

THE PLACE OF PUBLIC INTEREST IN SOUTH AFRICA'S COMPETITION LEGISLATION

SOME IMPLICATIONS FOR INTERNATIONAL ANTITRUST CONVERGENCE

by

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EXECUTIVE SUMMARY

This paper discusses the public interest provisions in South Africa's competition legislation with the objective of illustrating the implications for international anti-trust convergence in developing countries. It will be shown that the objectives of a country's competition laws have significant impact on the degree of convergence that a country may see as desirable. This is particularly true in the case of developing countries whose competition laws may incorporate many national or political objectives. South Africa's competition legislation will be used as an example of the level of convergence that may be achieved having regard to the non-competition factors incorporated in the legislation and potential or perceived difficulties in reconciling a competition analysis with a public interest analysis.

In order to illustrate this, the paper discusses the reasoning behind the incorporation of certain national and political objectives in South Africa's competition laws by setting out the background and history which preceded the current legislation. Thereafter, the purpose and objectives of the current legislation are discussed, followed by the public interest objectives contained in the legislation. This is followed by a discussion on the manner in which the public interest provisions are applied in practice. Specific cases are cited as examples to illustrate the point. The two most contentious areas surrounding public interest in merger evaluation relate to the promotion of employment and black economic empowerment and are highlighted by the cases in which such issues arose.

The discussion thereafter draws on the South African experience to illustrate the prospects for international anti-trust convergence. It is deduced that the objectives of a country's competition laws have a significant impact on the degree of convergence that developing countries may see as desirable. In South Africa however, despite the incorporation of non-competition factors, convergence is still achievable by utilising sound economic analysis and other realities peculiar to South Africa. Whilst the potential does exist that certain mergers may require a longer period for review due to interventions on public interest grounds – which affects the level of procedural convergence that can be achieved – this does not feature very often. The paper concludes that despite the incorporation of non-competition factors in South Africa a substantial degree of convergence is able to be achieved.

INTRODUCTION

1. "Competition policy", or "antitrust policy" is an instrument through which governments ensure that their markets are functioning efficiently, competitively and in the interests of consumers. It is also accepted that competition policy is an economic policy concerned with economic structures, economic conduct and economic effects.¹ Competition policy is accordingly a broad term and such policy of a country encompasses within it a system of competition law.² Generally, competition legislation is designed to enable authorities to monitor and ultimately prohibit market practices adversely affecting an economy. Such practices could include the conduct of firms acting in a collusive manner in order to fix outputs and prices, raising private sector barriers and creating excessive market concentration (via mergers and acquisitions) amongst others. In general terms, antitrust or competition policy seeks to regulate against conduct in the market that would substantially restrict competition.
2. Two primary schools of thought emerge relating to the role of competition policy. On the one hand, the view in a number of industrialised countries is that antitrust laws have as their primary aim the achievement of maximum efficiency. Accordingly, in many industrialised countries competition policy is based largely on a model which focuses on consumer welfare, having as its goal the maintenance of competitive markets.³
3. On the other hand, what seems to be emerging in many developing countries is a model whereby various non-competition factors are incorporated in the competition policy of the particular developing country concerned.⁴ Specifically certain public interest objectives are incorporated into competition legislation. South Africa is an example of a developing country which has specific public interest goals incorporated in its competition legislation. This model of competition policy envisages Competition Authorities engaging in the balancing of various interests, namely those of workers and consumers when adjudicating competition matters. Here the regulation of competition is considered an instrument for economic development which seeks to correct the socio-economic imbalances of a particular country as a result of its peculiar history and development. In South Africa the government's industrial objectives are specifically incorporated into the competition legislation.⁵

¹ Jonathan Faull and Ali Nikpay, *The EC Law of Competition* London: Oxford University Press, 1999 at p. 4.

² Alison Jones and Brenda Sufrin "EC Competition Law: Text, Cases and Materials" London: Oxford University Press at p. 3.

³ Alison Jones and Brenda Sufrin, "EC Competition Law: Text, Cases and Materials" London: Oxford University Press at p. 4 and 17. Lawrence Reyburn, *Competition Law of South Africa* Durban: Butterworths, 2004 at p. 2-19

⁴ Lawrence Reyburn, *Competition Law of South Africa* Durban: Butterworths, 2004 at p.2-19

⁵ Lawrence Reyburn, *Competition Law of South Africa*, 3-39 to 3-45.

