A Case for Public Interest Considerations in Merger Control Analysis with Reference to Competition Law Enforcement in Developing Countries: The Example of South Africa

UWADI Enyinnaya C.

Introduction

Generally, competition law regulation entails regulating market behavior in such a way to promote and reinforce free and fair competition by all market participants, in order to prevent orchestrated market distortions by dominant firms. With an American origin, competition law has over time been adopted by numerous countries across the globe in their bid to address market distortions in their economies. More recently, emerging economies have also introduced competition laws into their legal and economic systems, as they increasingly move from command to market economies.[1] The challenges of legal transplant have compelled these emerging markets to adapt competition law and its implementation to suit local realities by introducing some non-competition related considerations in their competition regime, especially in merger control.

Merger control is a very important facet of competition law regulation where diverse policy objectives stand out conspicuously,[2] especially in emerging markets. As a result of the potential impact of mergers on competition, and the ripple effect on economic development, law makers subjected the process to review by competition authorities through merger control provisions, in order to maintain competitive markets, and equally for the protection of public interest. The impact of mergers on the economy and the need to protect competition led to the development of the substantial lessening of competition test (SLC). On the other hand, the socio-economic and socio-political impact of mergers on humans led to the development of the public interest considerations (PIC) test in merger review.

This approach of competition regulation by emerging economies has over time been met with several criticisms, most of which stem from the idea that a competition regime should strictly promote competition ideals and ought not to be used as a vehicle for addressing non-competition concerns. From the prism of developed countries, the above criticism appears valid. However, it failed to recognize some of the challenges faced by emerging markets that adopted competition regimes with the hope of addressing those challenges.

This article is written in defense of the diverse policy objectives of competition regimes in relation to merger control in the developing countries of Africa. While appreciating the criticisms, the essay uses South Africa as an example to explain the historical context and justify such a regime. It reviews the extent of PIC in line with the South African merger control regime, analyzes the various arguments for and against the inclusion of PICs in merger control analysis and comes to the conclusion that PICs ought to be considered in developing countries' merger control as these considerations play a very key role in stabilizing the fragile economy of emerging markets. This essay equally suggests that clear

[1] Eleanor Fox and Mor Bakhoum, *Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa* (OUP 2019).

[2] Azza Raslan, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' (2016) 4 World Competition 39, Kluwer Law International, 625.

procedures for analyzing the PICs should be adopted and put to paper in order to protect the process from being subjected to regulatory arbitrariness and abuse.

1. Mergers and Public Interest?

1.1. Why Merge?

In the corporate world, managers are always on the look-out for opportunities to expand and grow the fortunes of their firms. This may be attributed to the competitive nature of businesses in the globalised world of today, as any firm which refuses to evolve and remains on the same level of output over a period of time may likely run out of business, or lose its customers to other competitors. Some firms adopt the organic route of growth via product innovation and efficient and cost-effective business strategies. Others choose the inorganic route of corporate restructuring which includes mergers, acquisitions and takeovers in order to improve the fortunes of their firms. Of all these routes, recent trends appear to suggest that mergers and acquisitions (M&A) are the most preferred route.[3] For instance, the value of M&A activities in the US for the first three quarters of 2018 is stood at USD 1.3 trillion.[4]

The reason for this is not far-fetched, as most firms are always desirous of merging in order to take advantage of the various gains in merger. Some of the reasons why firms engage in merger activity include the following:

a. Synergy

Simply put, synergy can be explained as the cooperation between more than one firm to produce results which ordinarily would not have been possible to achieve if their individual efforts are aggregated. A merger activity where the combination is geared towards operating, financial and managerial synergies is considered reasonable, because such cooperation will result in the increase of the new firm's pricing power in a particular market as well as its capacity to access new markets. The financial clout of a bigger firm enables it to generate funds more easily, either by loan or via issue of shares, a factor that may be particularly important to undertake large capital projects. Large firms usually have access to a wider pool of funds as such firms may be more creditworthy, due to their ownership of large assets.

Equally, firms merge in a bid to take advantage of synergy in management where for example, a high-performing board of directors replaces a poor-performing one. The expertise and experience of the high-performing board via the adoption of a single management team would ultimately benefit the newly merged entity and will most likely impact its fortune positively.

b. Opportunism

Another reason for mergers is opportunism, which can be explained as taking advantage of an opportunity that presents itself, regardless of any prior planning or strategy. A survey conducted by KPMG in 2015 amongst chief executives of large firms illustrates opportunism

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[3] Deloitte, 'The State of the Deal' (M&A Trends 2019) <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/mergers-acqisitions/us-mergers-acquisitions-trends-2019-report.pdf> accessed 02 June 2019.

[4] ibid.

as the most cited reason for undertaking a business combination.[5] Business decisions involve an element of risk. A successful businessman is not one who only takes calculated risks, but one who also takes advantage of any opportunity which may increase the fortune of his or her business empire. Some of the risks may pay off while others may not. For example, a thriving firm may decide to merge or acquire another firm at an amount which is far lesser than the value of the assets of the target firm, perhaps due to the inefficient management of the target firm or poor business decisions of its board. Another instance is where the board of directors of a thriving firm may decide to take advantage of the dwindling fortunes of another firm by proposing a merger in order to guard against the possibility of the firm being merged with or acquired by a competitor.

