realize those efficiencies. The figures presented were arrived at in a brush and arbitrary manner and could not be justified."

In the Aon and Glenrand merger,[28] the Tribunal noted that "the parties had conducted a "Paterson job evaluation" and a budget and financial forecast of the business units. "The parties had undertaken several exercises using different methodologies and therefore were satisfied that a rational process had been followed."

Evidence from the Momentum and Metropolitan and the Aon and Glenrand mergers suggest that the parties must show how they arrived at the figures presented. A simple task of comparing the parties' list of employees and making assumptions of the likely job losses will not suffice. There is no methodology specified. However, a well- reasoned approach would be acceptable.

<u>Public interest justification</u>

The Tribunal, in the Momentum/Metropolitan[29] and the Aon and Glenrand[30] mergers identified the following as possible public interest justifications that might flow from the prior competition inquiry. This was also confirmed in the recent merger involving BB Investment and Adcock Ingram.

1. Where the merger is required to save a failing firm;

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[27] Competition Tribunal, case no. 41/LM/Jul10.
[28] Competition Tribunal, case no. 37/AM/Apr11.
[29] Competition Tribunal, case no. 41/LM/Jul10.
[30] Competition Tribunal, case no. 37/AM/Apr11.

2. Where the merger is required because pre-merger the firms will not be competitive unless they can lower their costs to be as efficient as their competitors and these can only be attained by employment reduction through the merger; or
3. Where the merger will lead to lower prices for consumers because of the merged firm's lower cost base and that this lower cost base can only come about or is materially dependent upon the contemplated employment reduction.

The above cases suggest that the Commission must consider whether the reasons advanced for the retrenchments are in the public interest. Further, that if retrenchments are effected for costs savings, the costs savings must be passed onto the consumer.

The Tribunal also said in the Aon and Glenrand merger[31] that "evidence of justification is most credible when supported by contemporaneous documentation that is documentation prepared at the time of the consideration of the transaction which shows that it was considered by the merging parties as part of their business rationale for the merger and not with any eye to making their position more congenial to these proceedings…."

In the same case, the Tribunal found that the passing on of costs savings was not supported by contemporaneous documentation. However, the financial distress of Glenrand was. This was accepted by the Tribunal as sufficient to show that the standard for justification had been met

Meeting the justification criteria

In Momentum and Metropolitan merger,[32] the Tribunal said that "whilst there may be a relationship between the two criteria in the sense that a strong public interest justification for the job losses may make up for a weakness in the evidence concerning the first requirement; it must be present in at least some form". "Conversely, however, even if the merging parties justify the first leg i.e. make a convincing argument for why the job loss is rationally connected to the efficiency claimed, this does not mean that there can be any compromise on their meeting the second criteria."

From the above, it is clear that satisfying the justification test requires that both criteria be met. Thus, if a firm were to show that the determination of the job losses has followed a rationale process, and is rationally linked to an efficiency claim that is a private interest, the justification would not be sufficient to meet the criteria. For example, where job losses are

[31] Competition Tribunal case no. 37/AM/Apr11.
[32] Competition Tribunal case no. 41/LM/Jul10.

justified on the basis of costs savings that would benefit shareholders, this would not be regarded as a legitimate countervailing public interest argument even if the parties showed a rational determination and connection.

In the recent merger between BB Investment and Adcock Ingram, the Tribunal went further to add that "Wakefield might be correct that all these retrenchments could be justified on one or more grounds set out in *Metropolitan.* The problem is that the merging parties have failed to properly consult with affected employees about these retrenchments, ostensibly it seems because they regard them as operational not merger specific." The Tribunal further argues that "the lack of consultation was not confined to employees. The Commission whose function it is to investigate merger related issues was also not properly apprised of the rationale and scale of retrenchments now contemplated."

The Tribunal indicated that the result of lack of consultation is that "the merging parties' version of justification has not been put to the employees or the Commission for them to verify whether these are merger specific or justified. Had this been the case, then the Tribunal would have been in a more informed position to decide this point".

The Tribunal concluded by stating that "the merging parties have not discharged the burden of justification as the process of consultation has not been properly followed…"

In this case, the Tribunal has highlighted that complete disclosure of information to employees and the Commission to enable them to properly consult and engage on issues is required to meet a justification criteria. Hence even parties were to prove that they have followed a rationale process and that there is rationale connection between the job losses and reasons for them, if parties do not properly engage with employees or the Commission, then the Tribunal would not consider that justification has been met.

