IS SOUTH AFRICA A GOOD INVESTMENT DESTINATION? A RELOOK AT CONDITIONS IN MERGER CASES

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1. Introduction

The Competition Commission ("Commission") and the Competition Tribunal ("Tribunal") are empowered to impose conditions in merger cases to address competition concerns or public interest concerns that they identify. Of late the conditions imposed or recommended by the Commission have been vigorously challenged in the Tribunal. With the economic downturn of 2008, there has also been an increased focus on public interest concerns by the Commission and the Tribunal. This increased focus has given rise to a variety of conditions. One may argue that some of the conditions may not be in line with the role of the competition authorities in attaching conditions to their decisions. Arguably, some merging parties may have had stricter conditions imposed on them than is necessary to address competition or public interest issues identified. Some of the conditions may not be merger specific. As seen in the recent *Walmart/Massmart*[2] decisions, the conditions imposed in merger cases are sometimes used, rightly or wrongly, to measure the friendliness of South Africa as an investment destination. With such great importance, merger conditions have to be imposed after careful analysis of the dynamics of a market while taking cognizance of the existing legal framework. This paper explores the ambit within which the competition authorities should operate in imposing conditions in merger cases. It also explores the possible impact of conditions imposed in mergers on investments in the country. A comparison will be done with the European Commission's model of enabling the

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[2] *Walmart Stores Inc and Massmart Holdings Ltd* CT Case NO: 73/LM/Dec10 ("*Walmart/Massmart* decision") and *The Minister of Economic Development and Others v The Competition Tribunal and Others* CAC Case NO. 110/CAC/Jul11 and 111/CAC/Jun11 (the *Walmart/Massmart* CAC decision)

merging parties to suggest conditions which may be favourable in addressing some of the issues identified.

2. Investments that South Africa seeks

In developing countries domestic spending usually accounts for the greater part of the total investments.[3] South Africa is no exception to that norm. In addition to government spending, foreign direct investments (FDIs) are also a very important form of investment which will be considered in this paper. This paper shall not focus on portfolio inflows, investments that are made in shares on the JSE Securities Exchange and the bond market as they do not involve committed capital and can easily be taken away from the South Africa.

3. Government incentives and spending

Most of the instruments that the government utilises to stimulate private sector growth in pursuit of specific targets such as lower levels unemployment tend to be indirect and generally involve government spending on private goods and services, on the one hand, or are aimed at creating favourable or stable conditions for investment including foreign direct investment (FDI), on the other. In a free market economy the role of the state does not encompass prescribing to corporations how much resources to use, including human resources, and/or where to invest - more specifically to favour local production over imports.

In response to the 2008/09/10 global economic crisis government pursued an expansionary fiscal policy by increasing public sector spending on infrastructure and social assistance. In 2010 consolidated gross government spending increased by 1.5 per cent. Structural fiscal deficit expanded from 2.25 per cent of gross domestic product (GDP) for the 2008/09 fiscal year to 4.1 per cent of GDP for the 2010/11 fiscal year. This was mainly due to increases in social transfers, lending to SANRAL and Eskom and also as result of the burgeoning public salary. Unlike infrastructure or similar public works spending government spending on social security

[3] UNCTAD *World Investment Report* 2011 accessed at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf)at p21. For detailed discussion on FDI and domestic investment, see UNCTAD, 2010a and 2011a

payments has even more indirect effect on unemployment levels. Being primarily a demand side stimulus which, unlike government supply side development programmes, seeks to put money in the pockets of individuals in the hope that they will spend it on locally manufactured goods and services and that once so spent the money will not just constitute more profits in the pockets of capital, but will be reinvested.

While government spending itself directly impacts positively on employment in the form of creation of employment opportunities within the state or state enterprises that are recipients of government spending and in private companies involved in the provision of products or services to the state due to increase demand for inputs, in the private sector this does not necessarily translate to specific numbers in terms of employment nor does it have any promise of investment in local production.

