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Heal the World……Competition law and public interest issues

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The South African competition authorities have a very difficult tightrope to walk in relation to the question of public interest in merger analysis, which in South Africa falls under their purview, unlike many other jurisdictions, which need only focus on economic analysis. This leads to a tension between pure competition analysis and public interest concerns, both of which have to be weighed up in reaching a decision in relation to a merger.
The imposition of arguably intrusive conditions such as those imposed by the Competition Commission in the Kansai Paint / Freeworld merger, or those offered by the parties themselves in Wal-Mart / Massmart, suggest that in the current local and global economic climate, public interest criteria and their link with industrial policy objectives will play an increasingly important role in any merger determination.
Cognisant of the ambit and purpose of the Competition Act, this paper will examine the public interest criteria stipulated in the South African Competition Act, their tension or alignment with government's industrial and other policies and objectives, and the developing trend of government intervention in merger proceedings in support of policy objectives. It will compare the South African trends with those of foreign jurisdictions, and analyse the implications thereof for practitioners, merging parties and regulators alike, also taking into account the need for foreign investment. In the words of Thomas Merton - "*the tighter you squeeze, the less you have*."

INTRODUCTION

South African competition law is unusual in requiring public interest issues to be considered. When the introduction of new legislation was mooted, it was considered necessary to adopt a uniquely South African approach, because of "*the challenges that follow from our legacy of economic distortions…*"[2]. In defining the public interest, the DTI noted that "*The key to an understanding of the public interest in economic policy generally and competition policy more specifically is the combination of competitiveness and development."* In considering that competition policy had to be developmental, DTI gave examples, including access to economic activity by those previously excluded, support of emerging black entrepreneurs, as well as job-creation efforts to reduce the impact of job losses due to competitive efforts. They nevertheless recognised that competitiveness was necessary, and noted that *"a clear reflection of an economy's competitiveness is how much foreign investment it attracts….*[3]*"*

Defending this approach of including public policy goals under a competition regime, the former chairman of the Competition Tribunal David Lewis remarked that *"a competition statute that simply ignored the impact of its decisions on employment or on securing a greater spread of black ownership, would consign the act and the authorities to the scrap heap.*[4]*"* He also pointed out that many jurisdictions allowed public interest issues to impact on their merger evaluation.

The South African Competition Act, 1998 ("the Act") therefore makes reference to both competition and public policy factors in various sections of the Act, including the preamble, section 2 which sets out the purpose of the Act, and in the section which is relevant for purposes of this paper, being section 12A regarding consideration of mergers.

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[1] Webber Wentzel. With thanks to Dylan Cron for his assistance
[2] Department of Trade and Industry ("DTI"), "Proposed Guidelines for Competition Policy, A Framework for Competition, Competitiveness and Development", November 1997, Executive Summary
[3] Ibid at para 1.3
[4] David Lewis, "The Role of Public Interest in Merger Evaluation", International Competition Network, Merger Working Group, Naples, 28-29 September 2002

The way the merger analysis is required to be structured in terms of section 12A, it is clear that the competition authorities must engage in a series of balancing acts. First, they must weigh up the pro- and anti-competitive effects of a merger; if the merger is found to be pro-competitive, then they must still assess the public interest effects of the merger. If at the end of the competition analysis the merger is found to be anti-competitive, then it must still be assessed from a public interest perspective, and if the public interest benefits are sufficiently strong, it is possible that an anti-competitive merger might still be approved. Conversely, a merger that is found to be unproblematic from a competition perspective might still be prohibited if the public interest concerns are sufficiently compelling. The public interest effects must be "substantial", but there is no guidance as to what this means. One therefore has to turn to the decisions of the Competition Tribunal ("the Tribunal"**)**

THE TRENDS IN SOUTH AFRICA

In the early days of the current competition law regime, the Tribunal made it clear that it considered its role in this regard to be very much secondary to that of other relevant legislation. Thus in the merger involving Shell and Tepco[5] the Competition Commission the Commission") recommended that Shell be allowed to acquire the business of Tepco from Thebe subject to certain rather restrictive conditions. The Department of Mineral and Energy Affairs, as it then was, also gave input and recommended the imposition of additional conditions. These conditions were all intended to seek not to diminish the extent of ownership and control of historically disadvantaged persons in the economy. (para 57). The Tribunal indicated that caution must be exercised when using public interest as a basis for intervention, and stated that

"The role played by the competition authorities in defending even those aspects of the public interest listed in the Act is, at most, secondary to other statutory and regulatory instruments - in this case the Employment Equity Act, the Skills Development Act and the [mining] *Charter itself immediately spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner lest they damage precisely those interests that they ostensibly seek to protect."*