Furthermore, another closely related reason which differs slightly from opportunism is reputation, ego or prestige. This reason, which is non-economic related, usually hinges on the desire to build a great business structure in order to boost to prestige of the controlling entity. The motive may or may not be financially related because controlling a larger entity does not automatically lead to a higher stream of income.

c. Diversification and Increased Revenue

One of the top reasons why a firm engages in merger activities is to diversify in terms of the kind of products of services it offers. Equally, firms wish to widen their geographical spread by merging with firms involved in the production of other products and services, or one which carries on business in another location. respectively. Diversification insulates a firm from being vulnerability to geographical or product uncertainties. This equally increases the turnover of the firm positively, as product or geographical diversification may increase the customer base and output, which in turn may open up the firm to more streams of income.

d. Tax Advantages

Tax advantages are one of the considerations in which is not usually made public but is of a key significance in the merger activities. A thriving firm may undertake a merger with a less profitable firm in order to explore the possibility of a reduced tax liability. Equally, two highly profitable firms may decide to merge in order to take advantage of the favourable tax disposition made available to highly performing entities.

Having seen some of the key reasons why firm engage in merger activities in the preceding section, the next segment of this paper will briefly explain the different types of mergers that firm can undertake in order to realize the gains of merger; to wit, horizontal, vertical and conglomerate mergers.

1.2. Types of Merger

First among the different types of merger is known as horizontal merger. This type of merger involves the coming together of two firms at relatively the same level of market participation. For example, a merger between soft drink giants, Coca-Cola and Pepsi, or two computer

[5] KPMG; 'The boom is back: M&A re-emerges as leading growth strategy' available at http://www.kpmgsurvey-ma.com/ Last accessed 23/07/15.; cited in Nnamdi, Dimgba and Akinola, Oluwajoba and Chinedu, Ihenetu-Geoffrey Chibueze and Osinubi, Opeoluwa A and Ogunsanya, Adebola and Onele, Joseph, Law and Practice of Mergers and Acquisition in Nigeria (July 28, 2015). Available at SSRN: https://ssrn.com/abstract=2652362 or http://dx.doi.org/10.2139/ssrn.2652362'

manufacturers, Lenovo and HP. The implication of this form of merger is the elimination of a direct competitor, which will invariably lead to an increase in the market share of the new entity created by the merger activity. This sort of merger usually triggers the searchlight of competition authorities due to the imminent exit of a direct competitor from the market.

The second type of merger is known as vertical merger. This involves the combination of two firms operating at different levels of production in the market. For example, a merger between Ford Motors and Dunlop Tyres, firms operating at different levels of the automobile industry. While the above merger may not *prima facie* raise any competition concern, a closer examination of such a merger may prove otherwise due to the probability of creating an environment for predatory foreclosure and profit squeeze,[6] in order to injure non-integrated competitors, and run them out of business, while maintaining market dominance in both car manufacturing and tyre production. If a product provider acquires a crucial distribution channel (for example, an upstream oil & gas producer acquiring a crucial oil transportation pipeline or a media content provider such as Time Warner acquiring a content distributor such as AT&T), the product provider may use its control of the distribution channel to exclude access to the distribution channel or impose adverse access restrictions on competitor product or content providers who must rely on the same distribution channel. Also, such a merger may likely raise immediate and psychological barriers to the emergence and entry of new competitors into the market.[7]

The last type of merger to be considered is known as conglomerate merger. This involves the combination of two firms or more who operate in different markets and/or geographical location. In this sort of merger, there is usually no common product connecting the two firms either vertically or horizontally. For example, a merger between Nestle, a water bottling company, and Microsoft, a technology company. Just like vertical mergers, conglomerate mergers may appear not to raise any competition issue on the face of it. However, using the example of Nestle and Microsoft above, where a big firm like Microsoft merges with Nestle, the entrance of such a big firm like Microsoft in the water bottling market will affect market behavior. It may equally raise psychological barriers for new entrants into the water bottling market. There is equally the possibility of predatory subsidization in one market (water bottling market) while offsetting the seeming loss in that market with the huge profits from the software market.

Having discussed the various types of mergers, the next section of this paper will examine the legal basis for the regulation of mergers in South Africa as well as some other developing countries.

1.3. Public Interest

There is no generally accepted definition of the term ‘public interest’. It varies from the perspective of the user and equally the context of its usage. From a layman’s point of view, the term can be defined as the welfare or wellbeing of the general public. It could be used to refer to anything which affects the social, economic, political, security, health or rights of the general society. The importance of the public interest cannot be underemphasized in any

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[6] T Ellis, ‘A Survey of the Government Control of Mergers in the United Kingdom’ (1971) Northern Ireland Legal Quarterly, 22, 251-299 and 459-497, at 465.

[7] Nnamdi Dimgba ‘The Regulation of Competition through Merger Control: The Case under the Investment and Securities Act 2007’ (Paper presented at the Nigerian Bar Association Section on Business Law Conference, Abuja, April 16, 2009)

national discourse. That appears to be the reason why most government all over the world make laws and policies to either promote or protect the interest of the public.

