Developments in South African Merger Control – Ministerial Interventionism and the impact on timing and certainty

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> "*Partisanship can degrade the brand of the antitrust agencies, reduce their influence aboard, and discourage longer term investments that strengthen agency performance. Though difficult to quantify, these constitute a potentially serious, unnecessary drag on agency effectiveness*"[2]

ABSTRACT:

While the existence of 'public-interest' provisions in merger control is an express feature in certain jurisdictions' antitrust regimes, the manner and regularity with which they are applied remains a significant challenge both for antitrust practitioners and for their clients gauging certainty of their foreign investments.

A consideration of the developments in the South African context indicates the substantial risks associated with the manner in which antitrust agencies and governmental departments approach public interest considerations in merger proceedings.

Merging firms, particularly multinationals, need to be acutely aware of the challenges and risks associated with the use of public-interest considerations throughout merger-control proceedings in South Africa. Recent interventionist strategies have had a significant impact on two key features: the timing and cost of concluding mergers in the region.

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[2] W Kovacic "Policies and Partisanship in U.S. Federal Antitrust Enforcement" (2014) *Antitrust Law Journal*, Vol. 79 at 704.

Introduction

The express inclusion of public-interest considerations in the South African Competition Act[3] has recently presented international and local merging parties with unique challenges when engaging in the South African merger-control process. In particular, the manner in which the South African Competition Authorities as well as the Minister of Economic Development ("EDD",[4] or "the Minister", currently Minister Ebrahim Patel), have approached public-interest considerations in recent merger transactions, has developed.

As a result, transacting parties have seen a decline in the predictability of timing, costs and certainty in the country and indeed the region more broadly speaking, as the extra-judicial factor of the 'public-interest phenomenon' transcends the borders of the Republic of South Africa.[5]

The present paper discusses, specifically, the South African Competition Authorities' recent approach to public interest considerations in merger control, focussing particularly on the impact (on transparency and certainty) of ministerial interventionism and its concomitant impact on outcome certainty.[6]

It then considers the Competition Commission's imminent finalisation and adoption of the 'Guidelines on the Assessment of Public Interest Provisions in Merger Control' (the "Draft Guidelines")[7]. This paper notes that the Draft Guidelines are, in fact, an implicit acknowledgement that the evaluation and balancing of public-interest considerations in merger control is a complex task, and, furthermore, that the international antitrust community and particularly merging parties (who have an obligation to notify in South Africa), are demanding

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[3] Section 12A(3) of the South African Competition Act, 89 of 1998.
[4] The Competition Authorities fall under the auspices of the Minister of Economic Development.
[5] The principles of consistency and transparency have long been recognised by the International Competition Network ("**ICN**") as the most important principles to a good merger control regime. See the ICN "Recommended Practices for Merger Notification and Review Procedures", accessible at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf. One of the key objectives of the ICN is to "*build consensus and convergence towards sound competition policy principles across the global antitrust community*". Notably, the South African Competition Authorities are founding members of the ICN and have been involved in ICN projects since 2001 (http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-News-Edition-47-December2013.pdf accessed 07-03-2016).
[6] See http://africanantitrust.com/category/public-interest/ for numerous articles on public interest and competition policy shifts in South Africa.
[7] The "Guidelines on the assessment of public interest provisions in merger control regulation under the Competition Act, No 89, of 1998" as published in GG notice 1228 of 2015, are at the time of writing this paper, still open for a second round of public comment, although the authors do not expect any substantial changes to be made to the Draft Guidelines.

more certainty. The authors submit that the Draft Guidelines risk providing merging parties the assurance of timing and predictability of outcomes based on law and economics.

Overview of the applicable legislative provisions

The governing law, the South African Competition Act, expressly mandates the evaluation of a merger on certain enumerated public-interest grounds. In this regard, section 12(A)(3) of the Competition Act states:

> "*When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider* *the effect that the merger will have on* –
>
> *(a) 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."* (our emphasis)

It is important to bear in mind three principles that are clear from the wording of the Competition Act:

> **First**, section 2 of the Competition Act states that the purpose of the Competition Act is to "*promote and maintain competition in the Republic*" in order to achieve certain objectives, which include traditional competition-law objectives *in addition to* socio-economic objectives.[8] It is, therefore, clear from the legislative wording that the promotion and maintenance of competition in the market is intended to bring about certain public benefits that go well beyond traditional antitrust benefits of competition, which – here – include socio-economic benefits and societal protections beyond price competition on the merits.
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> **Second**, the public interest-test is confined to address only merger-specific effects as section 12A(3) specifically requires a consideration of the "*the effect that* ***the merger*** *will have*" (emphasis added).
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> **Third**, the public-interest grounds listed in section 12(A)(3) of the Competition Act are exhaustive. In spite of the absence of express wording in section 12(A)(3), subsection

[8] Section 2((a) – (f) of the South African Competition Act, 89 of 1998.

(1)(a)(ii) states that when evaluating a merger, the Competition Authorities must determine whether the merger "*can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3)*" (i.e. the specified public-interest grounds).[9]

Importantly, and in addition to the above, section 18(1) of the Competition Act expressly affords the Minister a right to intervene in merger proceedings only on "*public interest grounds referred to in Section 12A(3)*". We discuss the Minister's right to intervene more fully below.

