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Efficiencies in Merger Control – Note by South Africa

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South Africa

1. Introduction

1. The assessment of efficiencies or pro-competitive gains in merger control is a requirement of the South African Competition Act, 89 of 1998, as amended (the Act). Specifically, Section 12A(1) of the Act requires that if Competition Authorities find that a merger is likely to result in a substantial prevention or lessening of competition (SPLC), then the Competition Authorities must determine:

   1. Whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and
   2. Whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).

2. Further, in South Africa, the Act also requires the Commission to consider mergers on public interest grounds irrespective of the findings on competition. Section 12(1A) of the Act states that:

> *Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds as set out in subsection (3)".*

3. In this regard, there are five specific public interest factors that the effect of each merger must be considered on. These factors as listed in Section 12(A)(3) of the Act are:

> *A particular industrial sector or region;*
>
> *Employment;*
>
> *The ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market;*
>
> *The ability of national industries to compete in international markets; and*
>
> *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.*

4. This submission provides details on how efficiencies and public interest considerations are dealt with in the assessment of mergers in South Africa. The submission will set out the main factors considered in the assessment of efficiencies with a focus on key cases where Competition Authorities in South Africa have dealt with efficiencies. The submission will also explain how the public interest assessment in mergers is separate from the competition (and efficiencies) assessment and provide details on how this assessment is conducted in South Africa. Lastly, the submission will provide some insights as to why efficiency justifications and public interest gains generally fail to justify the approval of anticompetitive mergers in South Africa.

2. Overview of the Assessment of Efficiencies and Public Interest in South African Merger Control

5. As stated in the Act, efficiency justifications are considered only after the Commission has determined that the merger is likely to result in a SPLC. If a merger is unlikely to result in any anticompetitive effects or if there are remedies that sufficiently address the competition concerns, then there is no need to consider efficiencies. However, in instances where the Commission has found that the merger is likely to result in a SPLC, the merging parties may make submissions on efficiencies.[1] The onus is on the merging parties to demonstrate that the efficiencies would not arise absent the merger and that such efficiencies are likely to outweigh the anticompetitive effects of the merger.[2] The Commission is required to assess all efficiency claims made by merging parties in such instances.

6. While efficiencies are considered as part of the competition assessment and have an impact on the conclusion of that assessment, the public interest assessment in South Africa is conducted separately. In the developing country context, public interest elements are usually introduced by countries to enable them to align their competition policy with broader government policies aimed at addressing their socio-economic or socio-political challenges.[3] Similarly, in South Africa, public interest considerations were introduced to address the injustices of the South African political history and feature prominently in merger control. The preamble of the Act specifically states that the objectives of the Act include, *inter alia*, providing all South Africans with equal opportunity to participate in the economy and regulating the transfer of economic ownership in keeping with the public interest.[4]

7. In February 2019, the Act was amended to deal with the structural challenges of high levels of concentration and the racially skewed spread of ownership of firms in the South African economy. In this regard, the public interest provisions in merger control were amended to explicitly create public interest grounds to address ownership, control and the support of small businesses and firms owned or controlled by historically disadvantaged persons.[5] This resulted in the addition of Section 12(A)(3)(e) to the public interest considerations.

8. With regards to the assessment of public interest, the Commission must determine the effect of all mergers on each of the abovementioned five public interest grounds. While some of these public interest considerations may come up as efficiency claims such as "the ability of national industries to compete in international markets", it is important to note that the assessment on public interest is a separate assessment to that of the effect of the

[1] If merging parties do not make submissions on efficiencies upfront, the Commission may request the merging parties to do so after a negative finding on competition. The Commission will then assess these efficiency claims and determine whether they are likely to outweigh the anticompetitive effects of the merger.

[2] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number 89/LM/Oct00).

[3] OECD (2016), Public interest considerations in merger control, OECD Competition Policy Roundtable Background Note. Available online: https://www.oecd.org/en/publications/public-interest-considerations-in-merger-control_21950340-en.html.

[4] South African Competition Act, 89 of 1998, as amended.

[5] South African Competition Act, 89 of 1998, as amended.

merger on competition. This means that irrespective of the Commission's findings on whether a merger is likely or unlikely to result in SPLC or if an anticompetitive merger is justifiable on efficiency grounds, the Commission must still determine whether the merger is justifiable on substantial public interest grounds. However, unlike efficiency gains which seek to directly offset the anti-competitive effects, public interest gains consider the broader societal and development objectives that the Act seeks to achieve which may justify the approval of the merger.