4. Foreign direct investments

To achieve the targeted unemployment levels the government also looks up to foreign direct investment to provide the necessary stimulus. In a country like South Africa, FDI brings a lot of benefits[4] some of which have a positive impact on employment such as:

- Establishment of new production capacity or expansion of existing capacity;
- Skills transfer which alleviate the structural or skills mismatch causes of unemployment; and
- Improvement in production processes which increases competitiveness and demand of local products.

Unlike government spending, particularly in social security, FDI is seen as involving guaranteed private sector investment in the economy. As noted by Penelope Hawkins and Keith Lockwood[5] *"FDI is associated with relatively longer term, committed capital, and with 'patient' investors."*

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[4] There are strong views that FDIs do not bring economic growth but follow it. see Jason Kiat *The effect of exchange rate and inflation on foreign direct investment and its relationship with economic growth in South Africa* 2008 at p7-8 accessed at http://upetd.up.ac.za/thesis/submitted/etd-03172010-140315/unrestricted/dissertation.pdf

[5] *A Strategy for Attracting Foreign Direct Investment*, A paper presented to the Economic Society of South Africa's biennal conference, Glenburn Lodge(13 September 2001)

While this is certainly true it should be noted that a large proportion of FDI takes the form of mergers and acquisitions instead of greenfields entry.[6] Taking over an existing business may not necessarily translate into more employment at least until the foreign investor sees an opportunity for growth. Investments made by car manufacturers are the ideal form of FDI that the government is looking for. The government's Automotive Production and Development Programme (APDP) previously called Motor Industry Development Programme (MIDP) is at the core of this success. The programme provides incentives to local car and component manufacturers in the form of tariff breaks. This has resulted in a lot of greenfields entry into South African automotive and related components industry which has made a significant contribution to job creation.

Moreover, the recent form of market-seeking FDI caused by the revived interest in Africa as a potential growth market could spark acquisition of existing local companies. This could, with a not so negligible lag, bring expansion in production as companies seek to supply neighbouring countries. The government will need to take heed of factors that influence these types of investors.

5. Factors affecting FDIs

There are various ways in which the state actively tries to attract FDI and none of these involve direct interference in the commercial decisions of companies. However, it is also important that the government should not lose sight of the fact that incentives are but one factor investors look at when deciding where to invest. Economic determinants should be expected to constitute primary considerations. These, as enumerated by Rashmi Banga[7], include:

- Current market and potential market size;
- Costs of labour;

[6] FDI is traditionally broken down into three components: equity capital, intra-company loans, and reinvested earnings of foreign affiliates (See UNCTAD *World Investment Report* 2011 on p12 accessed at http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf)

[7] *Impact of Government Policies and Investment Agreements on FDI Inflows*, Working Paper N. 116, Indian Council for Research on International Economic Relations - http://www.icrier.org/pdf/WP116.PDF November 2008

- Availability of skilled labour;
- Cost of capital;
- Availability of infrastructure;
- Real exchange rate;
- Exchange rate stability;
- Rate of inflation;
- Financial health; and
- Overall Economic Stability that includes political stability.

One should admit that not all of these factors are wholly within the influence of the state. Firstly, it is clear that the appeal of the African continent as a potential growth market is certainly outside of the powers of the South African government. However, the state has a role to play in convincing corporations to see South Africa as a stepping stone into the rest of Africa. Hawkins note that investment incentives, such as tax holidays, are of less importance to market-seeking investment. An investor that has a broader Southern African or even African objective will invest irrespective of incentives given by the state. However, such investors are less likely to do so if the restrictions or risks in the country are such that they are likely to hinder the achievement of their objective.