Finally, the Authorities have justified the conditions imposed on public-interest grounds on the basis that they promote certain objectives contained in the preamble of the Competition Act. It is noteworthy that not all these socio-economic objectives have been repeated in section 12(A). This can only have been as a result of the legislature's intention to deliberately delineate the scope of public interest-considerations to ensure that an evaluation of a merger on public grounds is not a broad, general and open-ended inquiry, but rather a narrow and merger specific evaluation.

Overview of Public-Interest Considerations in respect of Case Law: First Round of Major Developments

This paper does not address the Competition Authorities' initial merger-control investigations and decisions, namely those from 2000 until 2010, which only dealt cautiously, if at all, with public interest considerations (i.e., the 'first phase').

From approximately 2010, the Competition Authorities as well as third party interveners brought public interest considerations in merger control sharply into light.

The cases analysed in detail below (namely from 2010 to 2014) specifically address the scope and development of the approach to the Competition Act's public-interest provisions in merger control proceedings.

Momentum/Metropolitan

[9] The Competition Tribunal confirmed that the list of public interest grounds contained in section 12A(3) of the Competition Act is not an open ended enquiry but is limited to the four specified factors. In this regard see Walmart Stores Inc and Massmart Holdings Limited Case No: 73/LM/Dec10 at para [30].

The Tribunal's analysis of the *Momentum/Metropolitan* merger[10] is often viewed as the starting point of the rise in public-interest considerations in merger proceedings. In this matter, the Tribunal was faced with the proposed merger of two financial services firms. The merger raised no competition concerns, but did result in the anticipated loss of 1,000 jobs in the country.

NEHAWU, a South African trade union representing about 6% of the potentially affected employees, intervened in the merger proceedings and sought a prohibition of the merger, and alternatively, advocating for a conditional approval requiring zero job losses, on the ground that the anticipated loss of employment was a "substantial" public-interest ground under the applicable merger provision. NEHAWU argued that the merging parties had failed properly to justify the need for any job losses whatsoever, and that they had not substantiated their proposed retrenchment figure of 1,000 jobs.[11]

The merging parties had made an initial proposal to the Competition Commission to limit the number of merger-related job losses to 1,000 in the first three years following the implementation of the merger and to provide support and training to employees together with redeployment wherever possible. In spite of the facts that the Competition Commission had accepted these undertakings and that the third-party complainant trade union represented only a small fraction of the workforce, the Competition Tribunal was willing to address extensively the regulation of labour on the basis that it was in the public interest to do so, notably as part of its merger investigation.

The Tribunal *upheld* NEHAWU's arguments and approved the merger only conditionally, subject to the undertaking that, with the exception of senior managers, no merger-related retrenchments were to take place for a period of two years following closing.[12] It also rejected

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[10] Metropolitan Holdings Limited and Momentum Group Limited Case No: 41/LM/Jul10 ("Metropolitan").

[11] Metropolitan at para [63].

[12] The relevant condition reads, at para [64]:

> "*1. MMI Holdings, the merged entity, shall ensure that there are no retrenchments in South Africa resulting from the merger for a period of 2 (two) years from the effective date of the proposed transaction.*
> *2. The condition in 1 shall not apply to "senior management" as set out in the table on page 242 of the record and defined in Annexure J: Maximum number of potential retrenchments in respect of skilled employees of the combined merged entity": Level: Senior Management to Metropolitan's supplementary documentation filed at the Tribunal on 01 October 2010.*
> *3. Metropolitan and Momentum must circulate the condition in 1 and 2 above to all their employees within 7 days of the date of this order."*

the merging parties' proposal around 're-skilling' and redeployment and held that such "soft" initiatives are largely ineffective in addressing redundancy concerns.[13]

Kansai Paint / Freeworld Coatings[14]

This matter involved the hostile takeover by Kansai (a coatings manufacturer) of Freeworld (a manufacturer and distributor of decorative and performance coatings). The Department of Trade and Industry (DTI) made a number of submissions to the Commission in respect of the transaction. In particular, it argued that the takeover constituted a direct threat to the South African Government's so-called 'localisation initiative'[15], since Freeworld was the only local manufacturer of automotive coatings supplying to the domestic automotive industries. The DTI also raised concerns regarding the effect of the takeover on employment levels, Black Economic Empowerment ("BEE") considerations,[16] and the impact of the takeover on innovation markets and foreign direct investment.

The Competition Commission approved the takeover conditionally, noting that, while the takeover gave rise to absolutely *no* competition concerns, it required a number of wide-ranging welfare provisions, including a prohibition on merger-related retrenchments for a period of three years; a condition ordering Kansai to divest Freeworld's entire automotive coatings business; a condition that Kansai continue to manufacture decorative coatings for 10 years and invest in research and development with respect thereto; and order forcing Kansai to implement a BEE proposal within two years of the takeover. Finally, the Commission conditioned its approval on Kansai establishing an automotive coatings manufacturing facility in South Africa within five years of the takeover.

Kansai, dissatisfied with the stringent and wide-raging divestiture conditions imposed, referred the matter to the Competition Tribunal for consideration. The DTI applied for formal intervention in the proceedings under Section 18 of the Competition Act, although subsequently withdrew its application when the Competition Commission undertook to present its concerns to

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13 Metropolitan at para [102]

14 Kansai Paint Co. Ltd. and Freeworld Coatings Ltd. Case No: 53/AM/Jul11.

15 The localisation initiative was driven by the Department of Trade and Industry as part of a policy to promote domestic investment and includes the prioritisation of procuring or sourcing from local suppliers.

