

# Public Interest Considerations In The South African Anti-Dumping And Competition Law, Policy, And Practice

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## ABSTRACT

*The paper addresses the delicate issue of public interest considerations when determining anti-dumping, competition, and investment measures to balance it with the interest of other interested parties in South Africa. It is particularly argued that the South African anti-dumping legislation must be amended as to clearly mandate the consideration of public interest when imposing an anti-dumping (or safeguard measure). Also, it is argued that the foreign direct investment regime must take into account policy considerations such as black economic empowerment in the public interest. The 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.*

**Keywords:** Anti-Dumping; Competition; Foreign Direct Investment; Mergers, Public Interest; WTO

## INTRODUCTION

Public interest considerations weigh more heavily in developing countries than they do in developed countries. The reasons for this are instructive: first, it is widely accepted that there is a greater role for industrial policy, for targeting support at strategically selected sectors or interest groups, in developing than in developed countries; secondly, developing country competition authorities are still engaged in a very basic struggle to achieve credibility and legitimacy in their countries...(Lewis, 2002, p.2)

This paper is intended to provide an overview of public interest considerations when determining anti-dumping, competition or anti-trust, and investment measures in South Africa. Anti-dumping, anti-competition, and foreign direct investment (FDI) measures often raises fundamental issues of public interest, often requiring due regard to other issues such as employment, redressing the socio-economic imbalances that exist due to the ramifications of the past Apartheid policies. The government of South Africa (GoSA), for example, requires that the foreign direct investment regime must take into account policy considerations such as black economic empowerment in the public interest. Public interest considerations have particularly re-emerged strongly “when fashioning and negotiating merger remedies in the case of multi-jurisdictional and cross-border mergers” (Oxenham, 2012 p.212) pursuant to the Competition Act of 1998. This position, argued Oxenham (2012) is due to the authorities realisation that “certain mergers may lead to appreciable detrimental effects on competition in the market or markets affected by a proposed merger” (p.213).

In this paper it is argued that the South African anti-dumping law and practice, it is particularly argued that the South African anti-dumping legislation, the International Trade Administration Act of 2002<sup>1</sup> (ITAA), must be amended as to clearly mandate the consideration of public interest when imposing an anti-dumping (or safeguard measure). The provisions of the ITAA on anti-dumping measures, and the associated regulations and legislation are not inimical to such consideration. The provisions of the South African competition legislation clearly espouse

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International Trade Administration Act 71 of 2002.

public interest consideration and analysis. But, this has not been without challenges as initially arguments were made against the inclusion of public consideration in the competition legislation. One of the arguments has been that there were more appropriate and suitable measures and policies to achieve the public interests contained in the Act, instead of using the competition policy (Duncan, 1999).

## **DATA AND METHOD**

This article is of an exploratory nature and involves a conceptual analytical approach. Conceptual analysis is a technique that treats concepts as classes of objects, events, properties or relationships. The technique involves defining the meaning of a given concept precisely by identifying and specifying the conditions under which any entity or phenomenon is (or could be) classified under the concept in question. Conceptual analysis is used in order to get a better understanding of public interest in South Africa.

## **LITERATURE REVIEW**

The study on which this article is based reviewed relevant literature sources on public interest in the field of anti-dumping, competition and direct foreign investment. Also, pertinent policy documents from the Department of Trade and Industries website, newspaper reports as well as other research documents relating to anti-dumping, competition and FDI were reviewed and analysed. Abstracts from the subject specific journals such as, for example, the *International Business and Economics Research Journal*, *Journal of Law and Economics*, *Journal of World Trade*, the *South African Mercantile Law Journal*, *THRHR*, *Potchefstroom Electronic Law Journal*, and the *South African Journal of Economics* were critically appraised and the full article sought and read if the abstract was considered robust and relevant. Some key papers are referenced in view of space limitations.