Neo Chabane, "An Evaluation of the Influence of BEE on the Application of Competition Policy in South Africa" at p. 4. Paper presented at the Trade and Industrial Policy Strategies (TIPS) Annual Forum 2003. Cape Town: Development Policy Research Project, University of Cape Town, 2003. http://www.tips.org.za/events/event_details/paper/forum2003.

BACKGROUND AND HISTORY TO SOUTH AFRICA'S COMPETITION LEGISLATION

4. In order to fully understand the stance taken by the legislators in drafting South Africa's current competition legislation, the Competition Act, 1998 ("Competition Act" or "Act") which came into effect in 1999⁶, South Africa's political and economic history is of utmost importance.
5. Prior to 1999 South Africa's Competition Board ("Competition Board") operated under the provisions of the Maintenance and Promotion of Competition Act⁷ ("the Old Act"). The Old Act provided for the review of mergers and acquisitions, restrictive practices and monopoly situations by the Board. However, the Board was an administrative body lacking executive authority and had to make recommendations to the Minister of Trade and Industry. The Minister had a discretion on whether to accept the Board's recommendations and take action. The Board's powers to review acquisitions which restricted competition was seen as limiting it to considering only horizontal transactions. In addition to this, no pre-merger notification was required and therefore the Board relied on complaints from other parties or voluntary notification. As a result, the Board assessed only a very few number of mergers. Furthermore the government was perceived to have had close ties with big businesses in South Africa. The reality, therefore, was that the Competition Authorities had little or no independence from the government. This scenario resulted in a large concentration of ownership and control in the South African economy being vested in a small number of large businesses, controlled by a small segment of the population. Two factors aggravating this was firstly, the role played by the mining financing houses in the development of the economy and, secondly, disinvestments by foreigners as a result of sanctions.⁸
6. The African National Congress ("ANC") stated, when it came to power in 1994, that its economic objective was to create and sustain an adaptive economy characterised by growth, employment and equity. The new government comprising the ANC, mainly through its Department of Trade and Industry outlined several strategies in order to pursue effective transformation of the economy. These strategies were incorporated into different forms of legislation, the Competition Act being one such example, which came into force on 1 September 1999.

⁶ Act 89 of 1998.

⁷ Act 96 of 1979

⁸ Lawrence Reyburn, *Competition Law of South Africa*, 3-39

7. When the ANC came to power it was critical of the existing competition legislation since it did not address the problem of concentration of ownership.⁹ As a result, negotiations for a new legislation commenced in 1998. When discussions and negotiations during the course of the drafting of the Competition Act took place, the ANC took cognisance of the problems associated with the old Act. There was much interaction between business, labour and the government prior to the drafting of the legislation. One feature of the new Competition Act was that it introduced compulsory pre-merger notification. The Competition Act heralded a new era of competition jurisprudence for South Africa.
8. In the Explanatory Memorandum accompanying the Competition Act it is stated that the overriding objective of competition policy is the promotion of competition in order to advance economic efficiency, international competitiveness and adaptability as well as the market access of small, medium and micro-enterprises (“SMMEs”), creation of new employment opportunities and the diversification of ownership in favour of historically disadvantaged South Africans. The equity or non-competition considerations recognise that South Africa’s discriminatory past resulted in a skewed distribution of ownership and control, inadequate restraint on anti-competitive trade practices and unjust restrictions on full and free participation in the economy by all South Africans.¹⁰

SOUTH AFRICA’S CURRENT COMPETITION LEGISLATION

Purpose and Objectives

9. The Competition Act provides for the establishment of a Competition Commission (“Commission”) responsible for the investigation, control and evaluation of restrictive practices, abuse of a dominant position and mergers.¹¹ The Commission is the investigatory arm of the current structure of the South African Competition Authorities. The Competition Act also establishes a Competition Tribunal (“Tribunal”) which is independent from the Commission and is responsible for the adjudication of competition matters.¹² A Competition Appeal Court is also established and may consider any appeal against or review of a decision of the Tribunal.¹³ Currently, therefore, the current South African Competition Authorities consist of a three-tiered structure comprising the Commission, Tribunal and Competition Appeal Court. The aforesaid institutions comprise a strong and credible enforcement agency, independent

⁹ Lawrence Reyburn, *Competition Law of South Africa*, 3-40

¹⁰ Lawrence Reyburn, *Competition Law of South Africa*, 4-3

¹¹ sections 19 and 21 of the Competition Act

¹² sections 26 and 27 of the Competition Act

¹³ section 36 of the Competition Act

from government intervention and very importantly, distinguishable from the erstwhile Competition Board.