However, while it is a given that public interest is a very critical consideration in the governance and lawmaking process of any society, it varies from one society to another. What amounts to the public interest in country A may likely be different in country B, because it could be the policy of one state to place value on something that could mean far less to another state. For instance, there is a wide gulf in the concept of a free press. That concept is key to American democracy and is rarely considered a security threat as it is provided for in the American constitution.[8] The same cannot be said of many developing countries, where one can be charged for sedition and treason for publishing information that does not put the government in good light.[9]

A further example is protectionism which could be the policy of one state, while another state places more value on free trade. Some emerging markets view free trade commitments with skepticism because of the likely inability of their domestic firms to compete evenly with powerful multinational firms. This seeming imbalance could likely result in protectionism being considered as a legitimate public interest worthy of protection in the relevant emerging market as opposed to other regimes where free trade is seen as a public interest. Therefore, a merger of a multinational firm with a domestic firm from an emerging market which may have pro-competitive benefits could be considered to be against the public interest of protectionism in that emerging market, due to the likely inability of other domestic firms in the relevant market to compete effectively with the newly merged entity. This divergence of public interest plays out in the economic plans and developmental agenda and the considerations to be accorded thereto by developing competition regimes, especially as it relates to mergers.

The next section of this article will consider how public interest issues play out in the South African merger regime. South Africa was adopted as the focal point of this essay because, since the adoption of competition law in the country in 1998,[10] it stands out as a model of competition law implementation in developing countries.[11] Its impact is felt regionally within the African continent through emulation and diffusion by learning,[12] as well as internationally via its synergy with other developing countries on the platform of BRICS.[13]

[8] Olivia B Waxman, 'The Freedom of the Press Is Enshrined in the First Amendment—But What That Means Has Changed' (2019) <https://time.com/5580170/first-amendment-press-freedom-history/> accessed June 10 2019.

[9] <https://newsinvestigatorsng.com/opinion-before-buhari-tampers-with-press-freedom-again/> accessed June 10 2019.

[10] Competition Act No 89 <http://www.compcom.co.za/> accessed 23 April 2019.

[11] Azza Raslan, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' (2016) 4 World Competition 39, Kluwer Law International, 625.

[12] Azza A. Raslan, 'Public Policy Considerations in Competition Enforcement: Merger Control in South Africa' (2016) Centre for Law, Economics and Society Research Paper Series 3/2016.

[13] Jim O'Neill, 'Dreaming with BRICs: The Path to 2050' (2005) Global Economics Paper no. 99 http://www.macropolis.org/oriente/BRICS.pdf> accessed 23 April, 2019; Natalya Mosunova, 'Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects' (2017) 4 BRICS L.J. 156.

2. Merger Review under the South African Law

The institutions responsible for the implementation of competition law generally in SA are the Competition Commission (Commission), the Competition Tribunal (Tribunal), and the Competition Appeal Court (CAC) as established under the SA Competition Act.

The Commission is independent of executive and political interference and subject only to the SA constitution and legislations. It is headed by a Commissioner and at least one Deputy Commissioner to be appointed by the Trade and Industry Minister. The enforcement powers of the Commission are wide, encompassing a broad range of responsibilities geared towards the protection of consumers and promotion of a free market.

The Tribunal is composed of the Chairman and not less than three to a maximum of ten other members, appointed by the President. The Tribunal has jurisdiction over any matter that is prohibited under the Competition Act. It equally hears appeal from and reviews the decisions of the Commission.

In a similar vein, the CAC is established under Section 36 of the Act and has a status similar to a High Court in SA. It is composed of three judges appointed by the President from the pool of High Court judges, of whom one of the three appointees is designated as the Judge President. The CAC reviews the decisions of the Tribunal referred to it in terms of the Act. The CAC also entertains appeals arising from the decisions of the Tribunal.

The above three enforcement bodies play key roles independently and interdependently in the course of implementing competition law in SA generally, which includes mergers review.

Section 12A(1) of the Competition Act provides for mergers and prohibits mergers which have the likelihood of reducing or preventing competition unless a greater technological, efficiency, pro-competitive or PIC benefit can be derived from such a merger.[14] Merger review is divided into two stages under the SA competition law; to wit, the competition test and public interest test stages. The Competition Act provides for the prohibition of a merger where the merger will substantially lessen competition (SLC).[15] If a merger fails this test, it will then be reviewed under the PICs to see if there are other pro-competitive gains like technological innovation or efficiency that will make up for the SLC. The merger will be approved if it passes the PIC test.[16] The SLC test involves the assessment of the effect of the proposed merger on competition in the economy generally, and the relevant market in particular, while the PIC test on the other hand involves the assessment and consideration of non-competition concerns like the effect of the merger on employment, national security and social and political stratification.

There is equally a provision in the merger rules for third party intervention which requires the merging parties to notify the relevant registered employees union. The union has a right under the law to participate in the merger review process via making submissions in support or objection to the merger. The union may even be allowed to make presentations before the

[14] See also subsections 2 and 3

[15] Section 12 of the Competition Act no. 89 of 1998.

[16] Although in practice, no merger has been approved for passing only the PIC test, but mergers have been approved for passing the SLC test alone, while conditions were imposed to mitigate the impact on PIC. See Minister of Economic Development & Ors v. Competition Tribunal & Ors, 110/CAC/Jun11.