3. The Test for Assessing Efficiencies in Mergers

9. The Competition Tribunal (Tribunal) in the large merger between *Trident Steel (Proprietary) Limited and Dorbyl Limited* [6] (Trident/Dorbyl) developed a framework for the assessment of efficiencies in mergers. This merger resulted in a monopoly in the market for Improved Surface Finish steel products, however, the Tribunal approved the merger on the finding that the efficiency gains arising from the merger were likely to outweigh the anticompetitive effects. In its decision, the Tribunal laid out the principles against which merger efficiencies should be considered and a method for balancing these against potential anticompetitive effects. Some of the important findings of the Tribunal in this merger were:

- The burden of proof lies with the merging parties, who have the most information to show that the efficiencies claimed could not arise through some other agreement or arrangement;
- Efficiencies fall along a continuum with innovation or research and development (R&D) efficiencies as the most beneficial; production efficiencies lying between innovation and pecuniary efficiencies; and pecuniary efficiencies which are not "real" cost savings as the least beneficial;
- Efficiency gains are sometimes not capable of measurement. Where quantifiable, they may also not be measurable on the same scale and there is no formulaic approach that can be applied. Competition Authorities are required to exercise their discretion; and
- Evidence of pass through to consumers is not necessary when there are real efficiencies.

3.1. What types of efficiencies should be considered?

10. In the merger between *Tongaat-Hulett Group Ltd and Transvaal Suiker Bpk & Others*[7], the Tribunal indicated that the types of efficiencies that should be considered are those that, for example, evidences new products or processes that will flow from the merger of the two companies; or that identify new markets that will be penetrated as a consequence of the merger, markets that neither firm on their own would have been capable of entering; or that significantly enhances the intensity with which productive capacity is utilised. However, the Tribunal noted that these examples were not given to be an exhaustive list.

[6] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number: 89/LM/Oct00).

[7] The Tongaat-Hulett Group Limited / Transvaal Suiker Beperk, Middenen Ontwikkeling (Pty) Ltd, Senteeko (Edms) Bpk, New Komati Sugar Miller's Partnership, TSB Bestuursdienste, Competition Tribunal, (Case number: 83/LM/Jul00).

11. In the *Trident/Dorbyl* merger, the Tribunal described three categories of possible efficiencies arising from a merger. These are (i) dynamic efficiencies; (ii) production efficiencies; and (iii) pecuniary efficiencies. The first two categories, dynamic and production efficiencies, are seen as "real" efficiencies, whereas the third category, pecuniary efficiencies, are not.[8] According to the Tribunal, real efficiencies include plant efficiencies, distribution, procurement or capital cost economies, cost-reducing specialisation and R&D. The Tribunal cited *Areeda et al*[9] who find plant efficiencies most compelling and are more sceptical of the other types. In the *Trident/Dorbyl* merger, there was some potential cost-reducing "specialisation" between the two companies' plants which was seen as "plant efficiency". The Tribunal also accepted distribution and procurement efficiencies, so-called "supply efficiencies", as these arose from the fact that the joint firm would be large enough to order correctly sized pieces of steel (which each firm was not able to procure on its own) and this would drastically reduce the amount of scrap metal they produced.

12. Pecuniary efficiencies are seen as tax savings or lower input costs such as from improved bargaining power with suppliers. These are not real efficiencies. Of their overall approach to efficiencies, the Tribunal said the following:

> *"When we talk of real economies we would, without proposing an exhaustive list, include dynamic efficiencies, production efficiencies ranging from plant economies of scope and scale to research and development efficiencies that might not be achieved short of merger. Pecuniary efficiencies would not constitute real economies nor would those that result in a mere redistribution of income from the customers, suppliers or employees to the merged entity. Without categorically rejecting them we would be more sceptical than the Canadian courts in accepting certain efficiencies such as administrative efficiencies since these can be established in most mergers."*[10]

13. An important point noted by the Tribunal in the *Trident/Dorbyl* decision is that not all cost savings should be considered, only efficiencies that are "significant or enduring".