5.1.3. Determining whether retrenchments are merger specific

When looking at merger specificity we are examining whether the effect on employment is due to the merger or some other reasons. There is a presumption that the job losses declared in the merger filing are merger related. However, in certain cases pre-merger retrenchments are brought to the Commission's attention by the trade unions declaring that these are merger related.

Merger specificity therefore only becomes relevant where job losses occur prior, during or post the merger filing and the merging parties argue that they are not merger related.

Where there is no dispute on the merger specificity of the retrenchments, the Commission can accept the presumption and proceed to assess whether these are substantial. Where there is an argument that job losses are not merger related; the Commission must determine whether employment effects are merger related. The Walmart and Massmart merger was the first case at the Tribunal and CAC that dealt with this issue in detail. While the Sibanye Gold and Newshelf[33] merger dealt with issues around pre-merger retrenchments, the employment issues were not explored in detail at the Tribunal as the Commission and the merging parties had reached agreement on a condition prior to the Tribunal process. Recently, two mergers that is, the Bucket Full/Cartons and Labels Business of Nampak Products Ltd merger and the BB Investment Company and Adcock Ingram merger dealt with this issue.

In the Bucket Full merger, the Commission was of the view that the retrenchments claimed as non-merger specific was in fact merger specific. In its assessment, the Commission had considered internal documents relating to budgets on retrenchments and email correspondences between the merging parties during the negotiation phase of the merger which showed that the acquiring firm was not willing to proceed on the basis of the high employment costs at the target firm and had planned to make significant retrenchments. The Tribunal indicated that the Commission was unable to demonstrate that the retrenchments were merger specific as the evidence relied on by the Commission was not sufficient to prove that the retrenchments were merger specific.

In the CAC order relating to the Walmart and Massmart merger, the CAC indicated that "A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would accordingly be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision."[34]

In the same matter, the Tribunal had indicated that the union had to first show that a prima facie case was met for the retrenchments been merger specific before the justification burden could shift to the merging parties.

In the Walmart case, SACCAWU had alleged that 574 employees employed at Game and certain distribution centres that were retrenched were due to the merger. Its basis for this conclusion was the timing of the retrenchments and the merger negotiation process. The merging parties argued that the retrenchments arose from the decision to implement regional distribution structures made in 2002 and later a decision to build particular

[33] Competition Tribunal case no. 017855.
[34] Competition Appeal Court, Case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

distribution structures in 2008. The decision was therefore made well before any discussions around the merger. Massmart only knew that it was the target in June/July 2010. Further, Massmart had indicated that only 503 of a total of 26 500 employees were retrenched; it is highly unlikely that the retrenchments were meant to make Massmart "a sweeter prospect" for the merger.[35]

The CAC hinted that one must establish a linkage between the merger and retrenchments, which is what it was trying to do in examining the evidence. The CAC said that the question that needed clarification was whether the actual implementation of the 2002 decision then was merger specific. For this reason it had become important for the parties then to show that the decision to merge had occurred in late 2010 in order to rebut the above suggestion.

The CAC order indicates that "Mr Pattison had testified that merger negotiations had only picked up momentum in late September 2010, suggesting then that the actual decision to engage in the merger was way beyond the date upon which the retrenchment decisions had been taken. The CAC said that it was clear from documents generated from meetings of the Massmart board that talks had taken place from early as 2009. Mr Pattison was forced to concede that discussions had taken place as early as December 2008".

The CAC relied on three issues essentially to link the merger to the retrenchments. Firstly, the CAC had established that talks around the merger began as early as December 2008; secondly the retrenchments proposed to arise from the restructuring decision in 2002 arose some eight years after the decision was taken implying that there was no causal link between the decision and the retrenchments, thirdly, a communication between Massmart and the EDD around restructuring referring to the "Walmart approach" to operational issues which, based on other documentation, would have included issues on employment.[36]

The CAC decision in Walmart and recent Commission cases, suggest that the Commission ought to follow an approach of establishing a causal link between the merger and retrenchment as opposed to simply applying a counterfactual.

This entails an approach beyond merely determining the cause of the retrenchments but actually determining whether the decision to retrench is the result of the merger; or at the hands of the acquiring party or a joint decision by both parties.

In the recent case between BB Investment and Adcock Ingram, the Tribunal elaborated on the approach to merger specific retrenchments.

[35] Competition Appeal Court, Case nos. 110/CAC/Jul11 and 111/CAC/Jun11.
[36] Competition Appeal Court, Case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

In the BB Investment and Adcock Ingram merger, the Tribunal reiterated that competition authorities can only intervene when public interest issues arise as a result of the merger and are merger specific. The Tribunal said “The public interest requirements in section 12 (A) (3) of the Act are implicated only if the *“merger will have an effect on*…..” the various factors which are then listed, amongst which, relevant to this case, is employment. This requirement has been interpreted in the case law as founding jurisdiction to intervene on public interest grounds if the effect is “merger specific”.