10. The industrial objectives of South Africa feature strongly in the Preamble and provisions of the Competition Act. The preamble specifically stipulates the following:-

“The people of South Africa recognise:

That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans.

That the economy be open to greater ownership by a greater number of South Africans.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development will benefit all South Africans.”

11. In elaboration of what is set out in the Explanatory Memorandum the objectives and purposes of the Competition Act are specifically stated in the Act¹⁴ as follows:

- 11.1. to promote the efficiency, adaptability and development of the economy;
- 11.2. to provide consumers with competitive prices and product choices;
- 11.3. to promote employment and advance the social and economic welfare of South Africans;
- 11.4. to expand opportunities for South African participation in world markets and to recognise the role of foreign competition in the Republic;
- 11.5. to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

¹⁴ section 2 of the Competition Act

- 11.6. to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

South Africa's competition policy is therefore distinguishable from the policies of other countries especially industrialised nations.

PUBLIC INTEREST OBJECTIVES IN THE COMPETITION ACT

12. The provisions promoting public interest which are expressly incorporated in the Competition Act relate to exemptions and mergers. The exemption provisions¹⁵ permit a firm to apply to the Commission to have agreements or practices of the firm exempted from the application of those provisions of the Competition Act which deal with restrictive practices. The implication of this is that conduct of a firm that would ordinarily be prohibited by the Competition Act in that it amounts to a horizontal restrictive practice, a vertical restrictive practice, or an abuse of dominance, would, if exempted, not be prohibited and the firm would be immune from penalty in terms of the Act, in respect of such conduct. The Commission is, however, only permitted to grant such an exemption application if the agreement or practice in question is required to obtain one of a specific list of objectives contained in the Competition Act. An anticompetitive agreement or practice may, for instance be granted if it promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.
13. The second area of South African Competition law in which public interest considerations feature prominently is in respect of mergers. For purposes of the Competition Act a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. The Competition Act requires that all mergers between firms which meet certain thresholds in respect of asset or turnover value be notified to the Competition Authorities and such notifiable mergers are not to be implemented without first receiving merger approval from the Competition Authorities.
14. The public interest considerations are not unlimited and are specifically stated in the Competition Act. In determining whether a merger can or cannot be justified on public interest grounds, the Commission or Tribunal must consider the effect that the merger will have 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.

¹⁵ section 10 of the Competition Act

15. The Commission or Tribunal must determine whether or not a merger is likely to substantially prevent or lessen competition and otherwise, determine whether the merger can or cannot be justified on substantial public interest grounds.¹⁶ This means that the Commission or Tribunal is required to consider two questions. The first is the likely effect of the merger on competition, the second is whether substantial public interest grounds arise and are affected by the merger. In the Tribunal's decision in the matter of *Anglo American Holdings Limited / Kumba Resources Limited (Industrial Development Corporation Intervening)*, it was held that the use of the word "otherwise" in the Act¹⁷ means that the public interest evaluation must be undertaken regardless of the outcome of the overall "competition" analysis. In other words, even although the Tribunal found that the merger would not lead to a substantial prevention or lessening of competition, this did not mean that the merger should necessarily be approved. It was held that even if the merger would not adversely affect competition, such merger could only be approved if the Tribunal was satisfied that in addition to having no anti-competitive effect, no public interest grounds exist on which the merger should be prohibited.
16. Of the various public interest grounds contained in the merger provisions, employment has thus far received a fair deal of consideration. To ensure that the effect of a merger on employment may be thoroughly analysed by the Competition Authorities before approving such merger, input from affected employee groups and trade unions are considered. The Competition Act specifically requires that trade unions and/or employee representatives of affected employees be notified of any proposed mergers that are notifiable to the Competition Authorities.¹⁸ This is achieved by the requirement that parties to a merger serve a copy of the merger notification made to the Competition Authorities on such trade unions or employee representatives, prior to the submission thereof to the Competition Authorities. Of importance is the practical reality that a merger cannot be registered with the Commission until proof is provided to the Commission that service has been effected on trade unions or employees, where applicable.