3.2. Total welfare or consumer welfare standard?

14. On the issue of whether efficiencies should be considered against a consumer welfare or total welfare standard, the Tribunal concluded that "*where efficiencies constitute "real" efficiencies and there is evidence to verify them of a quantitative or qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling*". In other words, it is not necessary to show pass-through to consumers if the efficiency gains are shown to be "real" and of a reasonable order of magnitude. On the other hand, if the efficiencies put forward achieve only "less compelling economies", the Tribunal ruled that

[8] According to the Tribunal, dynamic efficiencies are those associated with innovation which improves product or service quality. It was also noted that although these efficiencies are seen as the most beneficial, they are also the hardest to quantify in practice. Production efficiencies are described as those which allow firms to produce more or better-quality output with the same amount of input.

[9] See Areeda, Hovenkamp, Solow Antitrust Law Vol IIA, (1995) pg. 975.

[10] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number: 89/LM/Oct00).

firms must then show that there are some benefits to consumers. These "*need to be more than trivial, but neither is it necessary that they are wholly passed on*".[11]

3.3. Merger-specific efficiencies

15. The principle of merger-specificity of efficiencies is clearly set out in the Act, which states that efficiencies should only be considered if they "*would not likely be obtained if the merger is prevented*". The Tribunal elaborated on this, stating that *"if the efficiencies could come about through some other legal arrangement or organisational form that is not a merger, or if one of the firms could achieve a claimed efficiency on its own, the efficiency defence fails."*[12] This clearly demonstrates that the merging parties must show that the efficiencies are likely to only arise as a result of the merger.

3.4. How are efficiencies balanced against anti-competitive effects?

16. In the *Trident/Dorbyl* merger, the Tribunal noted that there are two possible approaches to weighing efficiencies against anticompetitive effects. The first, which the Tribunal described as a "formulaic" approach, explicitly calculates the trade-offs associated with the merger. Both efficiencies and potential deadweight loss resulting from the reduced competition are calculated and compared.[13] This is, however, difficult to achieve, as in practice the two effects are extremely difficult to quantify. The alternative method was termed the "discretionary" approach, which is what the Tribunal used to weigh the possible effects in the *Trident/Dorbyl* merger. In this regard, to form a view whether the claimed efficiencies are likely to outweigh the anticompetitive effects of the merger, a determination must be made as to whether the claimed efficiencies are:

- real;
- compelling or substantial;
- verifiable (how likely are they to occur?);
- merger-specific (and could not otherwise be achieved); and
- going to be passed on to consumers (this is only required if the efficiencies are not sufficiently compelling).

17. This is the approach that the Commission has been using in all mergers where efficiency justifications have arisen since the *Trident/Dorbyl* merger.

4. Mergers Decided on Efficiencies

4.1. Pioneer and Pannar

18. Following the *Trident/Dorbyl* merger, Competition Authorities in South Africa have rarely approved an anticompetitive merger based on efficiency justifications. One

[11] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number: 89/LM/Oct00).

[12] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number: 89/LM/Oct00).

[13] Williamson's trade off model.

merger that was decided by the Competition Appeal Court (CAC) on efficiencies was the merger between *Pioneer Hi-Bred International and Pannar Seed Limited*[14] (Pioneer/Pannar). This merger was in the market for breeding and commercialisation of hybrid maize seed (and soya bean seed to a lesser extent) in South Africa. Specifically, the rationale for the transaction was to combine Pioneer's strong advanced breeding technologies (ABTs) with Pannar's germplasm pool that is adapted to the South African environment in order to improve yields. The Commission prohibited the merger arguing that it was a three-to-two merger[15] (in a market that is central to food security and livelihoods, especially in low income households) where there would be minimal constraining influence on these two entities, with a high likelihood that maize seed prices would increase in future.[16] The merging parties appealed the Commission's decision at the Tribunal, which upheld the Commission's decision and prohibited the merger. The merging parties further appealed the decision at the CAC, which overturned the Tribunal's decision and conditionally approved the merger. The CAC's approval of the merger was based on the efficiency gains likely to arise from the merger.

19. The efficiency claims under consideration in this case were in relation to:

- cost savings through reduced incremental licensing costs. The merging parties argued that Pioneer had a global trait fee agreement which had lower costs compared to what Pannar was paying. The merging parties included this cost saving in their merger simulation model, showing that the trait fee saving would reduce the modelled average price increase post-merger.
- dynamic efficiencies through (i) the combination of germplasm to improve diversity and complementarity of the merging parties' combined pool; and (ii) the merged entity's ability to apply Pioneer's ABTs and global access to biotech traits to this larger and broader germplasm pool. Overall, this would improve the performance of maize seeds. The merging parties quantified this yield gain benefit.
- The merging parties further argued that the claimed yield gains (and their benefits to farmers) would dwarf any potential short-term pricing effects that may arise, based on either a total welfare standard or a consumer welfare standard.