The Tribunal went on to define merger specific as “it means conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller.” This definition implying, and as was also considered in Walmart, whether the retrenchments are in any way linked to the incentives or intentions of the acquiring firm.

Where an event would have occurred in any event absent the merger, this is seen to be not merger specific. Merger specificity is more easily established when firms have overlapping activities as it would make sense that duplication would arise. However, the Tribunal cautions against adopting this approach as it could be misleading. The Tribunal argues that one may need to consider when assessing merger specificity whether a particular controller may be more inclined than others to shed jobs and hence have an incentive to cut jobs than another controller or even the controlling entities of the target firm pre-merger. This approach tends to suggest that the management style and incentives of the acquiring party is important.

Further, the Tribunal suggests adopting an approach of looking at a pre-merger counterfactual compared to the post-merger scenario. However, it cautions that inferences must be drawn very carefully.

Pre-merger management plans in use or proposed may be useful to compare to the plans the firm has post-merger if available. If the differences are stark, and particularly if the change in plans take place within a short period of time, then it is reasonable to infer that the post-merger merger plans of the acquirer reflect a different set of incentives to those of the pre-merger management and hence can be considered merger specific.

In this merger, the Tribunal found that the Wakefield plan was reflective of Bidvest’s influence and that it was starkly different to a pre-merger plan that was operational in nature. Therefore, the Tribunal found that on a balance of probabilities the planned retrenchments were merger specific.

From the CAC and Tribunal decision in the Walmart and Massmart merger,[37] it is clear that the timing of the merger and retrenchments cannot imply causality and cannot be accepted as proof of merger related retrenchments. Only establishing a direct link of causality between the retrenchments and the merger would constitute sufficient evidence to prove merger related retrenchments.

5.1.4. Remedies

The Metropolitan and Momentum merger set the trend for the imposition of a two year moratorium on merger specific retrenchments. Recently, the Commission has recommended the approval of mergers with a three year moratorium. In the merger between Bucket Full and the Cartons and Labels Business of Nampak, the Commission recommended that a three moratorium be imposed as a two year period is academic in that a merger may take significant time to implement and that a two year moratorium becomes insignificant. Further, the Commission had considered that the parties could not justify the retrenchments as they did not follow a rationale process in arriving at the figures.

The Tribunal indicated that the onus rests on the Commission to prove that a three year moratorium is necessary and that it had failed to provide sufficient information, while the merging parties had made a more compelling case for a two year moratorium.[38]

In the BB Investment and Adcock merger, the Tribunal imposed a moratorium on any retrenchments for a period of one year. This is due to the fact that the Tribunal could not distinguish between merger specific and non-merger specific retrenchments. The Tribunal further commented that the merging parties had through their own actions by prior implementing the merger created the blur between merger non merger related retrenchments.

5.2. The ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive

As a developing country, South Africa’s political history has an influence on competition policy and the concept of BEE dates back to mid-1990. It is an important driving force behind government’s attempts at correcting the imbalances of the past in wealth ownership and black participation in the economy post the apartheid regime.

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[37] Competition Appeal Court, Case nos. 110/CAC/Jul11 and 111/CAC/Jun11.
[38] Competition Tribunal, case no. 018457.

One of the objectives of the Act is to ensure that SMMEs and businesses owned or controlled by Historically Disadvantaged Persons or Individuals (HDIs) have an equitable opportunity to become competitive and participate in the economy.[39] This requires the Commission to monitor the markets to ensure that there are no unreasonable barriers for SMMEs and HDI firms to enter such markets, that the competitiveness of SMMEs and HDI firms is not hampered by collusive and/or exclusive arrangements and that SMMEs and HDI firms are not forced to exit the market because of abusive behavior by dominant firms.[40]

Section 12A (3) (c) requires the Commission to assess the following:

> "The ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive."

The section that follows considers the scope of the Commission's role in investigating the impact of a merger on the competiveness of small businesses. Key lessons are drawn from the Walmart/Massmart merger, the Agrigroupe/AFGRI merger and the Media24/Natal Witness merger.