Competition Tribunal if the decision of the Commission is challenged before the Tribunal.[17] The above provisions and procedures are substantially the same in emerging countries like Nigeria[18] and Kenya.[19]

Hitherto, the SA Competition Act provided four areas of PIC for the Competition Commission during merger review. These include the effects of the merger on; a particular industrial sector or region; employment; 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. However, under the 2019 amendment of the Act, PIC (which hitherto was a secondary area of assessment in mergers review) became a core area for the Commission's consideration.[20] At the same time, a fifth PIC was added to the existing four under Section 12A(3) -- the 'promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market'.[21] Additionally, the amendment clarifies the role of the Commission in considering an existing PIC. The amendment makes clear that the Commission may consider the ability of medium-sized businesses in addition to small businesses or firms controlled by historically disadvantaged persons to effectively enter into or expand within a market.[22]

Furthermore, under the new amendment, three additional factors were added to the previous eight[23] which must be considered by the authorities in deciding whether a proposed merger transaction is to be approved or prohibited; to wit -

> the extent of ownership in other firms in a related market by a party to a merger;[24]
> the extent to which a party to the merger is related to other firms in related markets, including through common members or directors; and[25]
> any other mergers engaged in by a party to a merger for a period to be stipulated by the Commission.[26]

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[17] Raslan, Public Policy Considerations in Competition Enforcement: Merger Control in South Africa (n 12). <https://www.ucl.ac.uk/cles/sites/cles/files/cles-3-2016.pdf> accessed 08 April 2019.

[18] Section 121of the Investment and Securities Act 2007.

[19] Section 46 of the Competition Act No 12 of 2010.

[20] This is in reaction to the *Wal-Mart and Massmart case (73/LM/Dec10) [2011] ZACT 41*; See also Leana Engelbrecht, '2019: The Future of Competition Law Reform in South Africa is Now' (Lexology 11 January 2019). <https://www.lexology.com/library/detail.aspx?g=5c36612f-9dfd-42c4-8b33-b21b18b7b99e> accessed 25 July 2019.

[21] Competition Act, s 12A (3)(e).

[22] Section 12A (3) (c).

[23] These are listed in Section 12A (2) of the Act to include the following:

a. the actual and potential level of import competition in the market;
b. the ease of entry into the market, including tariff and regulatory barriers;
c. the level and trends of concentration, and history of collusion, in the market;
d. the degree of countervailing power in the market;
e. the dynamic characteristics of the market, including growth, innovation, and product differentiation;
f. the nature and extent of vertical integration in the market;
g. whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
h. whether the merger will result in the removal of an effective competitor.

[24] Section 12A (2) (h).

[25] Section 12A (2) (i).

[26] Section 12A (2) (j).

The import of the new amendment is that PIC has taken a central role under the SA competition regime. That is to say that a merger can be prohibited solely on public interest grounds, notwithstanding whether it is competitive or not. Aside from the role of the Commission, the amendment also empowers the government to prohibit mergers on the grounds of national security,[27] in line with the Section 198 of the SA Constitution. This national security ground is similar to that of the UK regime where the Secretary of State is empowered to intervene and prohibit mergers on grounds of national security.[28]

In its merger control process, SA fashioned a unique model by involving relevant stakeholders, establishing clear definitions or roles and developing a transparent multi-level approach in its judicial interpretation and application of the Competition Act. That model arguably is worthy of emulation by competition regimes in emerging markets. For example, in the celebrated case of Wal-Mart's acquisition of Massmart[29] which posed no anti-competition challenge, the PIC of job security, treatment of workers and fear of displacement of small suppliers took the front burner. The Tribunal considered the PIC remedy packages offered by Wal-Mart which it found adequate, and adopted a pro-competitive approach as a defender of competition in approving the merger.[30] The stakeholders were not satisfied with the remedies offered by Wal-Mart and appealed to the Competition Appeal Court (CAC). Although the CAC affirmed the Tribunal's decision, the CAC inclined more to PIC in its approach. The CAC therefore imposed more remedial obligations on Wal-Mart, having held that the initial remedies were insufficient.[31]

It is worthy to note that competition law in SA stands out as a rare model, although it is of relatively recent origin. It recognises the essence of a competition regime in promoting a competitive economy while taking into consideration the economic and social goals of the country and its citizens.[32] It then appears that the core competition principles of the SA competition law makes it attractive to investors from the developed countries, while its recognition of local realities via PIC makes it appealing to some developing countries.[33] Hence, the general philosophy that guides the SA competition regime is in the idea of using the law as a vehicle towards the attainment of national economic and social objectives, which Fox and Bakhoum put succinctly as 'harnessing markets to make them work for the people'.[34] In all, SA competition law stands like a bridge between the ideals of pro-competition considerations found in developed countries and a more flexible approach in emerging markets.

As earlier stated, the SA competition law was tailored according to the country's history, where the former apartheid government erected economic barriers to limit and control the ability of racial groups to participate in the economy of the nation.[35] This was the background upon which the Competition Act was enacted. The Act has at its core the objective of

[27] Fox and Bakhoum, (n 65).