20. The Commission and Tribunal had similar findings on efficiencies. In terms of the cost savings, the Tribunal found that these were pecuniary efficiencies as they were arising from Pioneer's better bargaining position, or volume discounts. The Tribunal was not convinced by the pricing benefits determined by the merging parties and argued that these were overstated. Further, the Tribunal found that the cost efficiencies claimed were not merger specific as it was found that such cost benefits were obtainable outside of the merger.

21. With regards to dynamic efficiencies, there was substantial debate in terms of the magnitude, likelihood and timing as well as the extent of merger-specificity. The Tribunal found that the dynamic efficiencies were unrealistic (extremely exaggerated) and unsupported by realities in the maize industry particularly in South Africa.[17] The Tribunal further found that the efficiency gains were unlikely to be merger specific as the parties

14 Pioneer Hi-Bred International, Inc. / Pannar Seed (Pty) Ltd [2010], Competition Tribunal, (case number: LM083Dec10).

15 The largest player in South Africa at the time was Monsanto followed by Pioneer and then Pannar.

16 Competition Commission case number 2010Sept5359.

17 Pioneer Hi-Bred International, Inc. / Pannar Seed (Pty) Ltd [2010], Competition Tribunal, (case number: LM083Dec10).

had entered into an arrangement to achieve these benefits long before the merger was even consummated. This indicated that the merger was not necessary to achieve such benefits (even if they are likely). Further, the Tribunal found that the timeframe upon which the claimed efficiencies would be realised was distant (beyond 5 years) and not associated with a high probability of offsetting the competitive harm.

22. Since the dynamic efficiency claims were determined to be less compelling, evidence of pass through to consumers was required as determined in *Trident/Dorbyl*. When the harm to consumers is significant, the gains to consumers become even more important and it was found that the likely significant unilateral price effects were not offset by cognisable efficiencies.[18]

23. The CAC however, overturned the Tribunal's (and Commission's) decision and approved the merger with conditions. The CAC emphasised the importance of verification of the existence of efficiencies rather than their quantification. The CAC therefore criticised the Tribunal for its approach which they argued illustrates the dangers of pursuing immediate static efficiency gains, at the expense of long-term dynamic efficiency improvements that benefit consumers, in a market dominated by innovation competition. In their view, the case is one where innovation is a force that, to a degree, renders static measures of market structure unreliable. With regards to the timeframe for achieving dynamic efficiencies, the CAC accepted the timeframe of beyond 5 years for the achievement of these benefits. The CAC argued that in innovation markets, the achievement of efficiencies may take longer, and these must be taken into account as they demonstrate long-term benefits to consumers.

24. According to the CAC, neither Pioneer nor Pannar would be able to achieve the same level of innovation in South Africa without the other. In their view, the merger results in a more competitive adversary for Monsanto, the market leader, in the long term. The CAC ultimately approved the merger conditionally.[19]

25. This case brings an interesting dynamic as the Tribunal interrogated the claimed efficiencies and disputed their quantification. On the other hand, the CAC adopted a different approach, of not critically interrogating the quantification, but rather emphasising verification. Further, it raises questions as to the timeframes acceptable for the achievement of dynamic efficiencies. Typically, Competition Authorities consider a short-term period for the assessment of mergers as in many other jurisdictions. In this case, it was accepted that this time period may be longer in the case of innovation markets (even beyond 5 years).

4.2. South African Breweries (Sab) and Diageo

26. In the merger between *The South African Breweries (Pty) Ltd and The Licensed brands and related assets held by Diageo South Africa (Pty) Ltd*[20] (SAB / Diageo), the Commission found that the efficiencies arising from the merger would likely outweigh the

[18] Pioneer Hi-Bred International, Inc. / Pannar Seed (Pty) Ltd [2010], Competition Tribunal, (case number: LM083Dec10).

[19] The CAC approved the merger subject to a three-year pricing cap to address short-term price effects; the established of a maize breeding research hub in South Africa. Further, the merged entity is required to maintain the breeding of all non-genetically modified maize seeds as this was a concern raised by some non-governmental organisations that intervened during the Tribunal's hearing of the matter.