Secondly, cost of labour is partly influenced by the laws and market forces. South African labour laws are perceived to be rigid. Corporations find the difficulty of laying-off workers and complying with employment equity as disincentives to invest. This is compounded by scarcity of skilled labour. The state could relax the labour laws and invest more in building skills capacity. However, Brendan notes that the perception that South African labour laws makes it difficult to lay-off workers is indeed just, a perception.[8] Corporations are able to lay-off workers

[8] Brendan Vickers (2002), *An overview of South Africa's investment regime and performance,* Global Insights Issue No 16 -

if the proper procedures are followed. We also share this sentiment since employers need to acquaint themselves with local laws for almost all aspects of their operations and once clearly understood it could be realised that it is a matter of following procedure. Similarly for competition laws, in particular the public interest considerations, it is important to provide a clear message of the competition authorities' approach with regard to these and as to what informs any potential remedy.

Thirdly, the tariff structure impacts on the costs of imported capital and inputs. This, we would like to believe, is wholly within the control of the state. Fourthly, government fiscal policy partially influences the real exchange rate, exchange rate stability and rate of inflation. Lastly, the South African financial system has been praised for its stability. The South African Reserve Bank which is at the core of regulating the banking sector, even though privately owned, is still under some form of control by the government. It could be argued that the economy is fairly stable and other than the current uncertainty surrounding nationalisation talk, government policy has thus far been fairly predictable.

It is now opportune to determine how regulation and in particular the application of competition laws might impact on FDI inflows. We are interested in remedies that have been imposed by competition authorities in merger cases, in particular those pertaining to public interest issues as described in the Competition Act.

Clearly as set out above, whether a country experiences an inflow of FDI is not a simple matter of government incentives but a combination of factors. In order to assess the impact of application of competition laws it is important to control for the above economic variables. Rashmi Banga[9] found that:

> *"... after controlling for the effect of economic fundaments, FDI policies are found to be important determinants of FDI inflows. Results show that lower tariff rates attract FDI inflows.*

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http://www.igd.org.za/index.php?option=com_jdownloads&view=viewcategory&catid=3&Itemid=37&limitstart=90

[9] Supra

However, fiscal incentives offered by the host governments are found to be less significant as compared to removal of restrictions attracting FDI inflows."

6. Role of merger conditions

The Commission receives extensive media coverage and the media tends to shape the thinking of the nation and potential investors.[10] What is clear is that with all the publicity that the Commission receives, merger conditions are sometimes used as a platform for fuelling perceptions that influence investor decisions. For instance, in the *Walmart/Massmart*[11] merger the merger conditions and government involvement was used by the media to measure the friendliness of South Africa as an investment destination. It is therefore prudent for competition authorities and the Government to critically look at the possible perceptions that may be created by certain conditions imposed in mergers. The Tribunal recognized the possible effects that merger conditions, particularly public interest issues, may have on investments when it stated that:

> *"The role played by the competition authorities in defending even these 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 Charter itself spring to mind. The competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an overzealous manner lest they damage precisely those interests that they ostensibly seek to protect."*[12]

The above position was reinforced in the *Metrpolitan / Momentum* decision by the Tribunal.[13] In the same vein Penelope Hawkins and Keith Lockwood noted that:

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[10] See Commission's Annual Report 2010/2011. In the Commission's financial year 2008/2009 the Commission received print media and electronic media amounting to 5861 times, and in 2009/2010 it increased to 7 303 and in 2010/2011 it was 6632 (cf p51).

[11] *Walmart/Massmart* Supra

[12] See *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* CT Case No: 66/LM/Oct01 at paragraph 58

[13] *Metrpolitan Holdings Limited and Momentum Group Ltd* CT 41/LM/Jul10 see paragraphs 109-111.