In the merger between Stellenbosch Farmers Winery and Distillers Corporation[6] the Tribunal reinforced these comments, stating that they do not operate in a void in relation to public interest, but

"Parliament has in many instances enacted legislation that deals quite specifically with the issues referred to in section 12A(3) and employment is no exception. Indeed we observed in the Shell/Tepco case that in many respects our jurisdiction in these areas is secondary, as these other statutes and the institutions they create, are better placed and resourced to deal directly and effectively with these issues than are we, given that our discretion is described in section 12A(3) at a high level of generality." (para 232)

They went further to say that

"…where there are appropriate legislative instruments to redress the public interest, we must be cognisant of whether the residual public interest, that is that part of the public interest not susceptible to or better able to be dealt with under another law, is substantial."

In that case the Tribunal thought that only where the public interest concerns were so adverse that no other law or regulator could remedy them, would it be appropriate to intervene and set conditions or prohibit the merger outright.

This understanding of the role of public interest was echoed by David Lewis when he stated that

[5] Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd - 66/LM/Oct01
[6] 08/LM/Feb02

"…the protection that the Competition Act gives to the specified categories of public interest is ancillary to the protection offered by other legislation specifically directed at protecting those elements of public interest. Hence employees threatened by a merger are well advised to show that they have sought the protection of the Labour Relations Act before invoking the Competition Act in their defense. By the same token employers who have ignored these obligations are likely to be reminded of them when appearing before the Competition Tribunal."[7]

For a number of years, the only public interest issue that featured strongly in the Tribunal's deliberations was that of employment. Thus for example in the case of Langeberg Foods International and Ashton Canning Company (Pty) Ltd[8] where there was an employment concern, the Commission recommended the imposition of a condition that the merging parties be required to contribute R2 million to a training fund to be established to benefit retrenched workers and any other member of the affected community. The Tribunal approved the merger subject to a limitation on the number of retrenchments, and the establishment of the training fund referred to above.

This focus on employment is still central to the public interest considerations of the Tribunal, but it seems that the Tribunal has become more interventionist in its approach, in contrast to the approach that it advocated previously. The high watermark in this regard is the Momentum/Metropolitan case[9]. The merger gave rise to no concerns whatsoever from a competition perspective, but it was anticipated that there would be of the order of 1000 net job losses after taking natural attrition and early retirements into account. The merging parties offered certain conditions to ameliorate the situation, including reskilling and redeployment, but these were not satisfactory to the unions that had intervened in the process, and the Tribunal had to decide on the appropriate conditions to be imposed.

The Tribunal referred to its decision in Harmony/Gold Fields referred to above, and amplified its reasoning. It stated that although it had stated in that case that merging parties are not required to affirmatively justify a merger on public interest grounds, it had not commented on the evidentiary burden. Now it made clear that the merging parties do indeed face such an evidentiary burden - once a prima facie ground has been alleged that a merger may not be justifiable on substantial public interest grounds, the evidential burden shifts to the merging parties to rebut it. This evidential burden entails satisfying two criteria, being that:

1) a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. there is a rational connection between the reason for the job reduction and the number of jobs to be lost; and

2) the public interest in preventing job loss is balanced by an equally weighty but countervailing public interest justifying the job loss.

The argument was raised that the provisions of the Labour Relations Act should prevail in relation to retrenchments. In contrast to its earlier decision in the Shell/Tepco case, the Tribunal now stated that "*a deferential approach does not mean a hands-off approach."* The Tribunal refined its approach to other legislation, commenting that the Labour Relations Act deals with operational requirements of a firm, and does not enquire whether the merger giving rise to the operational circumstances should have been allowed in the first place. "*Understood in this way we are not duplicating the role of another regulator."* In the event, the Tribunal allowed the merger, but subject to stringent employment conditions, including a requirement that there be a moratorium on retrenchments other than of senior management for a period of two years. Given that streamlining of operations is often a ground for concluding a merger, this type of restriction can be problematic for merging entities, preventing the attainment of all the synergies and efficiencies that might be sought by the merging parties.

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[7] David Lewis, "The Role of Public Interest in Merger Evaluation", International Competition Network, Merger Working Group, Naples, 28-29 September 2002

[8] CT Case No.: 46/LM/May05

[9] Metropolitan Holdings Limited and Momentum Group Limited CT Case No.: 41/LM/Jul10

Since then the Tribunal has had to deal not only with employment issues, but with other public interest factors, such as those faced in the Wal -Mart/Massmart case[10]. The Commission has also had to engage with wider public interest considerations, and their respective approaches are instructive.

In the Wal -Mart case, there was no competitive overlap between the parties, as Wal-Mart is a new entrant into the South African market. However, certain unions had employment concerns in relation to which they participated in the merger hearing, and several government departments, namely Trade and Industry, Economic Development, and Agriculture, Forestry and Fisheries, also entered the arena.