[28] Enterprise Act 2002, s 42 and 58.

[29] *Wal-Mart Stores Inc v Massmart Holdings Ltd*. 73/LM/Nov10.

[30] ibid, the Tribunal noted in page 34 as follows 'we step carefully into shop floor issues lest we forget our purpose as competition regulator'.

[31] *SACCAWU v. Wal-Mart Stores Inc.*, 111/CAC/Jun11 [2012] ZACAC 6, para. 122 (2012)

[32] Section 2, Competition Act, act no. 89 of 1998 (amended in 2019 upon the presidential assent given on 13 February 2019).

[33] Enyinnaya Uwadi 'Prospects and Challenges of Implementing Competition Law in Developing Countries' (LLM Dissertation, University of Reading, 2019)

[34] Fox and Bakhoum (n 1) 120.

[35] This fact is captured in the Preamble to the Competition Act No. 89 of 1998.

providing an equal opportunity for all citizens to fairly participate in economic activities, while promoting more job opportunities and advancing socio-economic wellbeing of the citizens, especially historically disadvantaged persons.[36] It also empowers the competition regulatory authority to consider the impact of mergers on the public interest of employment and job opportunities, due to the high unemployment rate in the country (which is ranked amongst the highest globally).[37] Little wonder 'employment' ranked as the top public interest concern amongst other concerns in an empirical data analysis of public interest considerations in South African mergers between 1999 and 2014.[38]

By and large, despite the challenges faced by developing countries, the three SA competition enforcement institutions have been successful so far in applying the PIC under its merger review provision. The institutions have diligently discharged their roles independently under the Competition Act. Accordingly, the Act may serve as a model for developing countries desirous of using the vehicle of competition law to protect other socio-political interests.

2.1. Procedure for a Merger Review involving Public Interest Consideration in South Africa

The procedural aspect of the merger review process in South Africa is akin to third-party intervention proceedings[39] in civil suits. It starts with a notification of the proposed merger being sent to the Competition Commission by the proposed merging firms. A copy of this notice is equally required to be sent to the registered unions that represents a substantial number of the employees of both of the merging firms. In the absence of such a registered union, the notice will be sent to all the employees of both firms.[40] Where there exists more than one registered union of employees in one of the merging firms, and the one with majority of members is in support of the merger with the lesser one voices a dissent, the Commission will consider the reason for such a dissent even if it is made by just one employee, as long as such a dissent is legitimate.[41]

The review of the merger proposal by the Competition Commission is usually done in consultation with other important stakeholders like consumers, co-competitors to the merging firms, and the Minister for Economic Development.[42] It is at this stage of the review that the merging parties may propose specific post-merger binding undertakings in order to address any SLC or PIC issues likely to arise as a result of the merger. The Competition Commission as well may recommend appropriate remedies if the proposal being offered by the merging parties is not sufficient to address the issues. Thereafter, the process is referred to the Competition Tribunal for adjudication or judicial review. An interesting thing to note about

[36] S. 2 of the Competition Act.

[37] David Forfar, and Shane Jaftha, 'South Africa: Oil & Gas Regulation 2016' in Alan Falach (ed) *International Comparative Legal Guide to Oil and Gas Regulations 2016,* (London, Global Legal Group Ltd, 2016). <http://www.iclg.co.uk/practice-areas/oil-and-gas-regulation/oil-and-gas-regulation-2016/southafrica> accessed 16 June 2016.

[38] Raslan, 'Public Policy Considerations in Competition Enforcement: Merger Control in South Africa' (n 12) figure 4, p 19.

[39] In civil suits, this happens where a 3rd party who is not named on the suit comes before the Court by way of Motion on Notice praying to be joined as a party to the suit, because the outcome of the suit will affect the third party's interest.

[40] Section 13(A) of the South African Competition Act

[41] See Case no. 58/LM/May12 where the Tribunal held that 15 members of an employee union can legitimately object to a merger irrespective of the support of 426 members of a sister employee union.

[42] Section 18 of the South African Competition Act.

the merger review process in South Africa is the opportunity allowed for third party intervention in the process. Third party intervention equally exists beyond the Tribunal stage, as both parties to the merger and any of the participants to the review proceedings has the *locus standi* to appeal to the Competition Appeal Court (CAC). Indeed, the present jurisprudence in South African merger control review establishes that parties outside the Tribunal participants may be allowed to intervene at the appellate stage of the CAC review, based on public interest grounds. This was the decision of the CAC in the case of Anglo American Holdings Ltd and Kumba Resources Ltd, where Industrial Development Corporation intervened at the CAC.[43] This approach by the CAC allows any person to intervene at the CAC notwithstanding whether he/she has a substantial interest in the merger or not, as long as such an intervention will assist the Court to delivering substantial justice.[44] That approach is indeed commendable, as it allows for a pragmatic approach for the courts to circumvent technicalities in their quest to deliver justice.