The literature review results is that scholarship in this area of study falls under those in favour of public interest consideration and those against such consideration. Notable in the field of competition are:

- Lewis (2002); Hodge., Goga., and Moahloli (2012) and Reekie (1999) addressing mergers in the field of completion law and policy. According to Reekie (1999), employment should not be considered a public interest issue for the purposes of completion law, and argues employment issue must be dealt within the framework macroeconomic policy. Lewis (2002) points to what the added conditionalities to address public interest when the South African completion authorities approve mergers. In particular, these interventions are designed to prevent loss of jobs in mergers and acquisitions, and address the past economic imbalances. Oxenham (2012) cautions of the un-intended consequences of public interest consideration particularly its possible stifling effect.

## **PUBLIC INTEREST CONSIDERATIONS IN SOUTH AFRICA**

### **Public Interest in the Anti-Dumping Law and Practice**

The South African anti-dumping law is found in the International Trade Administration Act of 2002 (hereinafter ITAA) as amended, which is designed to establish an anti-dumping regulatory regime that *prima facie* in compliance with the rules of the *World Trade Organisation*<sup>2</sup> (WTO), namely the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*,<sup>3</sup> (hereinafter Anti-dumping Agreement), and Article VI of the 1994 *General Agreement on Tariffs and Trade (GATT)*. The ITAA must be read and interpreted in conjunction with the Customs and Excise Act of 1964<sup>4</sup>, the latter being a supplementary legislation. The provisions

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<sup>2</sup>See General Agreement on Tariffs and Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts – The Result of the Uruguay Round of Multilateral Trade Negotiations 17 (1999) 1869 U.N.T.S. 187, *reprinted in* (1994) 33 *I.L.M.* 115.

<sup>3</sup>WTO Agreement, Annex 1A, Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (Anti-Dumping Agreement).

<sup>4</sup>Customs Tariff Act 26 of 1914.

of the ITAA find elaboration in the Anti-Dumping Regulations<sup>5</sup> (hereinafter Anti-Dumping Regulations). South African anti-dumping law dates back to the Customs Tariff Act 12 of 1914, which was the world's fourth such legislation after legislation of Canada,<sup>6</sup> New Zealand,<sup>7</sup> and Australia.<sup>8</sup>

As noted earlier the anti-dumping provisions in the ITAA are designed to establish an anti-dumping regulatory regime that *prima facie* reflects compliance with the Anti-dumping Agreement (Sibanda, 2013a). According to section 1(2) of ITAA read with section 12(1) of ADR, and pursuant to article 2.1 of the WTO Anti-dumping Agreement, dumping is considered to be occurring in South Africa when there predatory price discrimination or differential pricing of different units of the same good sold at different prices in different markets (Brink, 2004, Sibanda, 2013. See also Viner, 1923,; Viner, 1931). That is, "... a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (Anti-Dumping Agreement, Art 2.1). Numerous reasons can be provided to justify the imposition of antidumping measures ranging including but not limited to preventing predatory trade, price discrimination and protection of infant domestic industries (Sibanda, 2013a). Generally, strategic trade policy and consumer welfare arguments are advanced as justifications for anti-dumping laws (See Messerlin and Tharakan, 1999; Phillips and Turner, 1975) All these reasons are undergird by the "importing country's desire to protect domestic industry and consumers" (Sibanda, 2013a) from injurious effects of dumped goods.

Neither the Anti-dumping Agreement nor GATT Article VI contains a public interest clause, except for the provision of Article 6.12, which calls on national authorities to give consumers and intermediate users the opportunity to provide information relevant to the investigation and the determination of dumping. According to Barfield (2005) WTO Members have argued for the inclusion of the public interest test provision in the Anti-dumping Agreement in terms of which the effects of anti-dumping orders on the whole national economy could be measured. At best the Anti-dumping Agreement makes provision for the adequate notification of all interested parties during anti-dumping investigations. For example, Article 6.1 of the Anti-dumping Agreement requires that notice of an investigation be given to all interested parties. It reads as follows:

All interested parties in an antidumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in the question.

Article 6.11 defines the term 'interested parties' to include "(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association and (ii) the Government of the exporting Member; and in 'interested parties". Furthermore, the term includes not only the exporters and domestic producers but also the importers of the product under investigation who are likely to be adversely affected by anti-dumping actions. Article 6.11 goes on to state that "[t]his list does not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties". The Anti-dumping Agreement thus allows member States to add to the list. For the purposes of this article these may include industrial users and consumers whose consideration will be in the public interest. Therefore, such an inclusion in ITAA will not be at odds with Article 6.2 of the Anti-Dumping Agreement which provides that throughout an anti-dumping investigation, all 'interested parties' shall have a full opportunity to defend their interests. Part of this defence of interests is for the interested parties to be afforded the opportunity to be heard and the opposing views presented and rebuttal arguments offered.