From an employment perspective, the Tribunal commented that "*We step cautiously into shop floor issues less [sic] we forget our purpose as a competition regulator."* They also said that *"…unlike the demand to protect existing labour rights which may well be merger specific, the creation of additional rights not presently enjoyed by unions is neither merger specific nor appropriately part of our limited public interest mandate in respect of effects on employment."*

Procurement was the focus of the government intervenors, who sought either total prohibition of the merger, or the imposition of conditions to address the harm to employment, industry sectors, BEE businesses and small businesses.

The Tribunal assessed the concerns carefully and noted that although the intervenors raised a valid concern, it was also associated with the benefit of lower prices to consumers and job creation at Massmart. The affected consumers would also be the poorest of South Africans. The Tribunal had practical difficulties with the suggested procurement conditions, and also commented correctly that the conditions not only created an unjustified asymmetry, but would contradict the major objective of competition regulation - to secure lower prices for consumers. Furthermore, as the Tribunal pointed out at para 116

"imposing a remedy on a single non-dominant procurer to remedy an industry wide concern, would not be a rational exercise of public power,\. Other industrial policy instruments, not limited to firm specific application, would seem more apposite for this than merger regulation."

Instead the Tribunal imposed conditions offered by the merging parties, which they considered as an appropriate response to the public interest concerns raised.

The approach of the Tribunal, which was somewhat restrained and recognised the limitations of competition law to achieve policy objectives, is distinguishable from that of the Commission in the Kansai / Freeworld merger. In that merger, Kansai Paint Co. Limited sought to acquire Freeworld Coating Limited. The Department of Economic Development had concerns about this merger too, and participated in the Commission's review process. The merger was also hostile, and this may have led to more concerns being expressed than would otherwise have been the case.

The Commission found that there were competition risks in relation to a joint venture between Freeworld and Du Pont, and ordered that Kansai divest of Freeworld's automotive coatings business, which includes Freeworld's shareholding in the Du Pont joint venture.

As regards the public interest concerns, the Commission imposed wide ranging conditions. There was the now familiar moratorium on retrenchments, albeit for a lengthy period of three years. But there was also a requirement that Kansai continue to manufacture decorative coatings for ten years, and establish an automotive coatings manufacturing facility in South Africa within five year. Kansai was also required to invest in South African research and development in decorative coatings, and to implement a BEE transaction in respect of 15% of Freeworld's shares within two years.

[10] Wal-Mart Stores Inc and Massmart Holdings Limited CT case no.: 73/LM/Dec10

These conditions are extensive, and it is questionable whether there is any basis for some of them in the Act. Indeed, Kansai has taken the BEE condition on appeal, and it will be interesting to see how the Tribunal reacts to this. Similarly the Wal-Mart decision has been taken on appeal by the intervenors, and the outcome will be studied with interest.

The conditions sought by the intervenors in the Wal-Mart and Kansai mergers were far-reaching and with questionable links to the merger itself. It is of concern that South Africa, which is in dire need of foreign direct investment, considers it appropriate to limit the free choice of market participants in a manner that might well discourage foreign investors.

It can be seen that there has been a significant change in approach to public interest in the recent past. This change in focus ties in with the changing vision of government, as outlined in its New Growth Path[11]. In this document it is expressly stated that more consideration should be given to "*mandating public interest conditions on proposed mergers….",* and that trade unions should be more involved in the process. The trade unions have taken this encouragement to heart, and are using their rights under the Act vigorously. Indeed they are seeking to be heard even when they are not affected - thus it was widely reported that NUM was seeking to block the ultimately unsuccessful bid by Vale to purchase Metorex, despite the fact that Metorex had no mining activities in South Africa, and therefore the acquisition could not by any stretch of the imagination have had any effect on employment in South Africa. The competition authorities are also patently aware of public interest issues when assessing mergers, as outlined above.

The landscape is currently somewhat unpredictable - merging parties cannot be certain what the reaction of government will be to a merger, and therefore what conditions might be considered necessary to impose. This is very unsatisfactory, as parties require certainty and predictability in their business dealings when planning large investments.