5.2.1. Impact on the competitiveness of small businesses

The merger between Wal-Mart Stores and Massmart Holdings[41] created heated public interest debate around the impact that the transaction would have on local suppliers to Massmart. Two central concerns arose. Firstly, the dependence on local suppliers would be lowered post-merger as Wal-Mart, through its extensive global networks, would switch to imports thereby reducing dependence on domestic employment. Secondly, Wal-Mart's reputation as an employer in other countries spurred concerns around employment conditions for both current and future employees in South Africa.[42]

Switching to global procurement of imports was a feasible option for Wal-Mart given its global purchasing power, enabling the sourcing and distribution of products much cheaper than could be afforded by local suppliers. Many smaller domestic retailers face difficulties in achieving cost efficiencies in terms of imports due to minimum order sizes. The fact that

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[39] See section 3(c) of the Competition Act. The term BEE is commonly used as an instrument to promote transformation of HDI in the South African context.

[40] The Competition Act – A guide for SMEs (Notice), published by the Competition Commission at page 1.

[41] Competition Tribunal, case no. 73/LM/Nov10.

[42] See Commission's Policy and Research Brief - Evaluating Public Interest impact: A Review of the methodologies in the case of Defy/Arçelik by Siphamandla Mkhwanazi and Linton Reddy – March 2012.

Wal-Mart earns a possible benefit for the use of its global sourcing network whilst sharing Massmart's profits incentivizes decisions to switch to imports and utilize this network.[43]

The Tribunal conditionally approved the merger, a decision that was subsequently challenged in the Competition Appeal Court ("CAC") by government on review (which was dismissed) and by the Unions[44] on appeal (which was upheld in part). On appeal, the Unions argued that the Tribunal had failed to adequately consider the likelihood that the merger would result in an increased reliance on imports by the merged firms; a reliance that would adversely affect the ability of small businesses to compete with the lower import prices, and which would in turn result in the closure of small businesses and subsequent job losses. Government also argued that the firm's entry into South Africa had the potential to alter the local retail and manufacturing landscape and that on that basis alone it was obliged to intervene to secure the long-term interests of the economy.[45]

In its findings, the CAC criticized the Tribunal for its failure to adequately interrogate the implications of the growth of global value chains in the context of economic globalization as well as the effect of the Walmart model on small and medium sized firms in South Africa. It also criticized the Tribunal's failure to scrutinize the terms and conditions upon which the fund would operate. The CAC stipulated that a study be commissioned by government, business and the unions to investigate the implications of the merger for small and medium sized businesses and to present the CAC with greater detail on how the fund would operate.

The resultant report was presented to the CAC which ordered that the capital amount of the fund be increased to R200 million to be spent over a five year period. The CAC emphasized that the quantum of the fund would not be the yardstick for assessing its success, but rather, success would be measured by the extent to which small and medium sized businesses benefit as a result of the work of the fund.[46]

The Walmart/Massmart merger shows that the evidentiary burden on the parties is such that they cannot make claims of potential effects on public interest that are not substantiated by either documentary or oral evidence. This was evident in the CAC decision wherein the court

[43] Genesis Wal-Mart public interest report, Case No. 73/LM/Nov10

[44] These are the South African Commercial Catering and Allied Workers Union, Congress of South African Trade Unions, Food and Allied Workers Union, National Union of Metal Workers in South Africa, South African Small Medium and Micro Enterprise Forum and the South African Clothing Textile Workers Union.

[45] *Government intervention in Walmart prompts the need for greater clarity* by Raisa Cachalia – Bowman Gilfilan.

[46] Competition Tribunal, Case No. 73/LM/Nov10.

attempted to cure the deficiency in evidence before the Tribunal by creating a remedy of its own. Indeed there must be sufficient particularity on the claimed potential effects with supporting evidence on how these were arrived at. In dismissing governments review application whilst still affording it a significant role in the economic study, the CAC highlighted the need for the Commission to strike a balance between undue deference to government and the proper application of the public interest provisions of the Competition Act.

The Walmart case also highlights that any impact claimed must relate to the merger and be the result thereof. That is, the impact must be caused by the merger.

Further guidance can be taken from the AgriGroupe and AFRI merger[47] wherein government raised concerns that, post-merger, AgriGroupe would increase the storage costs for grain in certain regions, which is an indispensable cost in the realization of food security in South Africa. Moreover, the apprehension was raised that the merged entity would export grain to other countries and increase prices in South Africa. Employment concerns were also raised as well as the impact that the proposed transaction would have on farmers, specifically black farmers.

The Commission's investigation revealed that none of the public interest concerns raised were supported by evidence and the transaction was more likely to result in job opportunities in the long term. The Commission also noted that other concerns were raised, which fell beyond the purview of the Commission's statutorily entrenched public interest mandate, as a result, the Commission refrained from expressing a view on matters it considered itself not empowered to investigate.