The downside of this third part intervention approach allowed in the South African merger control process is the potential for abuse. It could become a tool in the hands of disgruntled actors to delay or frustrate the merger process. In order to prevent the possibility of using improper tactics to delay the merger process, or at least reduce its occurrence, the Competition Commission has made it mandatory for an intending intervener to set forth in an affidavit the interest, scope and nature of intervention.[45] Moreso, any application for postponement of review proceedings made by an intervening third party is required to be in an affidavit. That postponement application and will be refused if there is no accompanying affidavit or the reason for such a request is deemed to be a delay tactics.[46] Furthermore, the Competition Commission has equally set forth prescribed timelines for every stage of the merger process in order to ensure that every merger process is completed timely by complying with the strict timelines. Therefore, any intervening request must be within its prescribed timeline as published in the Service Standard.[47]

Having gone through the procedural framework for merger review in South Africa, the next section of this paper will explain the reason behind the inclusion of PIC in the South African and other developing countries of Africa's merger review process.

3. The Case for Public Interest Considerations

As stated previously in this paper, some of the economic challenges faced by many developing countries, including South Africa, encompass high rates of unemployment and lack of employment opportunities, poverty, and an inability of local firms to compete globally.[48] In a bid to address some of these economic challenges, many of these countries have enacted competition laws which created competition regulatory authorities with the mandate of implementing the law in a manner to ensure that some or all of these economic

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[43] Anglo American Holdings Ltd and Kumba Resources Ltd/Industrial Development Corporation (Intervening), 46/LM/Jun02, (2003)

[44] Community Healthcare Holdings (Pty) Ltd & Anor v. Competition Commission of South Africa & Ors, ZACAC 7, (2003).

[45] ibid.

[46] MYBICO v Lewis NO & Ors, 59 CAC Feb06 (2006)

[47] <http://www.compcom.co.za/wp-content/uploads/2014/09/Service-Standards_2015_Final.pdf> accessed June 9 2019

[48] Aditya Bhattacharjea, 'Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis' in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press 2013) Ch 3.

challenges are addressed.[49] However, these challenges are most often not addressed due to implementation challenges. Some scholars therefore take the position that competition law is not a magic wand for economic development.[50] Those scholars argue that, in the absence of effective implementation, the purpose of any piece of legislation will not be attained notwithstanding how well-crafted it appears.

In any event, inasmuch as developing countries desire to sustain competitive markets through a merger review process, such a regime ought to reflect the prevalent socio-economic conditions of these emerging markets while also noting pro-competition objectives. This is because it may not make much sense to the average citizen of a developing country if the SLC concern takes precedence over a PIC like security of jobs, or alternatively adequate pay off /retirement packages, in a merger review analysis, as governments exist to cater for the prevalent needs of its citizens and provide basic social amenities. It is the position of this article that any government from a developing jurisdiction which fails to address the PICs in a merger review which has the potential of affecting its citizens would be derelict in one of its primary assignments to ensure the overall economic welfare and wellbeing of its citizens. This is because competition law in developing countries is not founded on competition fundamentalism,[51] but rather exists to utilize the strengths and objectives of competition law to further national developmental needs.[52]

Furthermore, although PIC appears to be the least economic-related consideration, it has a huge economic cost when SLC takes preference over it in developing countries. For instance, in a merger control analysis where the PIC of loss of job is jettisoned for SLC, a high number of the populace may go out of jobs. Due to the paucity of unemployment benefits and social services in developing African countries,[53] the ripple effect of loss of jobs in these countries could lead to a number of socio-economic and political challenges such as higher poverty rates, civil unrest, increase in crime and economic recession.[54] Indeed, available empirical evidence shows a direct link between unemployment and an increase in the crime rate in emerging economies like South Africa.[55] It therefore makes no sense for a competition regulator acting as an agency of the government to overlook such an important consideration of public interest like unemployment while undertaking a merger review analysis. Nor should the regulatory prefer to review the merger solely on the issue of whether the merger will lessen competition. This explains why PIC is considered of a great importance in enforcement by the South African competition authority and equally that of other developing African countries during merger control analysis.

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[49] See Section 1(e) of the Nigerian Federal Competition Law which listed ‘sustainable economic development’ as one of its core objectives

[50] David Gerber, ‘Economic Development and Global Competition Law Convergence’ in Daniel Sokol, Thomas Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford University Press 2013) Ch 1.

[51] Literal interpretation and strict adherence to competition law in all circumstances, notwithstanding the prevailing local realities.

[52] John Oxenham, ‘Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control of Certainty’ (2012) 9:211 US-China Law Review, 211,216.

[53] <https://www.theguardian.com/social-care-network/2013/oct/28/african-social-workers-economic-growth> accessed 29 May 2019.

[54] Kingsley Ighobor, ‘Africa's jobless youth cast a shadow over economic growth’ (African Renewal Online Magazine 2017) <https://www.un.org/africarenewal/magazine/special-edition-youth-2017/africas-jobless-youth-cast-shadow-over-economic-growth> accessed 29 May 2019.

[55] N.G. Tshabalala, ‘Crime and Unemployment in South Africa; Revisiting an Established Causality: Evidence from the Kwazulu Natal Province’ (2014) Mediterranean Journal of Social Sciences Vol 5 No 15, 527.