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<sup>5</sup>Anti-Dumping Regulations of 2003 Notice 123 in *Government Gazette* No 24287 of 21 January 2003. For regulation before the ITAA see, *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Competition* (1992); *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping, Subsidies and other Forms of Disruptive Exports* (1994); and *Guide to the Policy and Procedure with regard to Action against Unfair International Trade Practices: Dumping and Subsidised Exports* (1995).

<sup>6</sup>An Act to Amend the Customs Tariffs of 1897, 4 Edw VIII, 1 Canada Statutes 111 1904.

<sup>7</sup>Agricultural Implement Manufacturer, Importation and Sale Act of 1905.

<sup>8</sup>Industries Preservation Act of 1906.

Anti-dumping measures, such as those imposed in the 2012 *Brazilian Fowl Meat* case merited public interest consideration. This argument is borne by the fact that in *casu* astronomical tariff increases, which were levied by the Minister of Trade and Industry, affected and impacted negatively on consumers' right to food security. On 21 June 2012 Brazil challenged South Africa's preliminary determination and the imposition of provisional anti-dumping duties on frozen meat of fowls of the species *Gallus Domesticus*, whole bird and boneless cuts, originating in or imported from Brazil, which were published in the ITAC Report No. 389. The ITAC's determination was made consequent to an application lodged by the South African Poultry Association (SAPA) on behalf of the Southern African Custom Union (SACU) industry in February 2012. In *casu* the DTI made a positive determination for to increase the tax on imported poultry products (Sibanda, SILVIA. See also *Increase in the Rates of Custom Duty on Frozen Meat Fowls of the Gallus Domesticus: Whole Birds, Boneless Cuts, Bone-In Portions, Carcasses and Offal*: ITAC Report No. 442.) to control the import and dumping of poultry in South Africa from Brazil. The tariffs have been raised on several imported chicken by 8.75 percentage points on average, and 82 percentages on whole birds from the 27 percentage in 2012. The tariff increases were: increase from 5% to 12% for boneless cuts were increased; increase from 27% to 31% for carcasses; and increase from 27% to 30% for offal (Sibanda, 2013b). In implementing the tariffs hike the ITAC had to engage in a delicate interests balancing exercise which included the gradual the "increasing levels of imports into SACU, and the "concomitant" chipping away of the market share of SACU producers of chicken meat; the business and investment that the domestic industry has made in the poultry employment opportunities the poultry industry gives to the South African public; the declines in profits of the domestic poultry industry due to dumped imports; the price disadvantage faced by domestic industries vis-à-vis foreign industries" (Sibanda, 2013b p.790).

Article 6.12 of the Anti-dumping Agreement also requires national authorities to provide opportunities for industrial users of the good subject to investigation and representative consumer organisations to provide relevant information during investigations. But, this is limited to the cases where the product is commonly sold at the retail level. Moreover, the aim of this provision is to enable consumer organizations and industrial users to provide any information that is relevant to an antidumping investigation. It must be conceded however, that the provision of Article 6.12 of the Anti-dumping Agreement indicates that adversely affected parties (including importers, downstream and upstream industrial users and consumers) have no rights but merely privileges and investigating authorities conducting an antidumping action are not obliged to take their views seriously. Thus, antidumping duties may be imposed even if they are contrary to the public interest.