However, the Tribunal raised some concerns about the Commission's analysis, especially with regards to employment and the ability of small farmers to be competitive in the sector. It did not pronounce on the concerns, as the agreement with the government departments had addressed the concerns. According to the agreement, which became a condition to approving the merger, AFGRI will make R90m available over four years for loans to emerging farmers, enroll emerging farmers in a development program established in 2012, and help poultry farmers.

In conclusion, the competition authorities employed a consultative strategy that engaged the merging parties to ensure the protection of SMMEs through establishing monetary funds. This seems to be the trend in the recent merger investigations when considering these

[47] Competition Tribunal, case number 017939.

public interest provisions of the Competition Act going forward in safeguarding the interests of HDI, which remains in line with the BEE objectives of the Act.

What is also apparent from the above case was that the Tribunal was also considerate of whether the merger itself would remove any benefit that was enjoyed by small farmers prior to the merger. Small farmers were already receiving loans with preferential interest rates and were privy to farmer development programs that would assist in their development and competitiveness in the agriculture sector. The conditions ensured the continuation of these benefits post the merger.

The Media24/Natal Witness merger was a transaction in which Media24 was acquiring the remaining 50% interest in Natal Witness and through this acquisition would lead to it holding an 80% interest in Africa Web, a competitor to Natal Witness in the Kwa-Zulu Natal and Eastern Cape regions. While the merger raised competition issues around foreclosure, this effect would be felt by small publishers. Hence, this raised a public interest concern rather than a direct competition concern.

The Tribunal assessed whether the merger would have a negative impact on the public interest since small community newspaper publishing businesses in Kwa-Zulu Natal and Northern Eastern Cape required coldest printing services such as that provided by Africa Web.

In the assessment of the merger, the Tribunal considered whether the ability of the small publishers to compete would be hindered by the merger and assessed this by looking at the ability of small publishers to access printing services at competitive conditions of supply and competitive pricing. The case also considered the role that small publishers played in the relevant market and in maintaining competition in the market. If the merger had a negative impact on the ability of small publishers to compete, then competition would be affected in the market. The Tribunal also considered whether the merger raised existing barriers to entry and expansion and thereby limited competition from small publishers. The Tribunal also considered whether the harm likely to arise and experienced by small publishers was merger specific and arising directly through the merger.

5.3. Impact on a Particular Industrial Sector or Region

Section 12 A (3) of the Act states that

"When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) A particular industrial sector or region;"

5.3.1. Determining whether the public interest concern is merger specific

In the Glencore and Xstrata merger,[48] the Tribunal evaluated a number of broad public interest concerns that were raised by Eskom during the course of the merger investigation. The Tribunal found that although there seemed to be cause for concern about future coal prices in the domestic market and the impact of increasing prices on electricity prices in South Africa, these and other related developments in the coal industry were not merger-specific as the proposed merger was not the cause for these developments. The concerns raised around increasing coal prices were determined by the Tribunal to be industry-wide and it was of the view that it could be addressed by other policy instruments available to government if it deemed it necessary to ensure that the strategic importance of South Africa's coal reserves to domestic industries is protected. The negative public interest effect of the merger as argued by Eskom was therefore not considered by the Tribunal in making a decision about the merger as it was found not to be merger-specific.

The Tribunal also highlighted the importance of public interest issues raised being merger specific in the Walmart and Massmart[49] matter.

5.3.2. Determining the "effect" of the merger

When assessing the impact of a merger on a particular industrial sector or region, the Commission may start by considering whether a South African owned firm is being purchased and what the target business is involved in, in South Africa. For example, if the target firm is involved in the manufacturing sector, whether the acquiring firm if it terminated domestic production would have far reaching consequences for the economy, or alternatively whether the target firm is involved in the distribution or sale of goods such that any termination of such contracts with local suppliers would have a negative effect on the sector or region and a wider effect on the economy. One should also consider whether the

[48] Competition Tribunal, case no. 33/LM/Mar12.
[49] Competition Appeal Court, case nos. 110/CAC/Jul11 and 111/CAC/Jun11.

merger results in increased importation rather than sourcing of locally produced goods, or a substitution of locally produced goods with imports, or the movement or diversion of local resources to international markets with dire consequences for local markets and sectors.

All these effects were identified in key cases at the Tribunal. In the Walmart and Massmart[50] merger, the Tribunal recognised the importance of small businesses such as emerging farmers that currently supplied Massmart with certain locally produced products and the effect that such a merger would have on them. The main concern here was the displacement of local suppliers' or manufacturers with imported products.