> *"A number of new legislation that impact directly on the business sector have been promulgated in South Africa in recent years. Because foreign investors in South Africa generally feel more insecure than their local counterparts, "subjective" elements in such legislation increase the risk associated with investment, and give rise to perception amongst them of being "unwelcomed" and "discriminated against", a reduction in scope of subjective rulings and interpretations in such legislation would reduce the risks faced by foreign investors."*[14]

In cutting the Commission's rating the Global Competition Review noted that two of the 288 mergers filed last year were blocked and that there are "increasingly adversarial approach to mergers, particularly ones involving foreign entities". The report further stated that there is a marked increase in the use of remedies with 28 mergers that were cleared with conditions in 2011 compared to 11 in 2010.[15] Some of the Commission's decisions have been labeled as "bizarre".[16]

The views of the global competition community clearly express the sentiments here. The issue is the one of managing perceptions. As noted earlier, reducing restrictions on FDI has been found to be more potent than providing incentives in attracting FDI. Restrictions could be associated with risks such as the possibility of the expansive interpretation of the public interest provisions of the Act by the Competition Commission and Competition Tribunal to a terrain better dealt with using other policy instruments other than competition policy. Indeed a few recent mergers involving foreign firms have attracted a lot of interest from the government which purportedly wanted to give wider interpretation to the public interest considerations.[17] If the same attention is not given to mergers involving only local firms a perception could indeed be created of being "unwelcomed" and "discriminated against".

[14] *A Strategy for Attracting Foreign Direct Investment*, A paper presented to the Economic Society of South Africa's biennal conference, Glenburn Lodge(13 September 2001)

[15] Global Competition Review http://www.globalcompetitionreview.com/features/article/31877/south-africas-competition-commission/

[16] Business Day 5 June 2012 p15

[17] See the *Walmart/Massmart* case (Supra)

With such a potential to influence investor perceptions on their investments in South Africa and on perceptions on the effective implementation of the Act, and damage to the interests (like employment) that the Act seek to protect, it is imperative that conditions in merger cases should be imposed within the ambit of the Act.

7. The ambit within which the competition authorities should operate in imposing conditions in merger cases

When a decision is taken by the Commission to attach conditions to a merger the Tribunal is required to consider whether the imposition of the condition is warranted on the basis of the evidence before it. The Act also has a very explicit public interest test that requires the Commission and the Tribunal to balance the substantial prevention or lessening of competition test against the proposed transaction's impact on a number of specified public interest factors. This section outlines the legal framework for evaluating both substantial prevention or lessening of competition test and public interests test in mergers. It also discusses the Tribunal and the CAC's jurisprudence and approach to the assessment of both tests as this provides some insight on when is it necessary to impose conditions on mergers.

8. Section 12A

In terms of section 12A when required to consider a merger the Commission or 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)".*[18] If the merger leads to a substantial prevention or lessening of competition, a determination has to be made as to whether or not there are any technological, efficiency or any other procompetitive gain that offset the prevention or lessening of competition caused by the merger.[19] Section 12A (2) provides that:

[18] See section 12A(1) of the Act

[19] Section 12A(1)(a)

> "*When determining whether or not a merger is likely to substantially prevent or lessen competition, the Competition Commission or Competition Tribunal must assess the strength of competition in the relevant market, and the probability that the firms in the market after the merger will behave competitively or co-operatively, taking into account any factor that is relevant to competition in that market…..,* "

Section 12(A)(2) then lists eight factors that have to be considered when assessing the strength of competition within a market, namely, import competition in a market, ease of entry into a market, the level and trends of concentrations within a market and the history of collusion within that market, the degree of countervailing power, the dynamic characteristics of the market, vertical integration in a market, the likelihood of a business to fail, and whether the merger would result in the removal of an effective competitor.

If the Commission intends to impose conditions in a merger or recommends that the Tribunal approve a merger subject to a particular condition the onus is on the Commission to prove that the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection 2. For this reason the CAC has reiterated in several cases that in the absence of evidence that the merger will substantially prevent or lessen completion there is no need to impose conditions on mergers, or prohibit them for that matter. It therefore seems that the Commission must first overcome the "evidence" hurdle before imposing any condition to a merger. As stated in *Schumann Sasol v Price's Daelite (Pty) Ltd*[20] :

> "*The requirement set out in section 12A capture the central premise of merger control being that transactions should be permitted unless it can be shown that the threshold test has been met on the basis of evidence placed before the Tribunal"*[21]

Regarding the meaning of the term 'substantial lessening' of competition the CAC stated in *Medicross Healthcare Group (Pty)Ltd Prime Cure Holdings (Pty) Ltd And The Competition*

[20] 2001-2-2002 CPLR 84 (CAC)

[21] See page 88

Commission [22] that section 12A is concerned with " *impediments or hindrances which retard or keep back that what which might otherwise have happened*."