[20] The South African Breweries (Pty) Ltd and The Licensed brands and related assets held by Diageo South Africa (Pty) Ltd (Competition Tribunal case number: LM187Oct18)

competition concerns. The Commission recommended an approval of the merger on this basis and the Tribunal accepted the Commission's findings. This merger was in the market for alcoholic beverages, particularly beer and flavoured alcoholic beverages (FABs). Specifically, SAB was acquiring the licenses to manufacture, market, distribute and sell the Smirnoff ready to drink (RTD) products, Guinness products and branded coolers of Diageo. The merger basically provided SAB with the opportunity to leverage its existing capabilities to produce and distribute the Diageo brands more effectively compared to what Diageo would be able to achieve in South Africa.

27. The Commission found that the merger raised competition concerns in the market for the manufacturing and supply of FABs where both SAB and Diageo were active. The FABs market was a highly concentrated market in South Africa with Distell being the dominant player and the merger would lead to further concentration in this market. Essentially, the merger would significantly alter the structure of the market by combining the second (SAB) and third (Diageo) largest players in the FABs market. Post-merger, there would be only 2 major players, Distell and SAB controlling the majority of the market. The Commission was concerned that such a change in the market structure was likely to confer some market power on SAB, as it would be able to control and set prices for a significant portfolio of FABs in its post-merger stable.

28. The merging parties, however, argued that the merger would result in tangible efficiencies that would benefit consumers. The efficiencies resulting from the merger were that there would be an immediate increase in the volume of Smirnoff RTDs supplied through SAB's distribution network. This would benefit consumers as they would have greater choice. This would also enable the Smirnoff RTDs to impose a better competitive constraint on the dominant Distell FABs resulting in increased competition in the FABs market.

29. The Commission found that the volume efficiency argument was plausible and timely. Evidence from the merger investigation showed that there was a latent demand for the Smirnoff RTDs that Diageo's distribution network was unable to satisfy. SAB had made commitments in terms of key performance indicator targets and capital investment (including a new blending plant for the Diageo FABs) that provided certainty that SAB had incentives to grow the Smirnoff RTDs. The Commission was satisfied that integrating the Smirnoff RTDs into SAB's distribution network was likely to increase the Smirnoff RTD volumes given that it will be distributed to a wider network of outlets that are already serviced by SAB.

30. The Commission's finding which was ultimately accepted by the Tribunal, was that despite the substantial increase in concentration in the FABs market, the benefits of SAB's distribution relative to Diageo's distribution meant that there would be no post-merger incentive for SAB to unilaterally increase the price of Smirnoff RTDs. This was evident given that a key driver of this transaction was SAB's intention to grow the Smirnoff RTDs and there were tangible commitments already in place to demonstrate this. The Commission found that any anti-competitive effects expected to result from the market concentration will be outweighed by the efficiency benefits of the increased sales of the Smirnoff brands post-merger. The strength of the assessment of unilateral effects meant that no conditions were ultimately applied to the merger in this respect.[21]

[21] The only conditions imposed on the merger as highlighted above were that a) no information sharing between SAB and Diageo occurs, b) SAB should not bundle products with Diageo and c) SAB must make Diageo coolers (fridges) available to third parties.

31. In 2023/24, the Commission conducted an impact assessment of this merger to determine whether the Commission's findings at the time of the merger were correct particularly in relation to the efficiencies arising from the merger. The impact assessment found that the Smirnoff brand performed well post-merger in most aspects. Smirnoff's volumes grew by a higher rate than most of its competitors and this also resulted in higher revenue growth for Smirnoff. It was found that could be attributed to the wider SAB distribution network and marketing strategy implemented by SAB for Smirnoff. Smirnoff also assisted SAB in gaining market share and growing in the market more broadly.[22]

32. Therefore, despite the concerns of the merger increasing concentration, the evidence showed that the approval of this merger on the basis that anticompetitive effects (in respect of Smirnoff) were unlikely because of the expected volume growth of the Smirnoff brand was most likely correct.

5. Public Interest Considerations in Merger Control

33. In South Africa, the Act requires the Commission to assess the effect of all mergers on each of the public interest elements as outlined above. This assessment applies to all mergers regardless of the sector or industry and as explained earlier, it is a separate assessment from the effect of the merger on competition. Further, this assessment is limited to the five specific public interest elements as stated in the Act. In recent times, there has been a lot of debate across Competition Authorities globally regarding environmental sustainability issues and the inclusion of these in the assessment of mergers.[23] While the Commission's public interest provisions do not explicitly deal with environmental sustainability, the Commission considers these issues as part of its assessment under the effect "on a particular industrial sector or region" (Section 12(A)(3)(a) of the Act). In this regard, the Commission's recently published revised public interest merger guidelines[24] indicate that when assessing the effect of a merger on a particular industrial sector or region, the Commission will consider the merger's effect on the environment in terms of pollution and carbon emissions amongst others. As such, although the Act is very specific on the five public interest grounds to be considered in merger control, the assessment of these could consider other factors more broadly.