Cases Involving Employment Issues

17. The involvement of employee organisations may materially affect the implementation of a proposed merger. An illustration is the case of *Unilever PLC /Competition Commission/ CEPPWAWU*.¹⁹ CEPPWAWU was a trade union representing the interests of chemical, energy, paper, printing, wood and allied workers. In this case the public interest concern was

¹⁶ section 12 of the Competition Act

¹⁷ section 12A(1)(b) of the Competition Act, 1998.

¹⁸ Section 13A of the Competition Act

¹⁹ *Unilever PLC /Competition Commission/CEPPWAWU* [2001-2002] CPLR 336 (CT)

the number of potential job losses in South Africa, which already has a high unemployment rate. The Tribunal held that a valid assessment of the effect of the merger on employment could not be conducted on the information made available by the parties. Hence, the Tribunal imposed as a condition for the approval of the merger an obligation on the merging parties to consult the trade unions regarding job losses, as a pre-condition to approving the merger. The Tribunal maintained that the most significant right that the Competition Act extended to employees and the unions was the right to timely information with respect to the potential employment impact of a merger. However despite the above, the Tribunal felt that the most powerful channel for unions to address employment related issues arising from a merger was labour specific legislation, being the Labour Relations Act, 1995, or private collective bargaining agreements.

18. The Tribunal therefore approved the merger subject to conditions.²⁰ What is interesting to note in this case is that the trade unions also made submissions to the Tribunal regarding competition issues. They maintained that the merger should be prohibited entirely because of the high levels of concentration in the market and the dominance of the merging parties. They also argued that the relationship between the major retailers and manufacturers, including the merging parties, was not based on countervailing power in the market, but rather on profitable mutual dependence. Here the trade unions were allowed not only to provide submissions on employment issues, but also on competition issues. It was found by the Tribunal ultimately that the implementation of the merger, subject to conditions, was not likely to substantially lessen or prevent competition.
19. A further case involving employment issues was the matter of *DB Investments SA v De Beers Consolidated Mines Limited*²¹. Here trade unions representing employees affected by the merger raised concerns in respect of an adverse impact on employment as a result of the merger. This resulted in the merging parties offering an undertaking to the employees that their conditions of employment would not change following the merger. This undertaking was however not made in perpetuity. The Tribunal held that it could not be expected of an employer to provide a perpetual undertaking and accordingly approved the merger.²²
20. It is interesting to note how the explicit consideration of public interest grounds has influenced the thinking of the Competition Authorities on other occasions. The *Nedcor/Stanbic* case,²³ a hostile merger between two banks where Nedcor Limited sought to acquire more than 49% of

²⁰ *Unilever PLC / Competition Commission/CEPPWAWU* [2001-2002] CPLR 336 (CT) at p. 336-337

²¹ *DB Investments SA v De Beers Consolidated Mines Limited* [2001-2002] CPLR 172 (CT)

²² *DB Investments SA v De Beers Consolidated Mines Limited* [2001-2002] CPLR 172 (CT) at p. 172-173

²³ *Standard Bank Investment Corp Ltd & Others v The Competition Commission & Others* 2000 (2) SA 797 (SCA)

the shares in Standard Bank Investment Corporation Limited, is an example of the weight given to public interest concerns in South Africa. The merger between the banks fell to be determined in terms of the Banks Act (since the merger was subject to authorisation by public regulation which provision has now been changed). The Minister of Finance was to act after consultation with the Competition Authorities. The Minister, in declining approval of the merger in terms of the Banks Act, quoted the Competition Commission's recommendations which he relied on in making his decision as follows :

*"In conclusion, therefore, the Commission is of the view that the proposed transaction should be prohibited on the grounds that it will have significant social costs (primarily) potential abuse of market power in the retail banking market and potential job losses), which represents a net loss to society, which cannot be offset by any potential efficiency gains or public interest considerations."*²⁴