It apparent from the wording of section 12A (1) that the anti-competitive effect referred to in that section must be "likely", which has as its primary meaning "probability". Therefore if on all evidence before the Commission of the Tribunal, it is not possible for the Tribunal to conclude that there will "probably" be a substantial lessening of competition in the market, the merger must be approved.

It is also trite law that a positive finding on anti-competitive effects cannot be speculative. It must be rationally attributable to the evidential foundation placed before the Tribunal. This was stressed by the CAC in *Mondi Ltd and Kohler Cores A division of Kohler Packaging Limited* [23] where the court stated:

> "*The decision required by section 12A (1) must be made on evidence which is available to the Tribunal. In other words, the Tribunal cannot base its decision upon speculation of the kind which cannot be attributed to any evidential foundation placed before the Tribunal*."

In *Johnnic Holdings Ltd and Mercanto Investments (Pty) Ltd; Hosken Consolidated Investments Ltd; Competition Tribunal and Competition Commission* [24] the CAC criticized Johnnic for advancing arguments as to the possible harm to competition that was simply based on speculation. Similarly in *Momentum Group Lauritz Lanser Dippenaar; Johan Petrus Burger and The Chairperson, Competition Tribunal; The Acting Commissioner, Competition Commission; African Life Health (Pty) Ltd and the appeal in the large merger between Momentum Group Limited and African Life Health (Pty) Ltd* [25] the CAC stated that there must be "*clear evidential justification*" for the imposition of conditions.

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[22] 2006 1CPLR1 CAC at paragraph 25

[23] See paragraph 38

[24] 57/CAC/Dec05 See paragraph 19

[25] 58/CAC/DEC05 See paragraph 9

It is therefore clear that for conditions to be attached in a merger the Commission must show that the proposed merger is likely to result in the relaxation of the competitive constraint in the merging parties and it must also identify the nature of potential harm or elucidate the extent of any potential harm arising from the proposed merger. In doing so the Commission would avoid situations where its conditions are vigorously challenged at the Tribunal.

9. Public Interest Test

Although the Commission or Tribunal can find that a merger is not likely to substantially prevent or lessen competition within the meaning of section 12A(1) of the Act as discussed above, it should consider whether the merger *"can or cannot be justified on substantial public interest grounds"* by considering the factors listed in section 12A(3) which states that:

> *"3. 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;*
>
> *(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.*

As shown above, Section 12A(3) of the Act lists four considerations that the Commission or Tribunal must have regard to when determining whether a merger can or cannot be justified on public interest grounds. It is therefore possible that a merger that passes the substantial lessening of competition test may nevertheless have conditions imposed upon it or may even be prohibited because it has failed the public interest test.[26] Although still theoretical, it is also possible that a

[26] See *Harmony Mining Company Limited and Gold Fields Ltd* 93/LM/NOV04 case where the Tribunal stated at para 56 that: *"The prioritisation of competition enquiry 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*

merger that is likely to result in substantial lessening or prevention of competition is cleared unconditionally because of substantial public interest benefits. It appears from the wording of the Act, and confirmation from the CAC,[27] that the public interest test is conducted after a finding on the substantial lessening of competition test (or competition grounds). However, the public interest test is conducted irrespective of the findings on competition effects.