34. In determining the likely effect of a merger on each of the public interest grounds, the Commission must determine whether such effect, if any, is merger specific and substantial. If the effect is found to be non-merger specific, the enquiry stops at that stage. If the effect is found to be merger specific but not substantial, the enquiry should stop at that stage.[25] Section12A(1)(b) of the Act requires the public interest being considered to be substantial but leaves open the question of what a substantial ground entails. The Act does

[22] See SAB_Diageo-Impact-Study_Final-Non_Confidential available at www.compcom.co.za

[23] OECD (2021), Environmental considerations in competition enforcement, OECD Competition Committee Discussion Paper, https://www.oecd.org/daf/competition/environmental-considerations-in-competitionenforcement.htm

[24] Competition Commission's Revised Public Interest Guidelines Relating to Merger Control, available online: https://www.compcom.co.za/guidelines/.

[25] See the Competition Commission's Revised Public Interest Guidelines Relating to Merger Control.

not give a defined outline on what substantial means.[26] In *Distillers Corporation (SA) Limited/ Stellenbosch Farmers Winery Group Ltd,*[27] the Tribunal held that the determination of what is substantial would depend on context.

35. If the Commission finds that a merger is not justifiable on substantial public interest grounds, the merging parties are required to offer remedies in the form of conditions to address the specific public interest harm identified. For example, if a merger has a negative impact on employment, the Commission may accept remedies that place a moratorium on merger-specific retrenchments for a specified period. The Commission may also accept other employment related remedies such as commitments for a minimum headcount number or a cap on job losses amongst others.[28] These conditions are for a specified period. Another example is the promotion of a greater spread of ownership, where the Commission's position is that all mergers must promote a greater spread of ownership. If the Commission finds that a merger has a negative or neutral impact with respect to this public interest element, remedies are required to address this harm. The types of remedies that are generally accepted by the Commission include amongst others, (i) employee share ownership programmes (ESOPs); (ii) equity sales to historically disadvantaged persons; or (iii) divestiture of a business or assets to historically disadvantaged persons.[29] Important to note here is that the remedy offered must be to address the specific public interest harm identified and not one that advances another public interest ground. However, if the effect on the specific public interest ground that is harmed cannot be remedied, the Commission may, on a case-by-case basis, consider equally weighty countervailing public interest grounds that outweigh the effect identified.[30]

36. Competition Authorities in South Africa have approved numerous mergers with public interest remedies over the years.[31] In addition, since the 2019 amendments to the Act and the inclusion of Section 12(A)(3)(e), the Commission and Tribunal have approved a large number of mergers that specifically address a greater spread of ownership concerns.[32] It must also be noted that where a merger is not justifiable on public interest

[26] The Commission's Revised public interest guidelines provide examples of factors that the Commission will take into account to determine substantiality for each of the five public interest elements. However, substantiality is not defined, and it depends on a case-by-case basis.

[27] Distillers Corporation (SA) Limited / Stellenbosch Farmers Winery Group Ltd [2002], Competition Tribunal, (case number: 08/LM/Feb02).

[28] Competition Commission's Revised Public Interest Guidelines Relating to Merger Control, available online: https://www.compcom.co.za/guidelines/.

[29] Competition Commission's Revised Public Interest Guidelines Relating to Merger Control, available online: https://www.compcom.co.za/guidelines/.

[30] Competition Commission's Revised Public Interest Guidelines Relating to Merger Control, available online: https://www.compcom.co.za/guidelines/.

[31] See for example, Metropolitan Holdings Limited / Momentum Group (Competition Tribunal case number: 41/LM/Jul10); Walmart Stores Inc. / Massmart Holdings Ltd (Competition Tribunal case number: 73/LM/Dec10); Sibanye Gold Ltd (T/A Sibanye-Stillwater) / Lonmin PLC (Competition Tribunal case number: LM315Mar18); Heineken / Distell (Competition Tribunal case number: LM215Feb17); Anheuser-Busch InBev SA/NV / SABMiller Plc (Competition Tribunal case number: LM211Jan16); and Simba (Pty) Ltd (PepsiCo) / Pioneer Food Group Ltd (Competition Tribunal case number: LM108Sep19).