In the IDC/Rio Tinto merger,[51] the Commission found that the merging parties may have an incentive to divert resources away from domestic customers to their own projects which would have a detrimental impact on the level of DMS iron ore available to the domestic market. Similarly, in the Thaba Chueu/SamQuarz[52] merger, the Commission found that the merged entity had the ability and the incentive to foreclose downstream competitors by restricting access to silica rock for the manufacture of ferrosilicon. More than 50% of the purchasers of ferrosilicon could not effectively import and therefore an increase in the price of ferrosilicon would be passed down to these customers. Therefore, if local producers of ferrosilicon that are constrained by international prices were foreclosed, it would put pressure on their downstream customers such as foundries and steel industries.

The Commission found that some of the producers of ferrosilicon were limited in terms of the prices they could charge because of the varying sizes of their customers and their ability to source abroad. However, smaller customers that were unable to import were forced to procure ferrosilicon locally and may be charged prices at import parity or even above. The Commission was of the view that *"the local manufacturing sector will suffer the burden when products are not available and shifted for production of products primarily for export".*[53] However, the Tribunal did not find likely foreclosure concerns and ruled that the transaction did not raise other public interest issues.

In Arçelik/Defy[54] merger, the Commission assessed the impact on the local supply chain and manufacturing operations if the merged entity switched supply of inputs (either whole or parts/components) to their parent company abroad or other international suppliers; and the incentives to relocate the production of Defy products to other Arçelik operations

[50] Competition Appeal Court case no. 110/CAC/Jul11 and 111/CAC/Jun11.
[51] Competition Tribunal, case no. 016329.
[52] Competition Tribunal, case no. 10/AM/Jan12.
[53] Competition Tribunal, case no. 10/AM/Jan12.
[54] Competition Commission case No.2011Aug0204.

internationally, with implications on local supply chain and manufacturing. In considering the impact on the local supply chain and the manufacturing operations of increased imported components or whole appliances, the Commission assessed whether after the acquisition, Arçelik would procure components or whole appliances from its other international branches thus compromising local manufacturing businesses. Therefore, it was found that the merger raised specific concerns about the implications for South Africa's industry producing consumer durables, as well as adjacent industries that supply the white goods manufacturing industry. Therefore, the merged entity could decide to import inputs, components or parts of full product ranges, and brand them as Defy before on-selling to the domestic market. This was seen to potentially negatively impact the current local suppliers of Defy.

Arçelik claimed that it would not be desirable to import components into the country, as quality problems could become costly together with time lags associated with importing. It was also noted that Arçelik had a history of developing local SMME's in countries that it invested in. Therefore, developing and sustaining local supply chains by the merged entity appeared genuine given its commitment to invest in the expansion of chest freezers and refrigerator manufacturing in South Africa.

In the AgriGroupe and AFGRI merger,[55] the Tribunal was asked by the SACP to consider the possible diversion of grain from South Africa as a threat to food security in the country in greater detail. The SACP submitted at the hearing that its main concern was that although AFGRI was not involved with commodity trading through SAFEX, it was in possession of a dormant trading license. Therefore, if the merged entity decided to start trading in future it was argued that it may have a significant impact on food security in South Africa. The SACP therefore requested the Tribunal to impose conditions on the merged entity with regards to getting a firm commitment from AFGRI that it will not trade on SAFEX in future. The SACP's other concern in this matter was that since AFGRI provided both finance and silo storage services to farmers, this placed AFGRI in a powerful position vis-à-vis the farmers.

Based on the evidence presented to the Tribunal by the merging parties and the analysis done by the Commission, it was satisfied that the nature of the maize market and the mechanics of SAFEX provided no basis to impose any condition related to grain trading by the merged entity post-merger. The Tribunal therefore did not impose any remedies relating to the public interest concerns with regards to the impact of the merger on the agricultural industry and region on the merging parties.

[55] Competition Tribunal, case no. 017939.

The above cases also suggest that the Commission should examine the dynamics of the affected markets and the strategy of the merging parties in determining whether there is likely to be any effect on a particular industrial sector or region. Whether a merger is likely to have an impact on a particular industrial sector or region depends largely on knowing the sector or industries likely to be affected by the merger and the relevant industrial policies within a sector where the merging parties are involved. Evidence from the nature of the transaction (e.g., a transaction resulting in monopsony power) and the structure of the affected markets can assist in detecting whether a merger will have an impact on a particular industrial sector or region.

5.3.3. Determining whether the effect is substantial

In assessing the impact on a particular industrial sector or region, the "strategic nature of the sector or product" to the economy must be assessed. In the Telkom and Business Connexion merger[56], the Tribunal demonstrated this by way of example, when it said that "if the merger was in the silk scarves segment of the broader apparel market, we may have been disinclined to consider the transaction's impact on the broader clothing sector or the knock-on effect on international competitiveness."