OTHER APPROACHES TO PUBLIC INTEREST CONSIDERATIONS

South Africa is not unique in placing restrictions on entities seeking to merge, and in particular in relation to foreign investment. Most, if not all countries have retained the sovereign right to review foreign direct investment (FDI).[12] Canada for instance enacted its Investment Canada Act of 1985 in terms of which any FDI above a certain threshold is subject to screening and automatically triggers a review by the particular industry minister who will approve the acquisition on the condition that it is of net benefit to the country (the 'net benefit test')[13]. However, it is noteworthy that despite retaining this power, the government has approved more than 1600 foreign acquisitions and rejected only two, one being the recent BHP Billiton bid for Potash Corp. Australia maintains that while eager to attract foreign investment it shall review foreign investment proposals against the national interest. Such review shall be carried out by the Foreign Investment Review Board under the Foreign Acquisitions and Takeovers Act of 1975. The United States remains entirely liberal towards foreign investment[14], however it has empowered its Committee on Foreign Investment in the United States to block any foreign acquisition on the basis of national security[15]. Thus a bid by a Middle Eastern entity to acquire control over certain US ports was blocked[16].

[11] The New Growth Path: The Framework 2011

[12] David M. Marchick, Matthew J. Slaughter, "Global FDI Policy, Correcting a Protectionist Shift" *Council on Foreign Relations* NO. 34, June 2008, pg 2

[13] Subrata Bhattacharjee "Extended Note: National Security with a Canadian Twist: The Investment Canada Act and the New National Security Review Test", *Columbia FDI Perspectives*, No.10, July 30, 2009. Available at www.vcc.columbia.edu

[14] Michael Holden "The Foreign Direct Investment Review Process in Canada and other Countries" *Canadian Library of Parliament*, September 2007, PRB 07-13E, pg 6

[15] Exon-Florio Amendment to the Defence Production Act of 1950

[16] Deborah M. Mostaghel, "Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?" 70 *Albany Law Review* 583 (2007)

Germany, Norway and most industrialised and developing countries have some form of foreign acquisition review system in place[17].

The difference is that South Africa places this regulatory burden on the competition authorities rather than leaving it in the hands of either a government body, such as the Australian Foreign Investment Review Board, or a government minister, as in Canada. To debate which framework is best is moot. South Africa has made its decision, and we consider that there are good reasons for retaining the current framework. First, the process is a very public one (except where the information being divulged is confidential) in which all views are aired, interrogated and extensively reported on. Second, the body deciding the public interest considerations is the same one weighing up the competition implications of a merger. Its assessment of public interest considerations is thus informed by its impressions of the merger from a competition perspective. It has had the benefit of considering all the issues, unlike government departments or ministers elsewhere, who approach the public interest question completely independently from, and without the benefit of, the competition analysis. It also means that the decision must be made without giving undue weight to social forces that might influence a government minister more strongly, given that he is likely to wish to appease the electorate.

However, it is essential that the existing framework be allowed to operate properly and predictably. As was noted often during the Wal-Mart hearing before the Tribunal, inappropriate use of the public interest provisions of the Act will lead to a chill in foreign investment inflows[18].

REQUIREMENT FOR CERTAINTY

While local companies are forced to deal with local regulations an interesting analysis can be made regarding the effect of unpredictability and uncertainty in the review of foreign investments in a fast globalising world whose adopted mantra is "trade liberalisation". This analysis, done in the context of the government's New Growth Plan[19], will hopefully shed some light on the elements of our current system that need refining and those that remain the pillar of an effective and well-regarded regulatory system.

It must be noted here that the aim of this paper is not to offer a critique on economic policy, nor to discuss the economic factors that impact FDI in general (although such considerations are vital in the assessment of current practice). The objective is simply to highlight areas that should be the focus of intense study in light of reaction of all parties to the two most recent merger decisions of the competition authorities where public interest issues were at stake, namely the Wal-Mart and Kansai proposed investments.

There are certain issues regarding the method and impact of regulation that could create concern among potential foreign investors. The first is the regulatory quality of the target country, more specifically the assurance that regulatory bodies dispense decisions based on a coherent and rational system that operates on principles of transparency and consistency. The second is the administrative cost involved in pursuing the chosen investment. As stated above, at the core of all of these issues, as with all concerns for investors, is the element of uncertainty.

There is accordingly a need for the adherence of the judicial as well as administrative process of competition analysis to the 'rule of law'[20]. In South Africa the rule of law creates a certain expectation of 'legality' regarding the decisions made by the relevant decision-making bodies.[21] In addition the decision is to be made independently of undue influence or bias. The decision must be based on the rational application of rules as well as the rational connection between the

[17] Scott Jacobs, Jacquiline Coolidge, "Reducing Administrative Barriers to Investment, Lessons Learned", *Foreign Investment Advisory Service, International Finance Corporation and World Bank, Occasional Paper* 17, 2006 pg 2
[18] http://www.businessday.co.za/articles/Content.aspx?id=144352
[19] Supra, note 11
[20] Department of Trade and Industry, "Proposed Guidelines for Comeptition Policy, A Framework for Competition, Competitiveness and Development", November 1997, para 2.2.3
[21] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Counci*l 1999 (1) SA 374 (CC)

decision made and the objectives of the state or principle of law.[22] The aim is that there is certainty, not in the outcome of the process, but rather that the process is carried out fairly.[23]

