

COMPETITION

Evaluating the public interest effects of a merger: The Competition Appeal Court charts the course

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When evaluating a merger, the Competition Act 89 of 1998 ("**the Act**") mandates that the competition authorities apply a two-pronged test. The first leg of this test involves an inquiry into whether the merger can or cannot be justified on competition grounds. The second leg involves an inquiry into whether the merger can or cannot be justified on substantial public interest grounds.

The Act therefore incorporates traditional competition law considerations alongside public interest considerations. Based on a textual analysis of the Act, it is clear that competition concerns and public interest concerns are of equal status, notwithstanding that the competition inquiry ordinarily precedes the public interest inquiry. However, in practice, this parity has not always been maintained.

Background

Recently, the Competition Appeal Court ("**CAC**"), in *Vodacom (Proprietary) Limited and Others v Competition Commission of South Africa* (260/CAC/Nov2024; 261/CAC/Nov2024) [2025] ZACAC 2 (14 August 2025) ("**Vodacom**"), provided authoritative guidance on the correct approach to assessing mergers under Section 12A of the Act. Before the judgment can be discussed, it is important to provide some background on the case.

In November 2021, Vodacom Proprietary Limited announced its intention to acquire a 30% stake in Maziv Proprietary Limited. Following an extensive investigation, the Competition Commission in August 2023 recommended to the Competition Tribunal that the merger be prohibited. On 28 March 2025 the Tribunal issued its ruling, agreed with the recommendation of the Commission and prohibited the merger, despite the merging parties proposing conditions in an attempt to address the Commission's concerns.

The Tribunal, in summary, found that the competition risks arising from the merger were long term and dynamic, involving complex commercial strategies that would be difficult to monitor. The Tribunal also found that the anti-competitive effects of the merger could not be outweighed by the public interest commitments proposed by the merging parties as conditions to the merger. Aggrieved by the prohibition of the merger, the merging parties and the Minister of Trade, Industry and Competition ("**Minister**") appealed the Tribunal's decision.

Subsequently, the merging parties and the Commission agreed on revised conditions following extensive negotiations, resulting in the Commission abandoning its opposition to the appeal.

The Competition Appeal Court's Determination

On appeal, the CAC was tasked with considering whether these revised conditions carried sufficient weight to remedy any adverse competition and public interest findings made by the Tribunal in its prohibition of the merger. The approach of the Court is discussed below.

Proper application of Section 12A of the Competition Act

The Court affirmed the structure of the statutory inquiry envisaged by Section 12A of the Act as follows:

- Step 1 (SLC Test): The first step is to determine whether the proposed merger would result in a substantial lessening of competition (SLC) using the factors which are set out in subsection 12A(2) of the Competition Act.
- Step 2 (Pro-competitive gains offset): If the SLC test is met, the Tribunal is then required to weigh the adverse SLC effects against any possible merger-specific technological, efficiency or other pro-competitive gains that could not otherwise be achieved in the absence of the merger. It must also consider whether such gains are greater than, and offset, the SLC effects.
- Step 3 (Public Interest Test): Thereafter, the Tribunal must engage with the public interest test. Crucially, this test must be conducted independently of the competition assessment, and strictly within the confines of the five enumerated factors listed in Section 12A(3)(a) to (e) of the Competition Act ("**public interest factors**").
- Step 4 (Weighing Up Exercise): Finally, the conclusion reached in respect of the SLC Test must be weighed up against the conclusion reached in respect of the public interest factors, to arrive at the final decision.

Importantly, these tests must be carried out through the prism of the normative framework of the Constitution. The Court quoted the Constitutional Court's decision in *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd and Another* 2022 (4) SA 323 (CC) which held as follows:

"In interpreting section 12A of the Act, the Competition Appeal Court majority was required to have had regard to the provisions of s 39(2) of the Constitution which provides instructive guidance in construing any provision, including s 12A, the Preamble and purpose of the Act. This should have been done also with due regard to the State's constitutional obligation to give effect to the rights in the Bill of Rights."