In South Africa the Minister of Finance may intervene at the end of the proceedings. The Minister of Finance enjoys discretion to impose the anti-dumping duty based on "public interest" considerations. Be that as it may, the South African anti-dumping law does not have a comprehensive provision for considering the "public interest" before anti-dumping duties can be imposed. But, the anti-dumping authorities have in some disputes given due regard to public interest. In the *Italie – Ansoek of Pasta* case, for example, it was held that public interests are important in deciding if the anti-dumping action should be instituted. Recourse to public interest is in the form of an enquiry after a directive by the Minister of Trade and Industry to the ITAC. The ADR makes provision for public interest considerations, which the ITAC should consider in determining whether or not to impose any type of anti-dumping duty. Public interest provision in the ADR gives the ITAC broad discretionary powers to determine if there are reasonable grounds to conclude that the imposition, amendment or continuation of any type of anti-dumping duty, or the imposition, amendment or continuation of an anti-dumping duty in the amount determined in an investigation or review proceedings is justified. The ADR provides that the ITAC's determination of the public interest shall be based on consideration of any relevant factors. This is a very important provision because it provides a non-peremptory guidance on, and indices of, public interests.

Public interest may militate against the imposition, amendment or continuation of an anti-dumping duty, or for the imposition, amendment or continuation of an anti-dumping duty if (i) it is likely to substantially lessen or prevent, or has substantially lessened or prevented, competition in the domestic market for goods or services; (ii) it is likely to substantially lessen or has substantially lessened the competitiveness of domestic producers; (iii) it is likely to cause significant damage or has caused significant damage to domestic producers that use the product under investigation in the production of other goods or the provision of services; (iv) it is likely to significantly restrict, or has significantly restricted, consumer access, at competitive prices, to the product under investigation or like product, or to other goods produced or services that use the product under investigation as an input; or (v) it is likely

to significantly impact, or has significantly impacted, negatively on the public health, the public safety or the environment.

In the light of the critical impact that the imposition of anti-dumping measures have on the general public, who are end-users of the product in question, it is prudent that that section 4(2) of the ITAA and the ADR be amended to contain a clear provision on “public interest” requiring the ITAC to consider the applicability or not of public interests without having to rely on the directive by the Minister of Finance. Part of the amendment should include a specific and clear articulation of public interest criteria, and a non-exhaustive list of factors that can guide the ITAC on whether and how to conduct a public interest enquiry (See, e.g., Tao, 2006 p107-109). There are of course scholars who argue against such a provision on the basis that the purpose of anti-dumping law was originally to protect producers and not consumers (Arajou 2001). In my view, a “public interest” provision fashioned along the lines of Article 21.1 of the European Community’s Basic Law could be workable for South Africa. The relevant part of Article 21.1 of the Basic Law states:

A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interest of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as may be determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

The current provision of section 4(2) of the ITAA will need to be redrafted to give an indication of the basis upon which the Minister of Finance makes a determination that the imports under investigation do not amount to irregular trade practice. The provision should permit the consideration of all relevant interests and put the elimination of trade-distorting effects of injurious dumping as the main objective. Similar approaches have been witnessed in other jurisdictions. For example, the Singaporean anti-dumping legislation requires the Minister of Trade and Industry to consider the “public interest” factor. Public interest is the criterion for determining whether to institute an anti-dumping investigation in Singapore. The Singaporean Minister of Trade and Industry has a duty to confirm, once a petition is received, whether the envisaged anti-dumping investigation is in the public interest. If the Minister determines that there is such evidence and that an investigation is in the public interest, the investigation would proceed (Hsu 1998).

The United States also implements implicitly the factor of public interest in imposing safeguard measures. The United States, for instance, requires that the President uses his discretionary power to implement safeguard measures based “implementing relief that provides greater economic and social benefits than costs, with a host of additional related factors to be weighed” (See Business Guide to Trade 2001). It has been proposed that the United States change in the United States anti-dumping regime which will make it possible for the President to intervene at the end of the process in favour of national interest and introduce a solution which covers both the economic and political goals of the United States (Barfield 2005). Barfield (2005) argues that the US Congress has sometimes legislated rules and given instructions to the United States International Trade Commission (USITC) that have little relevance to injurious dumping, and that members of the USITC have not been “political hacks with neither interest in or competence in economic analysis” (p.729). The introduction of such a highly politicised anti-dumping provision is not preferred in South Africa. Contrary to what Barfield (2005) observes, fundamental economics still plays a significant part in the South African anti-dumping process.