In this respect it is doubtful whether South Africa meets the first requirement. Specifically, it is unclear whether South Africa has established all of the rules required in order to ensure that their application to the facts of any given matter meets the standard set by the rule of law. However the challenge currently faced by the Commission and Tribunal is the very real possibility that the rules they enforce may conflict with one another in their intended aims and may thus scupper any effort to apply them in a coherent and rational manner. This criticism is not new in the competition law arena[24]. Wider or ancillary interests have long been said to have no place in competition analysis and it is also pointed out that it is impossible to weigh the potential differing interests against each other. Such a conclusion is not wholly without merit, in fact the simple product of the enforcement of wider interests that conflict with the traditional objective of competition law is the question: Why should the loss of 1000 jobs outweigh the numerous economic benefits of an acquisition? [assuming our system allowed for balances to be made in this way] Alternatively, why should the negative impact for the broader economy of the loss of 1000 jobs outweigh the efficiency gains of a streamlined entity? Our competition authorities are put in an invidious position, having to conduct this delicate balancing act, no doubt being accused by affected parties of having failed to achieve the correct balance.

This question raises a further issue of interest in the adjudication process. How exactly are the various consequences of a merger or acquisition balanced against each other? The Tribunal has itself commented that the test is that the public interest grounds must be "substantial", but there is no guidance given as to what "substantial" means. The Tribunal seems to have adopted the view that the balance is not between pro-competitive gains and public interest losses but rather the balance is between the degrees of public interest losses as defined in the Act. Therefore it is questionable whether the argument can be made that 'we plan to shed 100 jobs however the economy will benefit in a multitude of different ways due to the merger'. It is entirely possible that the prospective purchaser of the South African asset can only argue against the concern regarding the job losses, put forward evidence that such losses are necessary and are justified, and will be offset by future increases in employment or immediate employment in a separate division. However the same problem resulting from the balancing of two un-weighted interests arises. How many jobs can be shed before the acquisition is simply blocked. How many would warrant the imposition of conditions? How many job losses would be acceptable? It is difficult to envision the review of the acceptability of merger on the grounds of public interest without answers to these questions, and as the Tribunal has commented, the Act gives no guidance.

In this respect the assessment under the Act may differ from that which is undertaken in other jurisdictions. The Tribunal has interpreted the Act as stating that the assessment under the public interest provision is to be done separately from the competition assessment. While it does not form a distinct or separate process, it would appear that only the conclusion in the one process is taken into account when considering the other[25]. Therefore the factors or elements that may be pertinent in the competition assessment are not necessarily 'netted' against the public interest losses under Section 12A(3). Thus the range of arguments to be made to rebut a public interest loss or to justify it cannot be anything but a rebuttal, minimisation, or justification of such a loss. Therefore the assessment may simply be: 'are there public interest concerns and should we impose conditions?'

Given the Tribunal's support of such an interpretation it is unclear which consequences of the merger are taken into account. Section 12A(1)(a)(i) indicates that the factors that may be considered in such an analysis include "…technological, efficiency or other pro-competitive gains…". It is however unclear from previous Tribunal decisions if this would include broader spill-

[22] B Beinart "The Rule of Law" (1962) *Acta Juridica* 99
[23] Ian Currie and Johan de Waal *"The Bill of Rights Handbook"* Juta & Company 2010, pg 12
[24] Okeoghene Odudu, "The Wider Concerns of Competition Law", *Oxford Journal of Legal Studies*, Vol 30, No. 3 (2010) ; Frank H. Easterbrook "The Limits of Antitrust", 63 *Texas Law Review* 1984 pg 11
[25] Supra note 8, pg 12

over effects or positive externalities that may arise from FDI. Such spill-over effects are varied and may not fall within the definition of 'pro-competitive gains' or have any effect on the efficiency of the merged/acquired entity as these effects, more often than not, extend beyond the direct effect of the transaction. These effects could include a positive impact on government revenue or the country's balance of payments[26] (interestingly enough this factor is raised as a concern of the Government in its New Growth Plan)[27]. In addition the transactions could increase technological efficiency in the market, and the training of employees in utilising new technology, systems and processes could positively impact the broader economy when those employees move to other local firms[28]. To highlight the importance of the latter of these spill-over's, it should be noted that the government's Industrial Policy Action Plan of 2011 makes specific mention of the lack of skills in the higher levels of the employment spectrum[29]. These considerations, however, may not be relevant in a traditional competitive analysis and it is unclear whether such arguments can be made in defence of the enumerated public interest concerns, for instance, in offsetting the loss sustained as a result of potential retrenchments. They may therefore not be considered at all in assessing whether a foreign acquisition is, on the whole, of net benefit for the country. Indeed, the public interest grounds which the competition authorities is entitled to consider are circumscribed. This has the benefit of focusing the affected parties' minds on only those considerations, but it may have disadvantages when relevant considerations have to be omitted because they are not caught within the ambit of the public interest considerations enumerated in the Act.