The Tribunal, in the *Metropolitan/Momentum*[28] case, sought to give guidance in relation to what is meant by "substantial" and asserted:

> "*…Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made. This is not an unfair burden given that only the merging parties can answer this question."*

In the *Walmart/Massmart*[29] decision the Tribunal said that:

> "*… subject matter and substantiality are not the only limitations in considering the public interest. A further consideration is that the public interest consideration must be merger specific. Expressed in less technical language, unless the merger is the cause of the public interest*

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

[27] See the Tribunal decision in the *Walmart/Massmart* case (Supra); and the CAC discussion in the *Walmart/Massmart* merger (Supra) at paragraph 112

[28] *Metropolitan/Momentum* Supra

[29] *Walmart/Massmart* Supra at par 12

concerns we have no remit to do anything about them, our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction."

And on paragraph 33 of the *Walmart/Massmart* decision Tribunal further stated that:

"*… the fact that a concern exists independently of a specific merger however weighty that concern may be, does not bring it within our jurisdiction in performing merger adjudication*."

In circumstances where the concern that forms subject matter for the imposition of a condition is merger specific the Commission still has to show that the effect is substantial in order to justify a prohibition. It was stated in the CAC's decision in *Walmart/Massmart* [30] that:

"Unless the effect upon public grounds, as set out in s 12A(3) is shown to be substantial, the court cannot employ the public interest test to disallow the merger."

A careful consideration of the three recent cases before the Tribunal indicates that in addition to employment the only other public interest concern on which the Commission relied on recently was "the ability of small businesses … to become competitive" (section 12A (3)(c).[31]

10. Instances of public interest cases

In the following matters the Commission purported to find that "the exclusivity clause in lease agreements has the effect of preventing small businesses from competing effectively in the shopping centre".

In *Synergy/Khuthala merger*[32] the Commission concluded that there is a public interest concern arising from the proposed transaction given that the lease agreement between Spar and the landlord (Khuthala) contains an exclusivity clause. The Commission found that this exclusivity clause has the effect of preventing small businesses from competing with Spar in the King

[30] See CAC case number 110/CAC/Jul11 on paragraph

[31] See *Defy/Arcelyk* case, *Kansai Paint Co. Ltd and Freeworld Coatings* Ltd 53/AM/Jul11 and *Media 24 Limited and Paarl Coldset (Pty) Ltd and The Natal Witness Printing and Publishing Company (Pty) Ltd* 15/LM/Mar11

[32] In terms of the proposed transaction Synergy sought to acquire the letting enterprise (King Senzangakhona Shopping Centre) from Khuthala, comprising the fixed and moveable assets, goodwill as well as rights and obligations of Khuthala.

Senzangakhona Shopping Centre. This conditional approval of a small merger was vigorously contested by the merging parties. The merging parties filed reconsideration application before the Tribunal contesting the Commission's conditional approval. When the matter was heard at the Tribunal the merging parties submitted that as a result of its purchase of the King Senzangakhona Shopping Centre, Synergy was inheriting a lease which contained the exclusivity clause which the Commission was concerned about. They argued that Synergy could not change the terms of the lease, and the exclusivity clause was not brought about by the merger, in other words they argued that the exclusivity clause was not a merger specific effect, as it pre-existed the merger and it remains post the merger. Although this transaction was approved by the Tribunal subject to a condition that the parties put up,[33] the parties arguments before the Tribunal also finds resonance in the Tribunal's decision in Walmart where the Tribunal said that subject matter and substantiality are not the only limitations in considering the public interest, "<u>a further consideration is that the public interest consideration must be merger specific."</u> Our emphasis

The other matter where the issue about exclusivity clauses was dealt with is the *Redefine Properties Limited and Hyprop Investments* merger[34] and the *Synergy SA Corporate* merger[35]. Both these transactions were approved subject to conditions which were undertaken by the parties. Arguably these conditions may be viewed by others as being stricter than necessary since the concern they are seeking to address may not be merger specific.

11. The effect of merger conditions on investments in South Africa

It has to be admitted at the outset that it is difficult to do a quantitative analysis of how merger conditions have had an impact on FDIs as they form a small subset of factors that affect FDIs.

[33] The parties put up a condition to say they will make best efforts, *bona fide* to ask and to try and obtain consent from Spar to do away with the exclusivity when the lease expires.