16 Black Economic Empowerment (BEE) is a policy to address and promote historically disadvantaged persons in South Africa.

the Competition Tribunal. Thereafter, the parties entered into negotiations – the matter was ultimately settled.[17]

Wal-Mart/Massmart

Perhaps the seminal case to date pertaining to the public-interest criteria in merger proceedings in South Africa, and undoubtedly the most politically charged, has been the merger between Massmart Holdings Limited and Wal-Mart Stores Inc.[18] The review proceedings involved the intervention of nine parties – five trade unions ("SACCAWU", "COSATU", "FAWU", "NUMSA", and "SACTWU"), the South African Small Medium and Micro Enterprises Forum ("SMMEF"), and three government ministries (the DTI; the Minister of Agriculture Forestry and Fisheries ("DAFF"); and the Minister of Economic Development). It bears emphasising that the Competition Commission originally proposed that the merger be *unconditionally* approved given that it did not give rise to any competition concerns.

In the first instance, the intervening parties sought, *sotto voce*, to have the merger prohibited outright. Their primary argument pertained to the effect the merger would have on imports into South Africa, and the concern that the merger would cause domestic procurement to move away from local producers towards foreign low-cost producers located in Asia. This shifting of sourcing, they argued, would result in employment losses, have a negative effect on small and medium sized South African businesses, and result in the stifling of domestic industries overall.

Having received extensive submissions on the purported public-interest theories of harm, the Competition Tribunal approved the merger subject to various conditions, including the establishment of a procurement fund to assist local suppliers. Notwithstanding the submissions of the nine intervening parties, the Tribunal was at pains to emphasise that it was only concerned with merger-specific considerations, warning valiantly that "*[o]ur 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*

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[17] In respect of public interest conditions, the Competition Tribunal stated that "*conditions relating to merger related public interest concerns such as employment, the development of local manufacturing with concomitant research and development were agreed between the Commission and the merging parties and were not the subject of these consideration proceedings*"; Kansai Paint Co. Ltd. and Freeworld Coatings Ltd. Case No: 53/AM/Jul11 at 36.

[18] See, W Boshoff et al "The Economics of Public Interest Provisions in South African Competition Policy" (2012), 6th Annual Conference on Competition Law, Economics and Policy, Johannesburg, accessible at www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf.

transaction."[19] The Tribunal issued a further antitrust-centric caution, noting that "*we step carefully into shop floor issues lest we forget our purpose as a competition regulator*."

The three affected ministries, dissatisfied with the outcome before the Tribunal, took the matter on appeal to the Competition Appeal Court. The Competition Appeal Court approved the merger, but with a significant twist: it held that the transaction gave rise to *significant* public-interest concerns that ought to have been addressed in the Tribunal's approval below. The appellate court held as follows:

> *"[T]he introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized businesses in particular*."[20]

As a result, the Competition Appeal Court partly upheld and partly supplemented and modified the conditions imposed by the Tribunal. In doing so, it sent a clear message that the Competition Authorities take their section 12A duty to weigh the public interest very seriously:

> "*Manifestly, competition law cannot be a substitute for industrial or trade policy; hence this court cannot construct a holistic policy to address the challenges which are posed by globalisation.* ***But the public interest concerns set out in s 12A demand that this court gives tangible effect to the legislative ambition***."[21] (our emphasis)

The – precedential – appellate ruling in the *Wal-Mart/Massmart* case represented a well-aimed shot across the bow of 'traditional' competition-law enforcement of merger control. Its effect (beyond that of chastising, if you will, the Competition Authorities' previously circumspect and limited consideration of public-interest factors) has been questioned by many, while many view the Appeal Court outcome as ultimately providing the platform for the unceremonious removal of the previous Commissioner of the Competition Commission.[22]

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[19] Walmart/Massmart, 110/CAC/Jul11, 111/CAC/Jun11 (9 March 2012) at para [32].
[20] Walmart/Massmart, 110/CAC/Jul11, 111/CAC/Jun11 (9 March 2012) at para [158].
[21] Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another 110/CAC/Jul11, 111/CAC/Jun11, p. 97 para [154].
[22] See in this regard http://www.bdlive.co.za/opinion/columnists/2013/10/21/thick-end-of-the-wedge-poor-shan-ramburuth (accessed 14 03 2016) article by Peter Bruce in which he states:

Further, it is not apparent what the actual value of the public-interest benefit has been, other than possibly retaining jobs in the relatively short term, yet also discouraging foreign-direct investment ("FDI") and other, domestic corporate efficiency-enhancing transactions that would, under traditional antitrust economics, enhance consumer welfare.[23] The record of the *Wal-Mart/Massmart* matter makes it clear that the balancing exercise between the potential pro-consumer benefits versus the potential short-term impact on public-interest grounds is a highly complex, uncertain and consequently costly exercise.

AFGRI/AgriGroupe merger

In this merger, between AgriGroupe Holdings Limited and AFGRI Ltd[24], the Competition Tribunal approved the acquisition by the international AgriGroupe subject to certain public interest-related conditions, despite the Competition Commission's prior recommendation that the merger be approved unconditionally. The Competition Commission did not foresee the merger to have any deleterious impact on competition – nor, for that matter, on public-interest grounds.

Four government departments (the "Departments") intervened in the merger proceedings before the Competition Tribunal.[25] The Department of Economic Development ("EDD") raised certain 'public interest' concerns on behalf of the Departments, which related to – grain storage, grain trading, infrastructure, AFGRI's tax-related benefits and the value of AFGRI.