In contrast, Canada for instance, with its 'net benefit' test, allows for all the pro-economic effects of the transaction to be weighed against all potential negative impacts that may affect the public interest.[30] The particular areas of interest for the government are the effects of the investment on the level and nature of economic activity, for instance, employment, the sourcing of goods and services within Canada and the potential increased volume of exported goods from Canada, as well as the degree of participation of Canadian businesses and the effect on their interests.[31] It becomes apparent that the concerns of the Canadian government mirror those of South Africa as enumerated in the Act as well as the various arguments made during the Wal-Mart saga. Again the distinction to be made here is that in Canada, unlike South Africa, all pro-economic consequences of the transaction are netted against the effects arising from the public interest concerns. This means that should the company confess a need to shed jobs upon completion of the merger, such an action could be offset by the spill-over benefits of the acquisition. It should be considered whether excluding the consideration of some of the economic benefits of a merger or acquisition may lead to a substandard review process and consequently the possible loss of economic benefits from a rejected foreign acquisition.

The lack of a clear and objective methodology used to arrive at a rational conclusion to the balancing of the differing interests of creating efficient markets and serving the public interest, as well as the uncertainty regarding which impacts play a role in the consideration and which are too far removed or remote, has caused many a judicial system to completely eschew the consideration of public interest in the competition analysis. However, even in jurisdictions where similar analyses are made within the confines of a ministerial office, some framework for decision making has been created to ease investor concerns over arbitrary decision making. For instance in Canada, while the decision is left to the industry minister, a test has been established in order to guide the decision making. The acquirer would have to demonstrate a "net benefit" to the country as a result of the acquisition. Along with this mechanism, the government of Canada has published policy papers describing the factors that will be taken into account.[32]

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[26] Magnus Blomstrom "The Economics of International Investment Incentives" *International Investment Perspectives, OECD* No. 1 2002 pg 171
[27] Supra, note 8 pg 5
[28] Supra, note 21
[29] Department of Trade and Industry, "Industrial Policy Action Plan 2011/12 - 2013/14, Economic Sectors and Employment Cluster", February 2011, pg 67
[30] Supra, Note 11 pg 4
[31] Investment Canada Act 1985, Section 20
[32] Supra, Note 11

In a similar effort to lend certainty to a potentially arbitrary process, Australia has published its Foreign Investment Policy in which it details the country's concerns regarding potential foreign acquisitions of its corporations.[33] In addition the Foreign Investment Review Board publishes on its website the reasons for the decisions made.[34] From these decisions it becomes far simpler to construct a method to their madness and ascertain the areas of concern for the government. In addition, it enhances the transparency of the process. There are however only a few of these decisions available as only a few decisions have been made regarding foreign investments. This in itself probably sends a comforting message to investors that administrative interference is limited and investment is on the whole encouraged, whereas a considerable body of decisions would show an abundance of evidence of an over-reaching and protectionist government.

The DTI in its Guidelines indicates that the contradiction between public interest concerns and efficiency will not exist if policies are properly aligned, however no further elaboration is made on just how this could be achieved.[35] Our current economic policy, to a limited extent, calls out for more foreign investment[36], however it also states that more consideration should be given to imposing public interest conditions on mergers and acquisitions, particularly in respect of employment and prices.[37] The policy clearly envisages a greater degree of regulation of market activities in a manner that may very well prevent the realisation of any efficiency gains.

Further extracts from the Guidelines indicate that perhaps government policy should be utilised as the objective standard against which public interest losses can easily be measured and ruled upon.[38] The Tribunal should then turn to government policy when assessing which factor should gain supremacy in the balancing of differing interests. This however raises a few concerns. The independence of the Tribunal will no doubt be compromised should changing government policy form the bedrock of their decision making paradigm. Should the independence of the Tribunal come to be questioned, adherence to the rule of law is no longer a claim that the South African competition process can make. In addition the Tribunal will take on the hue of the government policy, which it would appear, is at the very least ambivalent towards business and broad FDI.

Should the Tribunal begin in earnest the direct implementation of government policy the concern to most investors will be the inability to distinguish between the Tribunal and the government itself. As seen in other jurisdictions, this is not in itself a problem, however, there is an inherent risk in direct government intervention on the basis of policy. Policy itself is fluid and can change at the whim and discretion of the government. Regulation under these conditions could easily evolve into or be perceived as excessive political intervention. Due to its impulsive nature, lack of sound reasoning or transparency, possible political intervention in the market is a source of grave uncertainty and has been shown to create severe drops in FDI inflows.[39] The risk the Tribunal and Commission face is that the conditions imposed on the transactions in order to allay the public interest concerns of the various government and trade union actors could be viewed as political intervention.