Under European Community anti-dumping rules, it must first be shown that the imposition of anti-dumping measures must be in the “Community interest”. Community interest essentially involves a political decision, taking into account the interests of users, consumers, and upstream and downstream industries. In short, it must be determined that the imposition of such measures will be to the benefit of the overall interest of the EC<sup>9</sup> (Business

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<sup>9</sup>See Council Regulation (EC) No. 384/96, 22 December 1995, as amended by Council Regulation (EC) No. 2331/96, 2 December 1996, Council Regulation (EC) No. 905/98, 27 April 1998, and Council Regulation (EC) No. 2238/2000, 9 October 2000.



Guide to Trade Remedies in the European Community, 2001). Tharakan points out that, in 1994, the EU went a step further by amending its “public interest” clause to give consumers some meaningful legal standing in anti-dumping cases (Tharakan, 1999). In a more guided manner, Article 21.1 of the Basic Regulation, for example, urges the European Commission and the Council to take into account “community interests” before a decision is made to impose anti-dumping measures on imports.

### **Public Interest in the Competition Law and Practice**

The Competition Act of 1998<sup>10</sup> whose primary purpose is to “promote and maintain competition” addresses competition or anti-trust issues in line with comparable jurisdictions such as the European Union, US and Canada (Minette 2006, Sibanda, 2001. Duncan 1999 ). In fact, the purposes and objective statement of the South African Competition Act was in great part borrowed from the Canadian Competition Act 1 of 2009. The declared purpose of the Canadian Competition Act is:

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

The South African Act was designed as a tool to combat anti-competition conducts; monopolies and abuse of dominant positions. It also carries provisions determining the legality of mergers – be it horizontal mergers, vertical mergers, or conglomerate mergers. In terms of the Act the South Africa Competition Commission (SCC) has the obligation to investigate and evaluate mergers and prohibited practices. Furthermore, the SCC can disallow small and intermediate mergers, and makes recommendations on larger mergers to the Competition Tribunal. The SCC’s decisions may be appealed to the South Africa Competition Tribunal (SACT) and the South African Competition Appeal Court (SACAC).

Public interest considerations are explicitly espoused and addressed the Competition Act of 1998. To begin with, the preamble of the Act speaks to the need for economic participation and issues of ownership to take into account public interest. Section 12A(3) of the Act, for example, makes provision for public interest grounds. The provision is couched in peremptory manner as section 12A(3) specifically list factors that the competition authorities “must consider” which include its effect on employment; a particular industrial sector; small businesses , or enterprises owned by historically disadvantaged persons ; and the ability of domestic industries to compete in the international markets, when determining if the proposed merger “can or cannot be justified on public grounds”. This is a much stronger and wider commitment to public interest in comparison to public interest consideration approach in mergers in the United Kingdom which, for example, requires the Secretary of State for Trade and Industry to consider national security which includes public security; plurality of media; and stability of the UK financial system.<sup>11</sup> Section 12A(1)(b) of the Competition Act also uses the word “must” to place an obligation on the competition authorities whenever required to consider a merger to “...determine whether the merger can or cannot be justified on substantial public interest grounds..” set out in section 12A(3). Section 12A bears some resemblance to the provisions of the considerations that the Canadian Minister of Finance should have due regard to when determining bank mergers. In terms of the Canadian Competition Act,<sup>12</sup> bank mergers, for example, must be assessed with due consideration to “possible costs and benefits to customers and small and medium-sized businesses, including the impact on branches, availability of financing, price, quality and availability of services; the timing and socio-economic impact of any branch closures or alternative service delivery measures at the regional level, and any alternative service delivery measures that might mitigate the impact; and what remedial or mitigating steps in respect of public interest concerns the banks are prepared to take, such as divestitures, service guarantees and other commitments, and what measures to ensure fair treatment of those whose jobs are affected...” (See Susan, 2005).

<sup>10</sup>Amended by the Competition Amendment Act No. 1 of 2009.

<sup>11</sup>However, the Secretary of State has powers to add new public interest considerations in terms of the Enterprise Act 2002.

<sup>12</sup>Competition Act, R.S. 1985, c. C-34.