Notably, the EDD (which did not, in fact, object to the merger itself), stated that AFGRI's growth was established and funded by the South African Government and that these resources needed to be recovered. Moreover, it was concerned that AFGRI <u>*might*</u> move its head offices to Mauritius to take advantage of a favourable tax regime,[26] thereby causing the South African

"*Ramburuth was insufficiently tough on Walmart during the hearings on its investment in South Africa a few years ago, and in the process he made a fool of Patel (under whose ministry the Competition Commission falls), who wanted Walmart's acquisition of Massmart to fail.*"

[23] H First and E Fox "Philadelphia National Bank, Globalization, and the Public Interest" (2015) Antitrust Law Journal Vol 80 at 337.

[24] AgriGroupe Holdings (Pty) Ltd and AFGRI Ltd Case no: 017939.

[25] There were also an additional three parties including a 'farmers association', a trade union and a political party.

[26] AgriGroupe Holdings (Pty) Ltd and AFGRI Ltd at para [18].

government tax coffers to suffer potential lost revenues. Although the EDD did raise additional concerns, these two issues are particularly notable, as they are far removed from both competition issues and, indeed, even from concerns based on the list of cognisable public-interest grounds enumerated in section 12A of the Competition Act.

Owing to the lack of nexus to the Competition Act, the Competition Commission correctly refused to consider the three concerns identified above, holding that they fell outside the scope of the public-interest grounds permitted in terms of the Competition Act. This led to the subsequent intervention by the other Departments named above. Their formal involvement in the merger proceedings before the Competition Tribunal (which is ultimately responsible for approving large mergers culminated in the merging parties' concluding a *de facto* settlement agreement with *inter alia*, the Department (the "Agreement"). The Agreement unsurprisingly included undertakings relating to the EDD's three originally identified concerns.[27] Although the conditions were ultimately imposed by consensus, the "consent decree"-like nature of the Agreement does not negate the significant risk posed by the Departments' interventionist approach to merger control. The EDD – which is, notably, intimately familiar with the role, duties and functions of the Competition Authorities – sent an arguably disconcerting message to parties seeking to invest in South Africa by seeking to have the Competition Authorities address concerns wholly unrelated to competition-law or permissible public-interest issues (as specified in the Competition Act), in the first place.

AgriGroupe further highlights what can only be termed the inconsistent and unclear *legal* approach that the Competition Authorities take to public-interest considerations, largely as a *political* result of the liberal policy approach to interventionism on such grounds by the Departments. In this regard, we note that the *AgriGroupe* parties' Agreement was made a condition of the merger with the Competition Tribunal noting that it "***broadly***" addresses the public-interest grounds brought to the fore during the proceedings – a remark which, this paper submits, obliterates the requirement that the Competition Authorities should only be concerned with the '***merger-specific' impact*** that a transaction may have on the *enumerated* public-interest grounds listed in section 12A(3) of the Competition Act. Arguably, remedies addressing broader policy objectives – in lieu of competition-law concerns – and which are not merger-specific, should be disregarded and in the words of one antitrust economist, "*may not only be unfair, but*

[27] One of the conditions included in the agreement was an undertaking by AFGRI not to move its head quarters to outside of South Africa for a specified period (four years).

risk other unintended distortions"[28]. This is particularly acute in cases like *AgriGroupe*, where the Competition Commission may conclude (as it did here) that the concerns raised by the EDD are *unlikely* to materialise, thereby implying that the legislation's 'merger specificity' requirement is 'specific' in name only and has effectively been deprived of all actual legal meaning that could be of use to antitrust counsel in advising their clients on likely outcomes. In short, the public-interest concerns have, since *AgriGroupe* become broader and more open-ended than the legislation would indicate or its precedential history had shown prior to the Appeal Court's ruling.

Lastly, while the Competition Commission had concluded in *AgriGroupe* that the merger was pro-competitive and would boost GDP growth – which would in turn promote employment opportunities – the Competition Tribunal held that the Commission had failed to consider the short-term impact on employment, should AFGRI move its head office. Based on this macro-economically questionable focus and the subsequent overall conclusion of the investigation, it appears that South African Competition Authorities are now largely focused on the impact on *specific employees*, as opposed to *employment in general*.

Accordingly, even if merging parties can satisfactorily demonstrate that the proposed merger will lead to an increase in employment in the long term (and therefore no negative impact on public-interest grounds relating to employment), the Competition Tribunal's conditional approval in this case suggests that such an outcome is not necessarily sufficient to avoid employment-related conditions being imposed on a merger in order to address the potential impact of the merger on individual employees in the short term, particularly where intervention has occurred.

Telkom/BCX

In the *Telkom SA SOC Limited/Business Connection Group*[29] merger (approved in 2015), the Competition Tribunal imposed a condition prohibiting merger-related job retrenchments above a permitted maximum of 60 employees over a three-year period. This condition was imposed *despite* the Competition Commission acknowledging that the relevant employees were considered highly skilled employees and constituted less than 1% of Telkom's employees.

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[28] P Smith "Public Interest Factors in African Competition Policy" *The African and Middle Eastern Antitrust Review* 2014 at 2 (wwww.globalcompetitionreview.com).

[29] Telkom SA SOC Limited/ and Business Connection Group and Dimension Data (Pty) Ltd Case No: LM065Aug14.