[32] Notable cases include ECP Africa Fund IV LLC & ECP Africa Fund IV A LLC / Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd (Competition Tribunal case number: LM053Aug21); Heineken / Distell (Competition Tribunal case number: LM215Feb17);

grounds and there are no remedies, the Commission may prohibit the merger even if the merger does not raise any competition concerns. One merger that was prohibited by the Commission on public interest grounds alone was the merger between *ECP Africa Fund IV LLC & ECP Africa Fund IV A LLC / Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd*[33]. The Commission prohibited the merger as the merger resulted in a decrease in the shareholding of historically disadvantaged persons in Burger King SA from 68% to 0%. Following prohibition, the merging parties engaged the Commission on possible remedies to address the concerns. The merger was subsequently approved by the Tribunal with significant public interest conditions.[34]

37. On the other hand, even if there is a finding of SPLC, a merger may still be approved if it is justifiable on public interest grounds. The Act makes it clear that the assessments on competition and public interest are equal in status.[35] As such, an anticompetitive merger may still qualify for approval if there are substantial public interest grounds. In this regard, following from a negative competition finding, the Commission must consider whether there are any public interest grounds that could outweigh the anticompetitive effects of the merger. As explained above, the Commission must determine if the public interest gains are merger-specific and substantial. Ultimately, this requires a balancing of competition and public interest issues and is dealt with on a case-by-case basis. In practice, there have not been any anticompetitive mergers that have been approved on substantial public interest grounds in South Africa.[36] The section below will provide some insights as to why this may be the case.

6. Why are Efficiencies and Public Interest Gains Rarely Used to Justify Anticompetitive Mergers?

38. In South Africa, although a number of mergers have been prohibited over the years due to competition concerns, and only a few have turned on efficiencies, several mergers have been approved with remedies to address the competition concerns. Competition Authorities in South Africa generally only prohibit mergers that raise very serious competition concerns that cannot be addressed through remedies. In these instances, efficiencies are rarely used as a defence, and this is not unique to South Africa as

and Simba (Pty) Ltd (PepsiCo) / Pioneer Food Group Ltd (Competition Tribunal case number: LM108Sep19).

[33] Competition Tribunal case number: LM053Aug21.

[34] The conditions include expansion commitments that involve an investment of no less than R500 million in capital expenditure; increasing Burger King outlets in South Africa; increasing the number of employees and employee benefits; local procurement commitments; an employee share ownership programme; and divestiture of its meat plant.

[35] Competition Commission's Revised Public Interest Guidelines Relating to Merger Control, available online: https://www.compcom.co.za/guidelines/.

[36] In the merger between Iscor Limited / Saldanha Steel (Pty) Ltd (Saldanha Steel) (Competition Tribunal case number: 67/LM/Dec01), the Competition Tribunal found that Saldanha Steel was a failing firm and not approving the merger would result in adverse public interest outcomes with respect to employment and effect on the region (Saldanha Steel was an important contributor to the local economy in the Saldanha region). The Tribunal found that the public interest favours the approval of the merger. However, the public interest aspect arose from the failing firm and the Tribunal did find that the merger does not result in SPLC as the failing firm concerns outweigh the loss to potential competition.

Competition Authorities across jurisdictions generally tend not to accept efficiency defences for the approval of anticompetitive mergers. Some of the reasons for this in the South African context, may be that the legal standards for an efficiency defence, as developed through precedent in South Africa, are arguably relatively strict.[37] The emphasis in South African cases has been on merger-specific real efficiencies which by their nature are difficult to verify and thus imply more uncertainty on the part of both Competition Authorities and merging parties. Arguing for an efficiency defence and showing that the efficiency gains outweigh the competition harm is a very difficult task. Competition Authorities in South Africa generally dismiss benefits that are more pecuniary in nature as these are unlikely to result in real, compelling merger-specific gains. However, there may be some merit in accepting production and dynamic efficiencies where there is evidence that these are likely to result in substantial gains even if they may not be quantifiable as shown by the CAC's decision in *Pioneer/Pannar*. The balancing exercise of weighing efficiencies against anticompetitive harm is still difficult and may explain why merging parties are rarely able to successfully put up an efficiency defence when the Commission has made a finding that the merger is likely to result in SPLC.