COST IMPLICATIONS

It must be properly understood that nowhere is it stated by the international community that administrative barriers are inherently bad or destructive. On the contrary the right of every sovereign nation to regulate its markets and the economic activities within them is fully recognised

[33] Australia's Foreign Investment Policy, January 2011, available at www.treasurer.gov.au
[34] www.firb.gov.au
[35] Supra note 2, pg 1
[36] Supra, note 17, pg 7
[37] Ibid, pg 19
[38] Supra, note 2 par 1.4.3
[39] Marina Azzimonti and Pierre-Daniel G. Sarte, "Barriers to Foreign Direct Investment Under Political Instability", *Economic Quarterly*, Vol 93, No. 3 2007 pg 293, Supra Note 29 par 3.4.3. It is interesting to note that the DTI cited the increased interference of the Minister under the previous Competition Law regime as a reason for the need to create a new monopolies law.

and encouraged.[40] There is however a standard that is expected, one neatly summarised as one of the Millennium Development Goals. This goal is to "develop an open trading and financial system that is rule based, predictive and non-discriminatory".[41] A warning is given to developing nations that the reason for the failure to live up to this standard is the attempt to achieve too many goals at the same time.[42]

The particular circumstances of a developing country present a distinct challenge. Most countries that fall within this bracket are faced with many and varied challenges. They usually have an abundance of goals and objectives out of necessity and not out of ambition. The challenge becomes how to balance the policies that attempt to solve a rampant unemployment rate, sluggish growth, and legacies of economic oppression with those that may, at least in the short term, contradict with these efforts. Such conditions may even threaten the political stability of country whose population demands a better life. How then, within this context, does a government strive towards the goal of an open, rule based and predictable, trading system that is inviting to foreign investors?

At this juncture in South Africa's institutional development we may have created an investment review process that does not contain a coherent set of rules or mechanism and thus may appear to have the potential to dispense unpredictable results, and while we perhaps cannot be said to discriminate against foreign corporations (as the same review process is applied to local companies as well), certainly the potential exists that the sentiment felt by international investors is that foreign acquisitions are not particularly welcome.

A factor that bolsters this concern is the now rising cost of investment in South Africa. This overall cost is difficult to quantify, although some studies have attached a numerical figure for the sake of illustration[43], and comes in the form of increased administrative barriers to investment. A plethora of economic studies have indicated, empirically, that the more extensive and obscure these barriers become the less FDI is committed to that country.[44]

Beyond the simpler additional cost of overcoming a complex regulatory hurdle, made up of legal fees, advisors and the like, the cost is made up of time.[45] For foreign investors time is relatively more valuable due to the possibility that investing elsewhere would provide greater or equal returns with less cost of investment, therefore their opportunity cost is much higher. In this context, the amount of time it takes a foreign investor to begin production and recoup start-up capital forms 80 percent of their total cost. The result is that delays due to complex and incoherent regulatory system will have a large impact on the willingness of foreign investors to commit capital in the country.

In this context, the time taken to review mergers and weigh up public interest factors raised by intervenors is of concern. Perhaps an inadvertent result of placing the review of public interest concerns within the competition framework is the creation of a litigious space. The aim becomes to pit the regulator against the merging parties. Foreign jurisdictions that have initiated similar reviews of FDI transactions, in an attempt to give off a constructive air, invite proposals from the acquiring entity that suggest the manner in which it intends tackling any public interest concerns should they exist. The government then immediately initiates negotiation regarding the conditions and undertakings proposed in order to allow as many transactions through as possible while ensuring the interests of the public are properly served. The government makes a concerted effort to act both in the public interest as well as the interest of the investing party. In contrast, the current litigious approach through the competition hearings process in South Africa may give the impression that the South African government and authorities are hostile towards foreign investment.

[40] Jacques Morisset and Olivier Lumenga Neso, "Administrative Barriers to Foreign Investment in Developing Countries", *Policy Research Working Paper, World Bank*, No. WPS 2848, pg 4. See also note 13 pg 8
[41] See http://www.developmentgoals.org/About_the _goals.htm
[42] Supra, note 15 pg 8
[43] Supra, note 39
[44] Supra, note 15
[45] Supra, note 39

CONCLUSION

Given that we have concluded that the public interest debate is correctly sited within the competition law framework, what can be done to ensure it works most effectively and does not deter foreign and other investment?