The moratorium on retrenchments of skilled employees seems at odds with the very justification of "protecting employees". There do not appear to be the same concerns with respect to skilled employees as in respect of employees who are unskilled and, therefore, unlikely (at least as far as the statistics are concerned) to be reskilled or promptly find alternate employment post-merger.

Interestingly, in terms of the Draft Guidelines, discussed below, the Competition Commission will only consider the impact on employment to be "substantial" if a large number of unskilled / semi-skilled employees are retrenched and who have no short-term prospects for re-employment.[30]

Interventionism in merger control

While interventionism no doubt has proven its place in merger control, for better or for worse, there is an inherent risk that the motivation for intervention is to achieve ulterior motives, entirely unrelated to actual competition law and underlying economics. This may lead to increased costs for merging parties, without ever achieving the purported actual antitrust goal of protecting consumer welfare.

This is particularly true when taking into account the impact that interventionism can have on the ***timing*** of a merger. The likely interveners (usually state ministries, trade unions or interest groups, including the Department of Economic Development (EDD) Minister Patel) are well aware of the negotiating power they hold over the parties by virtue of even the threat of unexpected (and possibly unmerited) intervention on public-interest grounds, especially in a suspensory merger-control jurisdiction like South Africa. The Competition Authorities must, therefore, guard against third parties using the intervention procedure in merger control as a means of negotiating leverage on extraneous issues, wielded by would-be interveners against merging parties. This is particularly relevant when interventionism is based purely on public-interest grounds. By permitting incessant intervention in mergers which are in fact pro-competitive, the Authorities jeopardise the fundamental objectives of sound merger control – a concern of which the Competition Tribunal is alive. In this regard, the former Chairman of the Competition Tribunal, David Lewis, stated that:

> "*As the Commission's investigatory prowess has improved, the utility of permissive intervention has decreased and its dangers have increased concomitantly. The danger is not so much that interveners, particularly those who are competitors, will provide self-interested information and*

[30] Draft Guidelines, at para [8.2.2.3]

> *analyses, but rather that they will use intervention as a mechanism for delaying and obstructing transactions in which time is often extremely costly. Recent years have been marked by interventions that have not contributed an iota of useful insight to the adjudicators, but have simply served to harass their competitors."*[31] (own emphasis)

In spite of the fact that the South African Competition Authorities have become more sophisticated, skilled and experienced, there has been a material increase in intervention by various Ministries who seek to play an increasingly significant role in merger-control proceedings, in order to leverage their own policy agenda into antitrust proceedings, at will.

Procedure: The Minister's Powers to Intervene in terms of the Competition Act

As mentioned above, the Minister has, in terms of the Competition Act, been granted the right to intervene in merger proceedings based on the *specified* public-interest grounds contained in section 12(A). In this regard, it is expressly stated that the Minister may intervene as a "*Party*" before the Competition Commission and / or the Competition Tribunal.[32]

This explicit right to intervene as a distinct party to the process indicates the South African legislature's intention that the Competition Authorities act independently of the Minister. Furthermore, Section 20 of the Competition Act obligates the Competition Commission to maintain its independence, act impartially and perform its duties without "*fear, favour or prejudice*".

The Competition Act goes on to provide for a number of tasks for which the Minister is, in conjunction with the Competition Commission, responsible.[33] We submit that none of the enumerated tasks show that the legislature contemplated the current level of Ministerial influence on merger proceedings, particularly in relation to large mergers, often involving foreign merging parties.

Indeed, Minister Patel's recent influence on merger control has been dramatic. Firstly, he has made no secret of his desire to use competition policy as a tool to advance industrial and socio-economic objectives.

The Economic Development Departments' Strategic Plan of 2011/12-2015/16 (the "Strategic Plan"), indicates that through the various regulatory bodies, including notably the Competition

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[31] D Lewis, *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2012), Edward Elgar Publishing Limited and International Development Research Centre (eds.), 90.

[32] Section 18(1) of the Competition Act. The Competition Act although caters for certain other persons to intervene such as interested third parties as well as trade unions.

[33] See Sections 21 to 25 of the South African Competition Act, 89 of 1998.

Authorities, the EDD will maintain "*oversight*" of these institutions in order to achieve certain "*government objectives*"[34]. The Strategic Plan confirms not only Minister Patel's economic ambitions, but also that the EDD is to have 'oversight' of the Competition Authorities. Minister Patel's intervention in merger proceedings, particularly prior to the Competition Commission finalising its recommendations to the Competition Tribunal, appears to amount to more than simply an "oversight".

It is submitted that, when one considers the fundamental interests of the affected parties in merger-control proceedings (namely timing, costs and certainty), that the transacting parties are at their weakest immediately after a merger filing, given that they are subject not only to established competition-law principles grounded in law and economics, but find themselves also at the mercy of the industrial policy *du jour*, a non-antitrust authority intervening on BEE grounds, or other third-party interveners seeking to extract their "toll" from a possible approval of the proposed transaction. Interestingly, it is specifically at this juncture that most public-interest related concessions have recently been "obtained" through the conditional merger approval process. Whether these conditions are indeed in the public's interest is not explored in detail here – and is often subject to being tested by time – as this would inevitably involve an analysis of the long term benefit to public interest as a result of a pro-competitive merger versus short-term public-interest goals. What does appear to be a feature of the recent period of increased ministerial interventionism, however, is the clear intent to influence merger control to promote distinct industrial and socio-economic policies. A look at the *Coca-Cola/SAB* merger, currently being considered by the South African Competition Authorities as well as the *SABMiller/Anheuser-Busch InBev* transaction, indicates that the "second round" of cases under review in this paper is beset with even greater uncertainty.