Cases Involving Promotion of Black Economic Empowerment

21. Another public interest ground which has been the subject of much debate has been that relating to "promotion of firms controlled or owned by historically disadvantaged persons, to become competitive." As pointed out above, in mergers the Competition Authorities must take into account the effect that the merger will have on the ability of black-owned or controlled or small businesses or firms to become competitive. The term "Black Economic Empowerment" is commonly used in the South African market and is utilised by government as an instrument to promote transformation in South Africa.
22. In the case of the large merger between *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*,²⁵ Thebe, a black economic empowerment company attempted to sell off its subsidiary Tepco, to Shell South Africa. The reason for the sale was that Tepco found itself in financial problems, suffering net losses due to the mature nature of the industry as well as high structural barriers to entry. In accordance with the Competition Act, the first question the Tribunal asked was whether the merger was likely to prevent or lessen competition. In this regard it found that the merger was not likely to prevent or lessen competition. The second question that the Tribunal asked was whether there were any public interest grounds for not approving the merger. The Tribunal considered the effect that the merger would have on the ability of small, black owned/controlled firms to become competitive. The Tribunal noted that the Commission had approved the merger subject to a number of conditions. One of the conditions imposed by the Commission was that Tepco had to continue to exist in the market jointly controlled/owned by Thebe and Shell South Africa. However, the Tribunal was critical

²⁴ *Standard Bank Investment Corp Ltd & Others v The Competition Commission & Others* 2000 (2) SA 797 (SCA)

²⁵ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (Case No: 66/LM/Oct01)

of this condition because it amounted to the parties restructuring the deal in a form that neither of the parties wanted. The Tribunal stated:

“Empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine.”²⁶

23. The Tribunal was also critical of a number of other conditions imposed by the Commission on the proposed merger. In fact, the Tribunal approved the merger without any conditions. The Tribunal found that the Commission had adopted a paternalistic approach. No doubt, the Tribunal's reasoning and decision is far more tempered and accepts an evaluation based on sound economic analysis as follows:

“The Commission’s role is to promote and protect competition and a specified public interest. It is not to second – guess the commercial decisions of precisely that element of the public that it is enjoined to defend, particularly where no threat to competition is entailed The Competition authorities, however well intentioned, are well advised not to pursue their public interest mandate in an over-zealous manner, lest they damage precisely those interests that they ostensibly seek to protect.”²⁷

24. In the case of *Anglo American Holdings Limited and Kumba Resources Limited (Industrial Development Corporation Intervening)*,²⁸ Anglo (a firm traditionally having a significant standing in the South African mining industry) attempted to purchase Kumba, a black economic empowerment company. In this case the Industrial Development Corporation ("IDC"), a statutory body whose primary function is to foster economic development pertaining to black owned businesses, intervened on public interest grounds. The IDC argued that the merger would pose a barrier to entry for potential black firms, and therefore impede empowerment in the industry. The IDC recommended that Kumba needed to remain a black economic empowerment controlled firm. The IDC maintained that in interpreting the provisions in the Competition Act pertaining to black economic empowerment, the Tribunal ought to adopt a purposive interpretation and not confine itself to the literal wording of the Competition Act. Hence, the IDC argued, that when interpreting the Competition Act the Tribunal must respect the objects of promoting a greater spirit of ownership and increasing stakes of historically disadvantaged persons in South Africa.
25. Anglo, on the other hand, argued that the Tribunal ought not to use a broad interpretation of these provisions. In its argument Anglo submitted that such an interpretation would have

²⁶ *The large merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (Case No: 66/LM/Oct01) at p. 5. <http://www.comptrib.co.za/decidedcases/html/66LMOCT01M.HTM> 4th February 2004.

²⁷ *The large merger between Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (Case No: 66/LM/Oct01) at p. 6. <http://www.comptrib.co.za/decidedcases/html/66LMOCT01M.HTM> on 4th February 2004.

²⁸ *Anglo American Holdings Limited and Kumba Resources Limited (Industrial Development Corporation Intervening)* [2003] 2 CPLR 288 (CT).

dangerous policy consequences, because it would transform the Competition Act from an antitrust statute into an unchecked vehicle for redistribution. Anglo argued further that the legislature had not intended to invest such an ambitious power in an un-elected body without clear language in the provisions. In its finding the Tribunal did not pronounce on which interpretation was the correct one. However, it did say that if the IDC's approach were to be applied, there was no evidence to suggest that the merger would frustrate the Competition Act's purpose. The Tribunal found no evidence to suggest that the merger would close the door on an increase of historically disadvantaged persons' ownership in the industry. The Tribunal therefore approved the merger.²⁹