The Guidelines show that at the time of constructing the framework in which the Act would be developed the DTI did not believe that the policies of development and efficiency were contradictory, provided that the policies were properly aligned and implemented in a creative manner.[46] However, conditions imposed by the Tribunal appear not to give the life to this. In the Momentum / Metropolitan merger, the Tribunal prevented the retrenchment of all but very senior employees for a period of two years, thus requiring redundant employees to be retained for an extensive period, at the direct expense of possible efficiency gains from the merger. To reflect the DTI's vision, conditions imposed should if possible allow for, and enhance efficiency, as well as advancing the implementation of government policy. The Tribunal could consider allowing the retrenchments to proceed on the basis that the parties would undertake retraining, scholarship funds, and the like. There is possibly a creative way to structure the conditions that would allow for efficiency gains to be realised out of a merger as well as furthering the government's industrial and economic policies.

There is however another option to create a somewhat greater sense of clarity concerning the weight given to various consequences arising from a merger or acquisition. The decisions of the Tribunal reveal an effort to establish a nuanced approach to public interest concerns. Whether it be in the form of "merger specific retrenchments" or the establishment of the Tribunal's intentions and jurisdictional boundaries in the advancement of public interest objectives, the Tribunal has begun to create jurisprudence from which competition practitioners can discern a methodology. Should this expand and grow into a rich source of precedent and academics from both a legal and economics perspective add to the discourse, we may have a body of law that could help in allaying the fears of potential investors.

The path South Africa has chosen in the quest to best achieve its aims has laid before its policy makers, judges, legal practitioners, and business community a substantial challenge. In the specific case of competition law and the regulation of transactions both local and international, the standard is set rather high. One cannot but wonder just how the system is to act in the interests of all the constituents who are directly and indirectly affected by a merger or acquisition. It would appear that in the most recent efforts to do so, all the parties involved seem to be dissatisfied with the result. Government and unions believe that the Tribunal is not invasive enough when considering the public interest. The business community believes the conditions to be too onerous and counter-productive in the process of building a strong, diverse, vibrant economy.

However, despite the challenges which our peculiar system provides there are a number of factors which lead one to believe that hope is not altogether lost. The independence of the Tribunal remains intact, and the Tribunal refers to past decisions in an effort to shed light and clarity on its decisions. As a result a body of precedent is emerging, though in a very nascent state. It is difficult now to predict the value of such a resource, especially as the precedent of the Tribunal is not binding on anything really, however the hope is that with further exploration, experimentation and experience, interested parties both locally and internationally will be able to acquire a steadily increasing sense of certainty in the regulatory process and the public interest.

It nevertheless remains vital that the independence of the competition review system is maintained. It is completely understandable that the government should have concerns regarding the acquisition of local assets by foreign firms. Similarly, the concerns of government and trade unions regarding the effect of mergers on employment are also understandable in these times of high unemployment. However, government and the trade unions must beware of chilling economic activity by interfering too vigorously in the process, particularly where other forums are available as alternatives. International Trade regulation is best accomplished through the negotiation of

[46] Supra Note 2, par 1.3.4

bilateral investment treaties and, to a certain extent, the WTO.[47] There is very little doubt in the international community that access to world markets is beneficial for the economic growth of a country, however the degree of openness is a matter for debate, scholarship and negotiation, it is not an issue that should be placed at the door of the competition authorities to decide.

Competition law practitioners require certainty regarding the competition and public interest landscape in order to properly advise clients, both local and foreign, regarding their prospects of success in relation to particular mergers, . As we have argued, certainty is an essential part of the process and features high on the list of requirements when investment decisions are taken. Practitioners currently have some difficulty in advising clients of their prospects, since there is no certainty whether government or trade unions will intervene in relation to public interest issues, and if so, what conditions will be imposed as a result. The Tribunal should be allowed to continue developing a body of cases from which some guidance could be gleaned. It should also be allowed to continue its work without influence from the government of the day, for the reasons outlined above. If government is seeking to widen the scope of public interest considerations, it should do so by legislative amendment, allowing the competition authorities to review those issues through the same prism as is currently the case.

Government should beware of deciding to remove public interest analysis from the hands of the competition authorities. Although other countries, particularly developed ones, have not placed responsibility for such considerations on the shoulders of their competition authorities, it must be borne in mind that the South African process has several benefits. The body weighing up the public interest concerns does so in the context of the competition analysis, rather than in a vacuum. The process allows for open and public airing of the issues, rather than behind-the-scenes lobbying. This is in line with the principles of accountability, transparency and consistency. The public is kept fully abreast of developments, and there is a trust that has developed. This would not be the case if decisions were made in private by a government minister, and suspicion of the process could result, thus undermining the whole process.

[47] Stephen S. Golub, "Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries" OECD Economic Studies No. 36, 2003/1 pg 108