Second Round of Cases: *Quo Vadis*?

South Africa's merger control appears to be entering a 'second phase', in which the extent of ministerial intervention has escalated. Crucially, the nature of the intervention has evolved such that there is now, commonly, no standardised public-interest test, in the sense of a requirement to show that a merger did not have a specific and merger related impact. Rather, there appears

[34] See the foreword of the Economic Development Departments' Strategic Plan of 2011/12-2015/16 as well as page 22 and 40. Accessible at: http://www.economic.gov.za/communications/strategic-plans.

broader discretion in the hands of the Minister, as to the nature and extent of "conditions" to be imposed.

Coca-Cola/SAB

In the long-running *Coca-Cola* case, three parties (SAB Miller plc ("SAB"), the Gutsche Family Investments Proprietary Limited and the Coca–Cola Company) are seeking to combine their bottling operations of their non-alcoholic beverages businesses in South Africa under a single entity to be called Coca-Cola Beverages South Africa Proprietary Limited ("Coca-Cola Beverages SA").

The merger, announced on 27 November 2014, has yet to clear the South African antitrust regulators' review. It has, pertinently here, led to a vast amount of speculation and public debate, particularly in relation to the anticipated intervention by third parties based on public-interest grounds. Although no final decision has been made, we submit that the proposed transaction does not appear to raise any concerns in terms of what most antitrust practitioners would deem to be a 'standard' competition-law assessment.

The Competition Commission has, on the apparent 'advice' of Minister Patel, recommended that the merger be approved subject to a number of conditions proposed to address certain concerns cloaked in public-interest guise[35]. The Commission's recommended conditions focus on the negative impact that the merger may have on *inter alia*:

- domestic suppliers;
- employment;
- small businesses; and
- Broad-Based Black Economic Empowerment ("B-BBEE").

The merging parties have already agreed to a number of public-interest conditions in order to assuage the Commission's concerns. These include an undertaking to purchase certain products (such as tin cans, glass, bottles, packaging, crates and sugar) from local suppliers, subject to certain terms and conditions[36].

To address the impact on employment, the merging parties have undertaken not to retrench employees as a result of the merger, except for a certain category of identified employees, which

[35] See http://www.bdlive.co.za/business/trade/2016/01/20/patel-sets-tough-terms-for-bottling-merger-to-keep-appletiser-sa-made (accessed 01-03-2015).
[36] *i.e.* terms which are not less favourable than the current terms.

shall not exceed 250 in number. Furthermore, the merging parties have made a commitment to implement appropriate measures to mitigate the consequences of any possible job losses[37].

In relation to small businesses, the parties have committed to invest R650 million to support the development of black-owned retailers, small suppliers and developing farmers[38].

Finally, to mitigate against the expressed B-BBEE concerns, the parties have undertaken to increase Black ownership interest in Coca-Cola Beverages SA and to divest a certain percentage of shareholding in *Appletiser* South Africa to a black-owned company or consortium to operate as an active industrial partner to the merged entity[39].

The rational link and proportionality between the public-interest grounds set out in section 12A(3) of the Competition Act and the recommended conditions is difficult to evaluate without further explanation from the Competition Commission[40]. This is particularly the case when considering the B-BBEE related conditions. This entirely points towards the Commission and Minister Patel's desire to use merger control as a means to address broader socio-economic issues, outside of the scope of the factors listed in Section 12A(3). This paper submits that these broader objectives should be left to other governmental departments, not the Competition Authorities.

Minister Patel's intervention in recent merger proceedings is not lost on South African policy-makers. For instance, Patel's impact on merger control in South Africa has not escaped criticism from the former Chairman of the Competition Tribunal, David Lewis, who described Minister Patel as the Department's "*Highwayman*"[41]. Likewise, Michael Cardo, the Democratic

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[37] The mitigating measures include, among others, funding to re-skill affected employees, counselling and guidance on applying for alternative employment and re-employment of some of the affected employees with the business of the merged entity.

[38] This R650 million is divided into; R500 million to develop downstream distribution and retail aspects of Coca Cola Beverages SA as well as black owned retailers of Coca Cola Beverages SA, R150 million fund to support and train historically disadvantaged developing farmers and small suppliers.

[39] A summary of the Competition Commission's recommended conditions can be found in the Competition Commission's media release on 17 December 2015 at http://www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-recommends-conditional-approval-of-merger-creating-Coca-Cola-Beverages-Africa.pdf.

[40] In this regard, the hearing before the Competition Tribunal has not yet taken place. It is not clear, at this stage, whether the alleged harm, which the recommended conditions seek to address, is indeed merger specific.

[41] D Lewis, *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* (2012), Edward Elgar Publishing Limited and International Development Research Centre (eds.), 275.

Alliance's[42] spokesperson on economic development, has called on the Competition Authorities to insist that Minister Patel respect the Competition Commission's independence. Mr. Cardo based his call for restraint on the negative impact on foreign direct investment resulting from the Minister's socio-economic interventionist strategy.[43]

In spite of such calls for circumspection, Minister Patel recently stated that the *Wal-Mart/Massmart* merger will be the "*benchmark*" as to how multinational corporations will be treated in South Africa.[44]

It is, therefore, no coincidence that the parties to the *SABMiller/Anheuser-Busch InBev* deal have engaged *directly* with Minister Patel in an attempt to pre-empt, negotiate and placate the EDD. This behind-the-scenes negotiation on non-competition merits is occurring despite the fact that the Competition Commission has yet to make recommendations to the Competition Tribunal regarding the transaction.