26. As already referred to above, in order to effectively consider public interest grounds, the Competition Authorities may require input from those affected by public interest considerations. Trade unions and employee representatives often participate in merger proceedings. The Competition Act further permits the Minister of Trade and Industry to participate as a party in any notifiable merger proceedings in order to make representations on any public interest ground. In *Anglo South Africa Capital (Proprietary) Limited and others v Industrial Development Corporation of South Africa and Another*³⁰ the Competition Appeal Court also considered the right of parties (being the IDC, already referred to above) to intervene in merger proceedings. The Competition Appeal Court granted the IDC the right to intervene and held that the common law test for *locus standi* (being material interest) is not applicable to merger proceedings as these are not adversarial in nature and thus not like ordinary litigation. The Competition Appeal Court also held that the Act (which permits the Minister of Trade and Industry to intervene on public interest grounds) does not exclude others from making similar interventions. It was further held that the Competition Tribunal has the discretion to grant an application to participate as no grounds for participation are set by the Act.³¹ Accordingly, the scope of persons who may intervene in a merger is wide and has the potential of considerably increasing the review period of a merger.
27. A further case in which a public interest issue arose indirectly was that of *Wesbank, a division of FirstRand Bank Ltd / Industrial Machinery Finance Book, owned by Barloworld Equipment Finance, a division of Barloworld Capital (Pty) Ltd*.³² The merger involved the acquisition by Wesbank of Barloworld Equipment Finance's industrial machinery book. This merger was not one with any anti-competitive effects, however, the Commission recommended that a

²⁹ *Anglo American Holdings Limited and Kumba Resources Limited (Industrial Development Corporation Intervening)* [2003] 2 CPLR 288 (CT) at p. 313-318.

³⁰ *Anglo South Africa Capital (Proprietary) Limited and others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC).

³¹ *Anglo South Africa Capital (Proprietary) Limited and others v Industrial Development Corporation of South Africa and Another* [2003] 1 CPLR 10 (CAC) at p. 10-11.

³² [2004] 2 CPLR 337 (CT)

condition be imposed on the proposed merger. The condition was that if customers were unable to secure finance from financial institutions, Barloworld Capital (the target firm) would retain the right to facilitate the financing. The rationale for the condition was that many of Barloworld Capital's customers were small to medium sized businesses and businesses controlled by previously disadvantaged persons. The Commission argued that these customers' interests and concerns needed to be protected and therefore suggested that the above condition be imposed. The Tribunal rejected the Commission's condition and approved the merger without any conditions. The Tribunal listed a number of commercial factors, present in the financing industry, which, in their opinion protected the concerns and interests of small to medium sized black economic empowerment companies. It is evident from this case that the Tribunal rejected the Commission's attempt to introduce black economic empowerment or promotion of small businesses as a justification for imposing a condition on a merger, where this was clearly unnecessary.

28. The above cases illustrate the manner in which the controversial public interest provisions in South Africa are interpreted by the Competition Authorities in their evaluation of mergers. The impact of the above and its implications for international anti-trust convergence is discussed below.

PROSPECTS FOR INTERNATIONAL ANTITRUST CONVERGENCE, USING SOUTH AFRICA AS AN ILLUSTRATION

29. The competition policy of the now democratic South Africa seeks to find a balance between economic efficiency and equity as reflected in the Preamble of the Competition Act. This is appropriately summed up by the OECD peer review as follows:

“... policies of equity and distribution as well as efficiency, and [that] they clearly incorporate goals and ideals for competition law derived from the early ANC positions and the stakeholder debate... recognising the problem of inefficiency and waste, but connects these too with equity, in noting not only that a credible competition law and institutions to administer it are necessary for an efficient economy, but also that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit to all South Africans.”

30. The cases on the consideration of mergers in South Africa as reviewed above indicate that competition law is an instrument used to promote South Africa's specific industrial policies. However, as shown in the cases above, the Competition Authorities in South Africa have not been arbitrary in the application of the provisions on public interest. The balancing of public interest considerations with a competition evaluation has been very carefully considered as is illustrated in the cases discussed.