[34] 47/LM/Apr12

[35] Tribunal Case No 103/LM/NOV11

For such an exercise one would need to take a lot of factors into consideration and then weigh the true impact of merger conditions. Below is a table that shows the FDIs into South Africa:

Table 1: Foreign direct investment, net inflows in South Africa (BoP, current US$)[36]

Year	2008	2009	2010	2011
FDI	9 644 834 927.13	5 353 688 722.76	1 224 280 433.34	5 717 863 701.27
Mergers approved with conditions			11	28

One can legitimately argue that the decrease in FDIs in in 2009 and 2010 was a result of the economic crisis. However, other factors may also be at play and these include domestic market structure which is considered small and not growing fast, labour market issues, among others.[37] Thus from the time that the Tribunal began placing more emphasis on public interest grounds in 2010, particularly employment, there is not enough data to work with to link FDIs to merger conditions as the time period is short and a lot of factors affect the FDIs. Though the data is not conclusive, it does not seem like the increase in conditions has resulted in a corresponding decrease FDIs.

While FDIs interact with industrial policies, one thing that is clear is that investors want certainty in policy. No matter how unfriendly policies are investors would invest in a country as long as they know what to expect and this applies to merger conditions as well. The UNCTAD World Investment Report 2011 notes that many countries are opting for restrictive FDI policies:

> *"Many governments have opted for more proactive industrial policy in recent years. The reasons for this are manifold and include, for instance, structural change and economic diversification,*

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[36] World Bank Data accessed at http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD/countries?display=graph

[37]CUTS Centre for Competition, Investment and Economic Regulation Discussion Paper, *Investment Policy in South Africa: Perceptions and Performance* accessed at http://www.cuts-international.org/CR_safAB.pdf at p25-26

pressure from international competition, disappointment with the results of laissez-faire policy, the wish to "guide" development, a desire to strengthen and protect national champions, and State intervention in response to various crises. The success of industrial policy in countries such as Brazil, China, India or the Republic of Korea has given further impetus to this development."[38]

The report goes on to note that:

"A number of countries have created such documents that specify to various degrees the extent to which FDI is prohibited, restricted, allowed or encouraged, and what FDI-related policy instruments to apply (e.g. China's "Foreign Investment Industrial Guidance Catalogue" and "Catalogue of Foreign Investment Advantageous Industries in Central and Western China", India's "Consolidated FDI Policy").17 Some guidelines specifically address the use of investment promotion instruments (e.g. the Republic of Korea's "FDI Promotion Policy in 2011", the Malaysian Industrial Development Authority's "Invest in Malaysia" policy, and the Thailand Board of Investment's "Investment Promotion Policy for Sustainable Development").18 These guidelines may also relate to the interpretation of national laws and policies at the sub-national level."[39]

The clarity in how foreign entities would be treated and the extent of the restrictions are clearly spelt out. South Africa can learn from countries like China and clarify its industrial policy. More importantly, competition authorities can play their part by clarifying the extent of the applicability of public interest issues. Though the legal framework has been interpreted by the Tribunal and the CAC, it is not clear where the boundaries are to be drawn in practice. In South Africa when investors invest via FDIs and acquire existing business enterprises, there is certainty on the greater part of the merger regime. However, the confusion is caused by the inconsistent implementation of public interest issues in South Africa. The inclusion of public interest issues in the competition regime is a novel approach and international investors often find it difficult to understand the concept. However, if the application of the public interest issues is clear and certain, a lot of confusion would be cleared and investor perceptions would not be negative

[38] UNCTAD *World Investment Report* 2011 p105

[39] UNCTAD *World Investment Report* 2011 at p106

towards public interest issues. Currently, there has been a greater emphasis on employment and there has been no direction or guidance regarding the other areas relating to public interest, save to some extent, the impact on small businesses. However, the other subsets of public interest are not that developed. One tends to wonder how far the competition authorities can go in imposing conditions on public interest issues relating to the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets.