Backroom deals do not benefit legal clarity, enforcement strategy, nor commercial predictability: we submit that, if the parties to this particular merger did in fact anticipate that there may well be a negative merger-specific impact on public-interest grounds listed in Section 12A(3) of the Competition Act, then they have the full opportunity to address any such issues in a transparent and upfront manner with the Competition Commission, who is in a position to make appropriate recommendations to the Competition Tribunal *under the law*. This was certainly in keeping with the manner in which these issues were addressed in the *Wal-Mart/Massmart* hearings.

It now appears that the recent cases and conditions imposed during the second phase have resulted in the merging parties in the *Inbev* matter engaging Minister Patel *prior to* the Competition Commission's issuance of its recommendations. The new reality resembles that of dealing with MOFCOM on antitrust issues: the parties simply do not know what to expect, whether to address actual antitrust concerns or unrelated domestic policy issues. Regardless, ongoing discussions with the EDD behind 'closed doors' does not foster a merger-control regime that is objective and transparent, a fact also recognised by First and Fox:

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[42] The Democratic Alliance is the official opposition to the current ruling party, the African National Congress.

[43] http://www.bdlive.co.za/opinion/2016/03/04/merger-regulator-must-tell-patel-to-butt-out (accessed 04-03-2016)

[44] Minister Patel made these comments during the Fourth BRICS International Competition Conference in Durban in November 2015.

"*having these proceedings occur in a competition tribunal rather than a Minister's office made an important difference in the way the arguments were framed and presented, and increased the transparency of the process*"[45].

State of Play: The Need for "harmonisation" and the Draft Guidelines

In the 2013-2014 period, 10 of 22 mergers were approved by the South African Competition Authorities subject to conditions relating to public-interest grounds. In the 2014-2015 period, the number of conditionally approved mergers relating to public interest grounds increased to 39 out of 44[46]. The increase in the imposition of public interest-based conditions has thus risen *almost two-fold from 45% to 87%,* merely over the course of one calendar year.

The above trend should be considered in context of a recent report by the International Centre for Trade and Sustainable Development ("ICTSD Report")[47] indicates that there has been an increase of over 600% in the number of jurisdictions with competition law enforcement since the 1990's. In particular, a number of African jurisdictions have recently implemented antitrust laws and in line with the trend of developing countries, have elected to include public interest grounds in their respective merger-control regimes.

The ICTSD Report found that, currently, over 30% of multinationals need to notify mergers in three or more countries. It further indicates that there is a need for harmonisation between antitrust agencies to ensure consistent decisions and approaches to merger control. In this regard, the ICTSD Report suggests "*convergence towards international consensus on the objectives and basic principles of competition law needs to continue*".

The above findings and suggestions by the ICTSD Report are particularly relevant when dealing with the public-interest concerns in South African merger control highlighted in this paper: the Competition Commission has acknowledged that weighing up public-interest concerns against pure competition-law factors, is challenging, as it requires weighing the positive long-term efficiency effects that a pro-competitive merger may have against the more nebulous public-interest considerations. It is submitted that this challenge is made all the more difficult as a result

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[45] H First and E Fox "Philadelphia National Bank, Globalization, and the Public Interest" (2015) Antitrust Law Journal Vol 80 at 340.

[46] See Competition Commission Annual Report 2014/2015 www.compcom.co.za/ http://www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-ANNUAL-REPORT-2015.pdf at p36-45 (accessed 10 03 2016).

[47] A Capobianco, J Davies and S Ennis "The E15 Initiative" *Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement* January 2016 at IV.

of parties engaging the EDD prior to the Competition Commission making recommendations and ensuring that any third-party (including Ministerial) intervention is done so formally (i.e. by submitting pleadings which sets out the theory of harm which is supported by evidence to show that the alleged harm is both substantial and merger specific).

The movement to develop 'competition policy' (largely influenced by Minister Patel) to advance 'industrial policy', will do very little to achieve the certainty which the antitrust community requires. Further to the concerns raised by the former Chairperson of the Competition Tribunal[48] and the official opposition political party[49], members of the private sector have also weighed in on the debate as to the benefits of the Competition Authorities approach to public interest consideration in merger control. In this regard, the following recent comments by a South African Bank's Chief Strategist and Economist are telling:

> *"The competition authorities, by their rulings on job retention, have made the economy less efficient and competitive than it could be. By setting these precedents, it also makes efficiency enhancing investments and acquisitions less likely and so the efficient use of capital and labour less likely.*
>
> *There is a public interest in a more competitive and efficient market for goods and services and for labour. There is only a private interest in avoiding particular retrenchments. Competition policy misuses the public interest in its focus on employment. The public interest is in employment growth and a more productive labour force to which mergers and acquisitions can make a very important contribution."*50

In an effort to promote further certainty as to the evaluation of public interest considerations by the Competition Commission, Draft Guidelines have been published and are expected to be finalised shortly. The Draft Guidelines, however, exhibit significant shortcomings in our view.

They are couched in such general and broad terms that their implementation abandons predictability and affords the Competition Commission the broadest discretion possible; moreover, as mentioned above, they are non-binding. The Competition Commission is entitled to consider a wide swath of public-interest considerations such as "*public policy*" goals,

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48 David Lewis.