However, the reverse is the case in majority of developed countries. For instance, in the US,[56] PICs are rarely or never considered. In fact the philosophy of the US merger review process is that the public interest is best protected by making competition considerations its exclusive focus.[57] In other words, the enforcement of US antitrust law in order to guarantee a competitive economy for the benefit of the consumers is a sufficient public interest on its own.[58] In addition to the US regime, the Organisation for Economic Co-operation and Development (OECD) as well as the International Competition Network (ICN) have also adopted a view similar to the US philosophy. Those institutions have recommended that their respective member countries focus their merger review analysis exclusively on competition laws, as merger review ought not to be used to pursue other objectives.[59] Surprisingly, this is not the case in the EU. Article 21(4) of the EU Merger Regulation (EUMR) allows member states (ironically, most of them are equally members of OECD and ICN) to take appropriate measure to protect legitimate public interests[60] that were not taken into consideration under the extant provisions of EUMR. Similarly, in the UK, the Secretary of State is empowered to intervene[61] in mergers which do not fall within the EUMR jurisdiction where the interest of the public will be affected. Presently, there is an ongoing debate in the UK for the inclusion of PICs in the current UK competition regime in order to enable the Competition and Markets Authority (CMA) to apply broader PICs outside the three provided in the EUMR which are public security, plurality of media, and prudential rules[62]

Notwithstanding the rationale for adopting a PIC approach in merger control by South Africa and other developing jurisdictions in Africa, the approach has some limitations. I will briefly discuss some of the criticisms and the responses to them in the next section.

4. Criticisms

Firstly, there is difficulty in administering the rules and balancing conflicting PICs. For example, in a merger review where the PIC of loss of jobs clashes with another PIC of technological efficiency which will result to lower prices of utility goods and services, the competition regulator may be at loss on how to rank these conflicting PICs. This further compounds the problem. While some argue that preference should be given to the PIC that maximizes greater public utility, others propose for the balancing of the competing interests on an imaginary scale if the competing PICs have similar public utility values. Further, there is no agreed standard for determining how to measure or compare the competing public

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[56] Section 7 of the Clayton Act.

[57] OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Public Interest Considerations in Merger Control – Note by the united States' (2016) Working Paper No. 3 on Co-operation and Enforcement <https://www.justice.gov/atr/file/872386/download> accessed 08 April 2019.

[58] ibid.

[59] See OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Executive Summary of the Roundtable on Public Interest Considerations in Merger Control' (2016) Working Paper No. 3 on Co-operation and Enforcement <https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN5/FINAL/en/pdf> accessed 08 April 2019. See also the ICN Recommended Practices for Merger Analysis 2002-2018 <https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-merger-analysis/> accessed 09 April, 2019.

[60] These are Public Security, Plurality of Media, and Prudential Rules.

[61] Section 42 of the Enterprise Act 2002.

[62] Dave Poddar and Gemma Stooke, 'Considerations of Public Interest Factors in Antitrust Merger Control' (2014) Competition Policy International <https://www.competitionpolicyinternational.com/assets/ICN-March-2015.pdf> accessed 09 April, 2019.

utility values. This equally creates a further dilemma of choice for the competition regulator, rather than a solution.[63]

A closely related challenge is that of striking a balance between PIC and international commitments to free trade and international best practices. For example, the merger of a foreign multinational firm with a national firm can be refused due to the effect it will have on other local firms in the same line of business who may not be able to match up with the higher technological efficiencies and capital base the newly merged firm will possess. Such a merger, which may not be anticompetitive, may still negatively affect the ability of the local firms to compete both domestically and globally. This scenario could create a dilemma for the competition authority in their bid to balance PIC and international commitment to free trade.

Secondly, the procedural issues related to the notification of the registered unions and employees,[64] as well as consideration of their submissions, makes the process appear complex, unpredictable, time consuming and expensive. Also, where the PIC decision of the competition regulator is challenged at the Competition Court or Tribunal, the decision being appealed against usually revolve around employment, national security, protection of domestic markets. The Court or Tribunal may consequently be forced to entertain evidence and make decisions which are unrelated to competition law. as. Little wonder the Competition Tribunal of South Africa noted in the Wal-Mart case[65] that, ‘we step carefully into shop floor issues lest we forget our purpose as competition regulator’.[66]

Thirdly, another criticism of the PIC in merger review is that its adoption suggests over-reliance on regulatory intervention and lack of trust in the capacity of the market to address these PIC’s. Although the core of this claim is valid, it suffers from a flaw in its reasoning. The criticism fails to consider the fact that PICs are largely unlimited in scope and could vary from one jurisdiction to the other. Also, a PIC like national security is not related to market economics and thus its concerns cannot be addressed by the market.

Fourthly, due to the novelty of competition law in most emerging markets, competition regulators who may not have the technical expertise needed to analyze the SLC test could resort to making PIC their first port of call in every merger review analysis, in order to hide their expertise deficiency. This can be likened to a driver who can only drive automatic cars because he learnt to drive with an automatic car. If he gets an employment which requires him to drive both automatic and manual cars, he will most likely prefer to drive the automatic one because of the lack of skill in driving a manual car. Therefore, one needs to be an expert in competition law in order to appreciate the extent of the SLC test and its boundary with PIC which could be quite slim most times. This is very important for any regime in emerging markets which desires to make PIC an issue of consideration in its merger review process.