31. It is therefore submitted that the incorporation of public interest objectives in competition legislation in South Africa does not mean that the overriding objectives of competition policy will not be achieved. In fact, South Africa's competition legislation is an example of a jurisdiction where a level of convergence may be achieved despite the incorporation of non-competition factors in the legislation and potential or perceived difficulties in reconciling competition evaluation with a public interest analysis.
32. The question which arises in the debate for international antitrust convergence is, what types of convergence (if at all) can be reconciled with non-competition factors? What seems to be emerging, and South Africa is an example, is that the objectives of a country's competition law has a significant impact on the degree of convergence that such a developing country may see as desirable.
33. The incorporation of provisions in the merger regulation promoting employment and black economic empowerment, have to date not been a bar to obtaining merger approval since the decisions are ultimately based on sound economic analysis. This is particularly evident in the case of *Tepco/Shell*.
34. It may therefore be deduced that a degree of convergence can nevertheless be achieved since the South African Competition Authorities in its application of the law does not view public interest as an infinitely elastic concept. Public interest seems to be limited by definition in the legislation. In other words, the competition evaluation on whether for example, a merger will prevent or lessen competition still occupies a primary position, thereafter the public interest test is treated as a filter and is given secondary consideration. The decisions emerging in South Africa illustrate that despite the presence of non-competition factors in South Africa's developing competition jurisprudence, convergence may still be achievable in reaching consistency by ultimately using sound economic theory in its evaluation. The outcome therefore in South Africa is not unlike that of its industrialized counterparts.
35. It is also submitted that the South African authorities are able to achieve substantive outcomes and certain procedural outcomes not unlike those in industrialized countries due to the following factors:
 - 35.1. the provisions on competition aspects are similar to the provisions in laws of mature jurisdictions. In particular South Africa uses the "*substantial lessening or prevention of competition test*" in its analysis of mergers. This analysis occupies a primary

position in a merger evaluation and as is evident from above, the public interest test is treated as a filter and given secondary consideration. Certain public interest provisions as found in South Africa also feature in industrialized countries, namely promotion of small businesses and promotion of the ability of national firms to compete in international markets. Even though such objective may not be specifically incorporated in the laws of industrialized jurisdictions, it is still a consideration in certain mergers;

- 35.2. technical assistance programs provided by the US Federal Trade Commission and US Department of Justice and the OECD have informed decisions in South Africa. Very often reference is made to foreign decisions and the reasoning adopted by the US or EU in its competition decisions. The South African legislation stipulates that in applying the Act, appropriate foreign and international law may be considered;
 - 35.3. South Africa's laws are clearly designated and the decision making process is a transparent one. Accordingly, save for exceptional cases, there is certainty and predictability in the outcome of decisions. This is complemented by South Africa's sophisticated legal system. The Competition Authorities are mindful also of the risk of deterring foreign direct investment if it had to impose burdensome requirements and processes on parties. Aside from the public interest aspects, the information requested from parties in mergers is similar to that requested by its industrialized counterparts;
 - 35.4. the laws apply equally to all foreign or local firms. In other words all firms are treated equally and there is no discrimination based on nationality of firms or consumers. All provisions, including those promoting employment and black economic empowerment apply equally to foreign companies as it does to local firms;
 - 35.5. to the extent that South African Competition Authorities co-operate on an informal basis with developed jurisdictions, this can facilitate convergence. If co-operation is to be achieved on an increased basis, this could facilitate more convergence.
36. On the other hand substantial convergence may sometimes be difficult to achieve having regard to the time that may be required to review a merger in South Africa. Despite what is stated above regarding the public interest test being used as a filter, such public interest analysis still needs to be conducted. Therefore, in order to conduct a proper assessment of competition factors whilst simultaneously conducting a public interest enquiry and analysis, a

longer review period may be required in appropriate circumstances than in a jurisdiction where only a competition evaluation is required. This is not applicable in all instances, however where employment for example becomes an area of contention as often happens in mergers, this inevitably results in delays. The express provisions in the legislation which enables trade unions and other interveners (who have a material interest) to participate in merger proceedings does create uncertainty and potential delays in a merger.

37. Accordingly, in conducting both a competition analysis and a public interest analysis it may be difficult to converge to an agreed standard on timing if more time may be required by a developing country to conduct a proper review of the matter. An element of uncertainty is also introduced owing to potential interveners who may seek to protect certain adversely affected interests. From a practical perspective mergers are generally approved within a period of 40 days (for intermediate mergers) and within 90 days in the case of large mergers.
38. In the ultimate analysis and in conclusion, it appears that even with public interest factors in the competition law of a country the utilisation of sound economic analysis can help achieve convergence. Whilst it may be more difficult to achieve consistency on timing due to the lengthened review periods required for public interest analysis – which can be problematic for parties hoping to finalise a global deal as soon as possible – it would appear that achieving consistency on substantive outcomes may be more important.