39. The approval of mergers with remedies to address competition concerns does, however, allow for efficiencies to be realised while also addressing the competition harm. As discussed above, efficiency gains are gains that are likely to arise in the future after the merger has been implemented. The Tribunal in *Trident/Dorbyl* stated that the task of identifying and quantifying claimed post-merger efficiencies at the pre-merger stage is difficult.[38] It is therefore not possible for Competition Authorities to predict with certainty whether the gains will materialise and if they do materialise, the extent of the gains is also uncertain. Remedies enable Competition Authorities to strike a balance between maintaining competition and allowing the potential efficiency gains that may result from a merger to be achieved. This is usually true for vertical mergers as they tend to result in pro-competitive efficiencies. To address competition concerns in vertical mergers, the Commission and Tribunal in South Africa have imposed remedies such as supply conditions.[39] In addition, Competition Authorities in South Africa have also approved several anticompetitive horizontal mergers with remedies. For example, where mergers involve multiple markets and competition concerns are likely to arise in some but not all markets, the Commission has generally approved such mergers with structural and behavioural remedies.[40] This enables merging parties to realise the potential efficiency gains from the merger while also ensuring that consumers are not harmed from the post-merger increase in concentration.

Merging parties may also be reluctant to put up an efficiency defence as this may be seen as an acceptance of the anticompetitive effects.

[38] Trident Steel (Pty) Ltd / Dorbyl Limited for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited [2000], Competition Tribunal, (case number: 89/LM/Oct00).

[39] See for example, Telkom Sa Soc Ltd / Business Connexion Group Ltd (Competition Tribunal case number: LM065Aug14); Senmin International (Pty) Ltd / Cellulose Derivatives (Pty) Ltd (Competition Tribunal case number: LM161Feb12); and The Prepaid Company (Pty) Ltd / Cell C Ltd (Competition Tribunal case number: LM095Sep23).

[40] See for example, Dowdupont Inc. / The Dow Chemical Company and E.I Du Pont De Nemours and Company (Competition Tribunal case number: LM030May16); Bayer Aktiengesellschaft / Monsanto Corporation (Competition Tribunal case number: LM057May17); and Anheuser-Busch InBev SA/NV / SABMiller Plc (Competition Tribunal case number: LM211Jan16).

40. With regards to public interest, some gains may arise naturally from the merger, but others may be offered as additional commitments by merging parties to bolster the overall public interest gains. For public interest gains that do not arise as a natural consequence of the merger, it is possible that merging parties may be tempted to keep revising their commitments (e.g. investment commitments) until they become attractive enough and acceptable by Competition Authorities.[41] A potential risk is that the incremental commitments may be funded by the increase in profits earned by the merged entity as a result of the higher post-merger prices. A further risk for public interest gains that do not arise naturally from the merger is that merging parties may seek to vary these commitments in future, citing changes in market circumstances that has made them unattainable or delayed in implementation.[42] Lastly, similar to the test for efficiencies, public interest gains must also be merger-specific and as discussed above, proving merger-specificity is a difficult task.

7. Conclusion

41. The Commission is required to consider efficiencies and public interest elements in merger control in South Africa. While efficiencies are only considered after the Commission has made a finding of SPLC, public interest factors are considered in all mergers separately from the competition assessment. Competition Authorities in South Africa have developed detailed guidance on the assessment of both efficiencies and public interest in merger control. However, in practice efficiency justifications have rarely been successful in approving anticompetitive mergers. The Commission generally does, however, approve anticompetitive mergers with remedies and only prohibits mergers where there are no remedies. This enables the Commission to strike a balance between maintaining competition and allowing the potential efficiency gains that may result from the merger to be achieved. With regards to public interest, the Commission has been very successful in implementing remedies to address the negative effects of mergers on public interest. However, the Commission has not approved any anticompetitive merger on substantial public interest grounds. This may be because the risks associated with approving an anticompetitive merger are very significant and likely to cause permanent harm. As such, both efficiency justifications and public interest gains are likely to only outweigh anticompetitive effects in very exceptional circumstances.

[41] For example, in the PepsiCo and Pioneer Food merger (Competition Tribunal case number: LM108Sep19), the merging parties kept revising their commitments to make the approval of the merger acceptable. However, this merger did not result in a SPLC and therefore it did not require a balancing exercise of the public interest gains against competition effects.

[42] For example, PepsiCo and Pioneer Food merger (Competition Tribunal case number: LM108Sep19 and VAR048Jun24).