On the flipside, an experienced competition authority may not have the required competence to address PICs as most of them have little or no nexus to the core of competition law. The example of a PIC like national security quickly comes to mind. This criticism of lack of

[63] John Harsanyi, ‘Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls’s Theory’ (1975) 69 American Political Science Review 594.
[64] Section 13A(2) of the South African Competition Act 1998.
[65] Wal-Mart Stores Inc and Massmart Holdings Ltd. 73/LM/Nov10.
[66] ibid, page 34.

competence in addressing PICs is usually pronounced in single authority model,[67] where the competition regulator equally sets and determines parameters for PICs. This model has the potential of opening the merger control process to abuse as was the case of South Africa before 2009. This challenge was however addressed by South Africa in 2009 when it adopted the dual responsibilities[68] model by establishing the Department for Economic Development (EDD) in 2009 to act a link between competition law enforcement by the competition authority and national development strategy. It is similar to the ministerial intervention model[69] under the UK Enterprise Act.

In practice, however, no merger has been blocked either in South Africa on purely PIC ground once it passes the SLC test. The regulators, though, adopt a remedy-oriented approach by ensuring that PIC concerns are addressed by the parties via proposed undertakings or imposed remedies which forms part of the merger decision.[70] On employment for example, the merging entity could undertake to pay reasonable compensation and terminal benefits for the retrenched members of staff. The merged entity can equally be required to comply with an obligation to place a moratorium on retrenchment of members of staff for a specified period of time, for instance, two years, or place a cap on the number of staff to be retrenched. This approach addresses the criticisms of pro-economic merger advocates.

5. Conclusion

In conclusion, PIC weighs heavier in developing jurisdictions than developed jurisdictions because of the greater role of government's industrial policy in supporting strategic sectors in developing countries. That role is reinforced by the fact that some new competition authorities in developing jurisdictions may still be struggling to attain public credibility in the eyes of their citizens.[71] Those concerns create the need for the inclusion of PICs by competition authorities in such countries to gain public trust and confidence. In any event, while performing their competition role in merger control as competition regulators, competition authorities should equally ensure that enforcing competition aligns with other national economic, social and development strategy of the government in order to meet the developmental needs of the citizens. Indeed, this appears to be the reason why many developing jurisdictions adopt a consumer protection approach in competition law enforcement, as shown in the wording of the law as well as the name of the commission.[72]

As we have seen in this article, the need to cater for public interest considerations led to a holistic approach being adopted by emerging countries like South Africa, in modeling their

[67] This refers to a competition regulatory model where the national competition authority regulates and enforces the provisions of the competition law to cover every sector of the economy; as opposed to the dual model where there are sector regulators who exercise competition regulatory powers within a specific sector.

[68] It distinguishes the role of the competition regulator and assigns PIC to another agency. Both agencies work together but independently.

[69] A ministerial department has powers under the law to intervene for PICs.

[70] Raslan, Public Policy Considerations in Competition Enforcement: Merger Control in South Africa (n 12). See also the case of Yara Int'l ASA and Kemira GrowHow Oyj 1/AM/Dec07 where an international horizontal merger was approved, subject to the fulfillment of PIC which is the supply of urea to buyers in South Africa for a period of 2 years.

[71] David Lewis, 'The role of Public Interest in Merger Evaluation' (2002) International Competition Network Merger Working Group, Naples.

[72] Nigeria, Zambia, and surprisingly, developed countries like Australia and Ireland. For instance, the Nigerian competition law is known as Federal Competition and ***Consumer Protection*** Act, while the commission is called Federal Competition and ***Consumer Protection*** Commission (emphasis mine).

competition laws to address diverse societal and development needs. This approach, however, is fraught with several implementation challenges and criticisms already discussed above. It is therefore suggested that developing countries should adopt clear and written guidelines for analyzing the PIC in merger control and review analysis in order to protect the process from being subjected to abuse.[73]

Furthermore, in the absence of such clear guidelines for analyzing PIC in developing countries, it is believed that the obligations of emerging jurisdictions under several international treaties on trade and investment should keep their competition regulators in check and prevent them from taking arbitrary decisions under the guise of the public interest. For example, concerns may arise where a pro-competitive merger between an international firm and a domestic firm is blocked in order to protect other domestic firms' inefficiencies in the relevant market. Therefore, notwithstanding the pro-competitive benefits of the merger like technological efficiency and lower prices, the competition authority may bend to the whims of the other local players who stand to lose out if they continue to adopt inefficient business practices. In such a situation, the obligations of the developing country in international trade treaties like Bilateral Investment Treaties (BITs) act as a check to prevent the possibility an arbitrary decision from being taken by the competition authority to block such a merger on the sole ground of protectionism. This was one of the ratios of the South African Competition Appeal Court's decision in the Wal-Mart and Massmart merger case,[74] prior to the formulation of the Guidelines on Public Interest Consideration which was gazetted on 02 June 2019,[75] to set down the procedures for the consideration of PIC in South Africa's merger control.

[73] Azza Raslan, 'Competition Policy and Inequality: Developing Countries' Perspectives' <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/10/CPI-Raslan.pdf>.accessed 29 May 2019..

[74] Walmart-Massmart case no. 110/CAC/Jun11.

[75] <http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf> accessed 8 April 2019.