Public interests considerations played a major role in a number of cases that came before the South Africa Competition Tribunal (SACT) and the South African Competition Commission (SCC) respectively. In the Walmart/Massmart merger case, for example, public consideration led to the stringent conditions placed on the merger of Walmart and Massmart. The Walmart/Massmart merger controversy arose in 2012 following the acquisition of 51% stake in Massmart by Walmart (Kruger 2012). In this case the SACT relied on its public interest mandate in terms of the Competition Act that no loss of jobs will happen as a result of the merger. Thus, an arrangement was secured for Walmart/Massmart to establish R100 million programme for the development of local South African suppliers (Sibanda, 2012, See DTI, 2013). Other public interest issues considered in the Walmart/Massmart ruling include, for instance, the country has a challenge of fluctuating rate of employment and it would not have been in the interest of the public, and of the Government of South Africa, to unconditionally accept the proposed merger (DTI, 2013). In fact, the South African competition authorities have never been shy to consider public interest, particularly in the cases of mergers which have the impact of loss of employment of huge magnitude. And, on mergers of potential or real impact on small business.<sup>13</sup> In *Metropolitan Holdings Limited and Momentum Group Limited*, for example, the competition authority held that:

Thus if on the facts of a particular case, employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited, then prima facie this would be presumed to have a substantial adverse effect on the public interest and the evidential burden would then shift to the merging parties to justify it before a final conclusion can be made.<sup>14</sup>

The strong approach of consideration of public interests is not surprising given the fact that issues considered are issues addressed in the country's Industrial Policy Action Plan (IPAP), which is released by the DTI since 2007. IPAP issues of poverty and unemployment through the promotion and the protection of manufacturing sectors so as to , increase value-added exports and absorb labour. GoSA is gradually moving towards a developmental state with greater state intervention in markets through regulation that supports and promote socio-economic goals and economic activities. In Africa there a number of jurisdictions with legislation that requires public interest considerations in competition or anti-trust cases, particularly in mergers and acquisitions including Botswana; Malawi; Namibia; Swaziland; Tanzania; and Zambia (Oxenham, 2012).

Some commentators had argued that the ruling will have a chilling effect on FDI. Also, that is brings into question the discharge of the country's WTO obligation, particularly due to performance requirements set for multinational companies (Kruger 2012). The SACT was aware of the possibility of the ruling been challenged for non-compliance with WTO requirements, particularly those requirements protecting local suppliers and labour rights. But, the ruling was in line with the provisions of the Competition Act in particular section 2 which states as the purpose of the Act amongst others the promotion of employment opportunities, and the advancement of socio-economic welfare of South African especially persons from previously disadvantaged groups. The main shortcoming of the Competition Act is that no mention is made of how one balances competition and public interest assessments. The SACT has in some cases stepped in to guide the SACC on what not to when adjudication issues. For example, in the merger between Shell South Africa (Pty) Ltd ("SSA") and Tepco Petroleum (Pty) Ltd ("Tepco") (Case No. 66/LM/Oct01) the SACT cautioned the to be "...extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as (sic) investor" (see Case No. 66/LM/Oct01, para 49). In particular, the SACT warned that however well-intentioned the competition authorities must "...not to pursue their public interest mandate in an over-zealous manner less they damage precisely those interests that they ostensibly seek to protect" (see Case No. 66/LM/Oct01). In *Harmony Gold Mining Company Ltd ("Harmony") and Goldfields Ltd ("Goldfields")* (Case No. 93/LM/Nov04) case, which involved a hostile take-over bid, the SACT rejected Goldfields' argument that a merger should be prohibited even if it does not raise anti-competition concerns merely on the basis of public interest. According to the SACT the danger with such an approach is that it "would render a good measure of the mergers which come before us daily, susceptible to prohibition" (Case No. 66/LM/Oct01, para 35). The relevant case law shows some success by South African competition authorities in striking a balance between competition and public interest considerations. Notable is

<sup>13</sup>See *Anglo American Holdings Ltd/Kumba Resources Ltd* 46/LM/Jun02 at paras 141-144.

<sup>14</sup>*Metropolitan Holdings Limited and Momentum Group Limited* 41/LM/Jul10, at 21. See also *Cherry Creek Trading 14 (Pty) Ltd/Northwest Star (Pty) Ltd* 52/LM/Jul04; *Multichoice Subscriber Management (Pty) Ltd v Tiscali* 72/LM/Sep04 on the imposition of employment related conditions.

*Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd*<sup>15</sup> in which the SACT acknowledge the possibility of conflicts between different interests at called for the completion authorities to adopt a three-prong approach in terms of which:

1. Each asserted public interest ground must be considered in isolation and it must be determined whether such ground is substantial.
2. If the answer to the above is in the affirmative, and there are at least two contradictory grounds, then the competition authority must attempt to reconcile the conflicting grounds.
3. If the competition authority is unable to reconcile the substantial contradictory grounds, then the grounds must be balanced and the competition authority must reach a net conclusion as to the public interest.<sup>16</sup>

Important to note as a balancing act is that the South African competition authorities have acknowledged and appreciated the fact that they play a secondary role to other bodies and/or authorities established to deal with employment issues such as salaries and basic conditions of employment. In *Daun et Cie AG/Kolosus Holdings Ltd*<sup>17</sup> the SACT expressed this position succinctly as follows:

We derive some comfort from the knowledge that each of the elements of public interest that we are obliged to consider are protected and promoted by legislation and institutions specifically designed for that purpose – hence, the merged entity would not be able to alter unilaterally employment conditions and agreed bargaining arrangements. While this cannot provide the basis for us shying away from tough decisions, it does place our own role in these matters in correct perspective. At most, our role is ancillary to these other statutes and institutions; it is supportive of their general thrust and should, by and large, not be employed as a substitute for, and in order to second-guess, these other interventions.<sup>18</sup>

## CONCLUSION

Public policy interest considerations in South Africa may be regarded as having deterrent effects ( Smith 2003. See generally Seldeslachts, Clougherty, and Barros, 2009). But, such a consideration it a necessary evil. The South African socio-economic situation is unique and merit further development and consideration of public interest. Not only is South Africa a developing country, it has suffered one of the most socio-economic injustices in the past. Some of the injustices where either perpetrate or encouraged by multinational corporation – and it will take some time to reverse the effects particularly in the case of the previously disadvantaged groups. Considering public interest in anti-dumping and competition law and practice remains an issue of national importance. The GoSA's policy space with respect in particular to ensuring that not only do trade measures achieve stabilisation of the overall competitiveness of domestic industries but also takes into account the impact of such measures on other public interests.

The current WTO Anti-Agreement imposes no substantive obligation on the authorities to take the broader public interest into account because anti-dumping investigations are mainly initiated at the instance of producers. But, neither does the Agreement preclude national authorities from considering public interests in their anti-dumping determinations. Thus, countries like Canada, for example, in terms of the public interest provisions enacted in 1984 go for the view that producer interest provisions in anti-dumping legislation and regulations is too narrow a conception, thus making important to explicitly refer to and take into account public interest. The express addition of “public interest” as a factor to be considered when making determinations for anti-dumping in South Africa should not be seen as aimed at making it difficult for domestic industries to receive relief from the ITAC. Interestingly, public interest is considered in the South African competition policy. And, such consideration of public interest has not defeated the aimed and objectives of the competition policy.

In the area of competition and investment South Africa has witnessed a strong jurisprudence requiring the taking into account public interest provision. As noted, for example, public interest considerations are central to the

<sup>15</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02.

<sup>16</sup> *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* *Ibid* at 217.

<sup>17</sup> *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03.

<sup>18</sup> *Daun et Cie AG/Kolosus Holdings Ltd* 10/LM/Mar03, *ibid*, par124.



fabric of the Competition Act of 1998, particularly in relation to mergers and exemptions. Also, the Competition Act's pre-ambular statement that declares that efforts to regulate the economy and to transfer the economic ownership make take into account or keep with public interest in the form of "the interests of workers, owners and consumers." (See generally case law *Anglo American Holdings Limited /Kumba Resources Limited (Industrial Development Corporation Intervening)*).

Admittedly, public interest considerations may produce un-intended consequences when, for example, authorities imposes overly restrictive and burdensome behavioural remedies, as has been the case in South Africa (Oxenham 2012). However, public interest considerations in the South African anti-dumping and competition practice cannot be equated to an unruly horse which has bolted out of the barn to the swimming pool. It has been applied circumspectively with appropriate balancing considerations put in place.

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