12. Experiences from the EU

The EU has a unique system of dealing with merger remedies which is slightly different from South Africa. The EU operates within the framework of the Remedies Notice of 2008 which stipulate how parties can propose conditions should their merger raise competition concerns. This gives parties the opportunity to assess what they are willing to abide by and not sacrifice the core of the merger. Usually, parties engage with the EU Commission during counseling sessions where they discuss issues which include remedies. It is at such early engagement with the EU Commission at pre-notification stage that proposals can be discussed and this has the advantage of enabling the EU Commission to engage with the conditions adequately within the tight time frames of analyzing the merger when the merger has been filed.

The difference between suggesting good remedies and bad remedies distinguishes between an approval or a prohibition of a merger by the EU Commission. The EU Commission rarely prohibits mergers as they engage with the parties at an early stage regarding addressing competition concerns that may be raised by a merger. By May 2011 out of 4676 transactions filed with the EU Commission since its inception of Merger Regulation in 1990, only 21 mergers had been blocked.[40] These statistics presumably show the fruits of the EU Commission engagement with parties which resulted in merger conditions being negotiated and agreed to. The Commission can also engage on extensive consultation with merging parties in trying to impose certain conditions. Though such engagement is taking place, if it is increased, more could be

[40] See EU Commission Statistics at http://ec.europa.eu/comm/competition/mergers/statistics.pdf

achieved in the realm of merger conditions. In addition, fewer challenges would arise regarding the Commission's decision to impose conditions.

Clearly, there is a strong preference for structural remedies, more particularly divestiture.[41] Divestiture is favoured because of the 'removal of links between the parties and competitors', i.e., between the divested entity and the former parent company and the ability it has to create more competition in the market should the new entity compete well. In addition divestiture is easy to monitor because monitoring takes place during the divestiture period unlike behavioral conditions whose monitoring is continuous. This strong preference for divestiture cannot be replicated in South Africa as there are clear grounds upon which it has to take place. Section 60 of the Competition Act clearly states that divestiture only takes place if a merger is implemented in contravention of Chapter 3. This has led to a rising number of behavioral conditions being imposed by the Commission, and the creation of a merger conditions monitoring team. Behavioral remedies are more suitable for emerging markets and small national markets, to address issues of access and to lower barriers to entry.[42] This may be due to the lack of alternative buyers in the small national markets.[43] However, and if need be, the Commission should not be hesitant to impose conditions requiring divestiture of subsidiaries or specific assets.

13. Conclusion

Since the *Metropolitan/Momentum* case in 2010 there has been increased interest in public interest issues in South Africa. Civil society, government, and competition authorities all seek to implement public interest issues for various reasons. Even in the recent *Massmart/Walmart* case

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[41] Remedies Notice paragraphs 58-61

[42] Aeriel Ezrachi, *'Behavioural Remedies in EC Merger Control: Theory and Practice'*, Oxford Competition Academy (8 July 2005)

[43] Consolidation in small markets may be desirable to achieve economies of scale and as such to enable local industries to effectively compete in an increasingly globalizing world. Accordingly, in order to gain these efficiencies through consolidation and still allow space for competition by lowering barriers to entry behavioural remedies such as access to inputs may be imposed instead of fragmenting the markets through divestitures. Inability to achieve minimum efficient scale in smaller operations also means that there is likely to be fewer or no alternative buyers for divested assets in the small national markets.

public interest issues were extensively discussed. However, one should not lose sight of the ambit within which mergers have to be analysed. That provides a basis for the imposition of conditions or a prohibition and that would provide a cushion against bad foreign investor perceptions that may be caused by imposing conditions that are not merger specific or that go beyond the statutory mandate of the competition authorities. The Commission should engage more with merging parties and other stakeholders to come up with solutions that address competition or public interest concerns raised. The Tribunal also has to exercise its inquisitorial powers before imposing merger conditions even when there is agreement between the Commission and merging parties.