SLC Test

As pointed out above, the first leg of the inquiry is to determine whether the proposed merger would result in an SLC. The Tribunal is required to assess all the available evidence against the factors set out in s 12A(2) of the Act as they apply to the particular transaction. By way of example, this includes an assessment of whether the merger would result in a removal of an effective competitor, the presence of barriers to entry, foreclosure concerns and the likelihood of coordinated conduct. As the Court correctly pointed out, these factors do not constitute a closed list.

Public Interest Test

The Court found that section 12A(1A) of the Competition Act requires that, regardless of the outcome of the SLC test, the Commission and the Tribunal are statutorily required to make a determination on whether the merger can or cannot be justified on public interest grounds.

The Court referred to the case of *Epiroc Holdings SA v K2022596519 (South Africa) (Pty) Ltd and Polka Dots Properties 117 (Pty) Ltd* [2023] 2 CPLR 20 (CT), where the Tribunal commented on the approach to be followed when assessing the public interest factors. In this regard, the Tribunal stated:

"As regards the public interest analysis under s 12A(3) of the Act, the Tribunal has previously explained that it is holistic one, in terms of which the different public interest grounds listed in section 12A(3) must be separately assessed and then, if necessary, weighed against each other in order to arrive at a net conclusion on the public interest effects of the merger."

In other words, each of the five enumerated public interest factors, as well as any public interest commitments made by the merging parties relating thereto, must be evaluated one-by-one. Thereafter, the public interest effects must be considered cumulatively. The Court indicated that while an individual commitment may be modest on its own terms, a cumulative assessment could conclude that the *overall* public interest effect on the merger in terms of all the Section 12A(3) factors (or as many as may be relevant to the merger under scrutiny) can dictate a particular positive or negative conclusion in respect of the merger.

Importantly, it is not all public interest effects that must be considered:

- Firstly, only merger-specific effects are taken into account, that is, only those that would have happened if the merger had not taken place (the so-called "pre-merger counterfactual") provided they are "sufficiently closely related" to the merger.
- Secondly, Section 12A(3) only provides for five specific public interest grounds^[1]. It is a closed list and anything that falls outside of these factors must be located within the context of the SLC test.

Weighing up exercise

The Court went on further to state that after the public interest assessment has been conducted, the Tribunal is required to weigh the conclusion reached in respect of the SLC test against the conclusion reached in respect of the public interest factors, to arrive at the final outcome. The Court noted that in many cases the two conclusions may point in the same direction, in which case a balancing exercise is unnecessary. But where it does not, a proper weighing exercise must be conducted. Admittedly this is not an easy task as the balancing is not susceptible to a mathematical evaluation. However, the weighing up must "*at least be the basis of a rational explanation for whatever conclusion is finally adopted in respect of the merger.*"

Finding

The Court found that the Tribunal erred in two ways in applying Section 12A.

First, the Tribunal found that the commitments of the merging parties were not merger-specific. However, this finding was based on a misreading of certain strategy documents of the merging parties. The Court said that there can be little doubt that, but for the conditional approval of the merger, the various public interest commitments (such as, roll-out of fibre lines and broadband connectivity to underserved communities, schools and police stations) may not have been realised. In this context it again cited *Mediclinic*:

"Maintaining or increasing the scope for choice of essential and much-needed services with particular regard to the plight of the financially under-resourced or the vulnerable, should always be at the back of the decision-makers' minds when dealing with mergers."

Second, the Court found that the Tribunal erroneously conflated the SLC test with specific public interest factors. The Tribunal attempted to find the consumer benefitting conditions in the five specific public interest grounds whereas it should have located them in the context of the SLC test.

The Court ultimately set aside the Tribunal order prohibiting the merger, and replaced this with an order approving the merger subject to a revised set of conditions agreed upon between the Commission, the Minister and the merging parties.

Conclusion

The *Vodacom* decision provides a useful and authoritative methodology for applying Section 12A. Parties applying for merger approval from the Commission or Tribunal should take this essential guidance from the Court into account when preparing their merger filings.

[1] Namely, a consideration of the effect that the merger will have on -

(a) a particular industrial sector or region;

(b) employment;

(c) 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;

(d) the ability of national industries to compete in international markets; and

(e) 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.



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