49 See Michael Cardo's (a Democratic Alliance- the official opposition's shadow minister in the presidency) comments above.

50 See at http://politicsweb.co.za/opinion/the-compcom-and-the-labour-market, comments by Brian Kantor Chief Strategist and Economist, Investec Wealth and Investment.

"*sustainability*", "*social projects*", as well as any "*constitutionally enshrined rights*".[51] Furthermore, the Draft Guidelines do not expressly limit the scope of the public interest considerations to merger-specific impact. When a merger does not have a merger-specific impact on a public interest, the inquiry should stop there.[52]

Achieving any level of certainty via the Draft Guidelines appears near impossible, particularly when one considers the Competition Commission's 'Background Note to the Public Interest Guidelines' which states that:

> "*Firstly, competition policy needed to be aligned with industrial and trade policy in order to synchronise varying domestic and international development tools.*
>
> *Secondly, competition policy needed to be aligned with government policies that aimed to redress economic distortions, social inequalities, small and medium business development and the spread of ownership. The alignment of competition policy to these objectives was seen as crucial for its success as a complete neglect of such objectives would result in negative perceptions towards competition policy.*"[53]

The Draft Guidelines, drafted in a broad and discretionary manner, also permit the Competition Commission the ability to take "*industrial*" and "*government*" policies into account. These are patently wide-ranging and flexible.

Accordingly, the Draft Guidelines are, somewhat ironically, given that they are intended to provide merging parties and practitioners with guidance and clarity as to how public interest considerations will be approached from the Competition Authorities perspective, equivocal.

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[51] Draft Guidelines, at para [7.2.1.1] and [7.2.3.1].

[52] In terms of the Guidelines, merging parties are required to disclose to the Competition Commission possible retrenchments. These include both merger related retrenchments as well as retrenchments for operational reasons. The latter is an onerous burden on merging parties as they may not always be in a position to accurately calculate the number of retrenchments for operation reasons.
Importantly, the Draft Guidelines have also placed a reverse onus on merging parties which is unjustified. In this regard, the onus will be on the merging parties to show that any retrenchments which took place during the period of pre-merger discussions until one year post merger approval are not merger related.(see Paragraphs 8.2.2.3-8.2.2.4 of the Draft Guidelines).

[53] http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Background-Note-to-Public-Interest-Guideline-210115.pdf at 6 (accessed 10 03 2016).

Conclusion

Interventionism in merger control has an impact on the timing and costs of concluding a transaction. This is of considerable importance, particularly in relation to multinational deals which require regulatory approval in multiple jurisdictions.

Although the majority of large mergers in South Africa are investigated and approved in within the specified time periods[54], Minister Patel's sporadic intervention in mergers, particularly multinational deals, in an apparent effort to pursue industrial policy objectives poses a risk to the efficacy of the South African merger control regime. This may deter foreign direct investment.

Following an evaluation of the public interest conditions imposed in the *Wal-Mart/Massmart* merger in South Africa, the following was said:

> "*the combination of political bargaining and the competition agencies willingness' to impose conditions on mergers they would not prohibit outright heightens the concern that the merger review process will effectively impose a penalty tax on merger transactions, particularly involving large foreign companies*"[55]

First and Fox accepted that the "*pervasive presence*" of public interest considerations in merger control has become a reality in many jurisdictions and that the only way to fully grapple with the impact of public interest considerations is through the "*norms of transparency and proportionality*"[56]. Recent case examples quoted in this paper demonstrate that the EDD's influence in merger proceedings have jeopardised the norms of "*transparency and proportionality*".

Two of the most publicised merger transactions, currently being investigated by the Competition Authorities (namely *Coca-Cola* and *In-Bev*), serve as a good illustration of the impact that Minister Patel has had on merger proceedings in South Africa.

> In relation to the *Coca-Cola* deal, commitments from the merging parties appear to go beyond the specified public interest grounds listed in Section 12A(3) of the Competition Act.
>
> While in the *In-Bev* deal, it is difficult to gauge, at this stage, exactly what kind of commitments are being sought. The mere fact that the merging parties have sought to

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[54] See http://www.compcom.co.za/wp-content/uploads/2014/09/COMPETITION-COMMISSION-ANNUAL-REPORT-2015.pdf at 39 (accessed 10 03 2016).

[55] H First and E Fox "Philadelphia National Bank, Globalization, and the Public Interest" at 347.

[56] H First and E Fox "Philadelphia National Bank, Globalization, and the Public Interest" at 351.

engage the Minister, behind “closed doors”, prior to the Competition Commission’s recommendations, further undermines the recent efforts made by the South African Competition Authorities to at least attempt to promote certainty in merger control, via the Draft Guidelines.

When advising clients who are contemplating notifying multinational transactions in South Africa, antitrust practitioners should take cognisance of the impact that Minister Patel may have in relation to the timing of a merger - which may be approved subject to conditions, despite not raising any pure competition law concerns and despite not necessarily having a negative merger specific impact on the public interest grounds.

This may require a nuanced approach to structuring multinational deals and merging firms will inevitably be required, in the interest of time, to be fully prepared to address potential challenges from interveners on public interest grounds. Furthermore, merging firms should be prepared to consider possible conditions in anticipation of such third party intervention, particularly from Minister Patel, to address potential public interest issues which may arise, even if the public interest concerns are not strictly merger specific.