In the same merger, the Tribunal said that the merger was taking place in a pivotal segment of the ICT sector, which would impact on the sector as a whole and on the broader economy. The character and effectiveness of the regulatory framework of the sector plays an important role in the development of the broader sector. What is clear is that the ramifications, arising from the merger's impact upon the primary market under consideration, on the broader sector, must be far reaching, beyond that particular sector. Further, in this case, the merger was coming at a time when government was in the process of deregulating the sector and the merger would impede public policy goals.

In the Iscor/Saldanah[57] transaction, the Tribunal considered what the likely public interest effects of the merger would be if the transaction was not approved by the Tribunal, particularly the effect on the particular industrial sector or region. The Tribunal felt that the Saldanah Steel plant that formed part of the transaction was vital to the local economic life of the town. In other words, if the plant was to shutdown, it would have a negative effect on the employees because they would lose their jobs, but also there would be a negative effect on the firms and individuals in the West coast region that depend on the functioning of the plant.

[56] Competition Tribunal case no. 51/LM/Jun06.
[57] Competition Tribunal, Case No: 67/LM/Dec01.

Hence, when the Commission is assessing substantiality in this context, it can be guided by the importance of the product to the sector, the extent of the consequences on the sector and beyond and whether the merger impedes any public policy goals. Further, as in Saldanah Steel, the Commission must consider the importance of a firm to the region and the benefits that flow to that region.

5.3.4. Mitigating anti-competitive effects

In the Saldanha Steel merger,[58] Saldanha Steel was involved in many projects and social programs, following which without the plant, these projects and social programs would become unviable. Therefore in this case, the Tribunal noted that the public interest favoured the approval of the merger.

The Tribunal had found that the merger would lead to substantial competition concerns and considered whether there was any mitigating public interest concerns that would outweigh the negative competition effects.

In the Tongaat /Hulett[59] merger, the Tribunal assessed a claim from the merging parties that the transaction will impact positively on the Mpumalanga region as well on the Southern African region. Mpumalanga, it was averred, would benefit from THS's undertaking to continue procuring inputs for the Mpumalanga operations from local suppliers. It also stated its intention to sell a portion of TSB's 8000 hectares of cane land to small-scale growers from historically disadvantaged communities.

However, the Tribunal found that these benefits was not substantial to countervail the negative impact of the merger on competition, nor was it clear from the evidence presented in the matter that it would not occur in the absence of the merger. In its decision, the Tribunal stated that while the sophisticated South African sugar industry undoubtedly impacts positively on the development of the sector in Southern Africa, the merger will have no impact, one way or another, on the ability of South African firms to play a positive role in the region.

The above cases suggest that when relying on these arguments to approve an anti-competitive merger, the benefits flowing to the region must be considered and assessed. These should be substantial. Further, that the benefit to the region must be such that it would not be attained without the merger.

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[58] Competition Tribunal, case no. 67/LM/Dec01.
[59] Competition Tribunal, case no 83/LM/Jul00.

5.4. The ability of national industries to compete in international markets

In order to understand whether the merger is likely to hinder or enhance the ability of national industries to compete in international markets, the Commission must consider the strategy advanced by the merging parties. In addition, similar to the assessments above on public interest grounds, the Commission must assess:

(i) whether the public interest concern is merger specific;
(ii) the likely effects of the merger on the ability of national industries to compete in international markets; and
(iii) whether the effects are negative or positive or both.

5.4.1. Determining whether the ability to compete is merger specific

In considering merger specificity, the Commission should consider whether the merging parties can achieve this public interest strategy without the merger. If international competitiveness can be achieved without the merger, then these positive public interest grounds are not merger specific.

In the Telkom and BCX merger[60], the Tribunal stated that section 12A (3) (a) and 12A (3) (d) require that the competition authority take into consideration the nature of the product/s as well as broader policy considerations. Telkom is a provider of fixed line Public Switched Telecommunications Services ("PSTS") and is a key player in the Value Added Network Services ("VANS"), whilst the target firm, BCX provided Information and Communications Technology ("ICT") services to a broad range of clients. The proposed merger took place in a pivotal segment of the ICT sector which the Commission noted had a significant impact on the international competitiveness of South African firms generally, and therefore the merger was likely to impact negatively on the public interest. The Commission noted that the Tribunal is entitled to have regard as to whether Neotel's entry is to be successful and the need for increased competition in the infrastructural market are vitally important to the public interest both in respect of the telecommunications sector, and the international competitiveness of South Africa.

In its decision, the Tribunal noted that the proposed merger was in the essential ITC segment with implications for the sector as a whole. The ITC sector was said to have a significant impact on the international competitiveness of firms in South Africa, as the sector was regarded as key to most businesses and would therefore impact on the international competitiveness of South African firms. The Tribunal found that the negative public interest

[60] Competition Tribunal, Case No: 51/LM/Jun06.

effects of this merger, including the concern that it would negatively impact on the international competitiveness of South African firms, strengthened their finding that the merger should be prohibited.

In the Tongaat/Hulett[61] merger, the merging parties made various submissions on the likely positive effects of the proposed merger based on public interest grounds. On the specific issue of whether the proposed transaction would enhance the ability of the firm to compete in international markets, the Tribunal stated that the South African sugar industry is a low cost producer well set up to compete successfully in international markets. Moreover, the Tribunal was of the view that the argument put forward by the parties that the transaction will boost the cost competitiveness of the merged entity is rooted in the notion that South African firms are small by international standards and that the merger will enhance scale economies.

However, in this transaction the argument was not justified by the available data given that Illovo and THS were sizable enterprises by world standards. Even though TSB was significantly smaller than its two fellow South African millers and, obviously, than the large scale international firms, TSB was larger than the second largest European miller and refiner and larger than the third largest Australian refiner in terms of refining capacity. The Tribunal therefore concluded that productive efficiencies have little to do with the size of the firm and that cost competitiveness may be considerably influenced by the size of the productive units. However, no evidence was available which proved that the merger did not have any direct influence on there being no consolidation of any productive capacity.

Finally, the Tribunal concluded that it is sceptical in general of arguments that insist that a precondition for successful international competition is domination of the domestic market. In select instances scale economies and rationalisation of production units may support this argument. However, to the extent that broad generalisations assist merger analysis, the Tribunal stated that it is inclined to the view that the most aggressive and successful international competitors are those who face robust competition at home.

Similarly, during the Iscor/Saldanha Steel[62] hearing, the DTI submitted that the merger would "enhance the competitiveness of Iscor internationally". It was noted that Iscor needed to compete globally against other larger firms and unless Iscor could increase its productive capacity, it would be difficult to secure international markets. In other words, the positive public interest grounds were in light of the merger and without the approval of the merger, the public interest aspect would be negative.

[61] Competition Tribunal, Case no. 83/LM/Jul00.
[62] Competition Tribunal, Case No: 67/LM/Dec01.

6. CONCLUSION

This paper has considered the various cases and precedent dealing with the public interest issues referred to in the Act. From these cases, key themes and approaches to analysis were identified.

With respect to the assessment of the impact of the merger on employment, it was found that the analysis should entail not only an assessment of the number of jobs lost. It was found that the assessment should at least, consider whether the reasons for the proposed job losses are directly linked to the number of job losses and whether the process used in determining the number of job losses is rational and makes sense. Although no standard approach was specified, the indication is that the standard must be an exercise that is non-random and non-arbitrary, and ensure the process followed is rational.

With respect to the impact on a particular industrial sector or region, it was found that the assessment should consider whether the claimed effects on the particular industrial sector or region firstly falls within the ambit of the Act, and secondly whether it is the result of the merger. To determine the effects of the merger on the industrial sector or region, various types of "effects" have been identified which include a consideration of:

- Whether the merger will have an impact on the productive capacity of the domestic market;
- Whether the target firm is involved in the distribution or sale of goods such that any termination of such contracts with local suppliers would have a negative effect on the sector or region and a wider effect on the economy, or
- Whether the merger results in increased importation rather than sourcing of locally produced goods or a substitution of locally produced goods with imports, or the movement or diversion of local resources to international markets with dire consequences for local markets and sectors.

In terms of the Act, the Commission is required to consider the impact of a merger on the ability of national industries to compete in international markets. Although the exact approach is not yet determined, the general approach could be to look into the factors relevant to make a determination on whether the merger could enable the competitiveness of firms in the global market. It is often a public interest ground advanced when the merger is likely to lessen competition in the domestic market, but advance the international competitiveness of the merged entity.

The public interest ground on the ability of small businesses or those owned by historically disadvantaged persons to compete has largely been achieved through remedies in mergers aimed at providing access to intermediate good on fair prices or through divestitures. In the development context of South Africa, as well as the increased focus on small businesses, it is vital that those mergers do not heighten barriers to entry or limit the expansion of small businesses.

In sum, the paper provides the basis, grounded on case law, on which the public interest provisions in the Act can be advanced.

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