

# STEEL AND PROPANE: THE EFFICIENCY DEFENCE AND HORIZONTAL MERGERS\*

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## INTRODUCTION

The Competition Act 89 of 1998 (the Act) contains comprehensive rules for the adjudication of mergers by the Competition Commission, Competition Tribunal and Competition Appeal Court. Adjudicating bodies must decide whether a merger should be approved, approved subject to conditions or prohibited. In determining the fate of a merger, the adjudicating body must determine whether the merger ‘is likely to substantially prevent or lessen competition’.<sup>1</sup> But even when the adjudicating body finds that a merger will substantially prevent or lessen competition, s 12A(1)(a)(i) determines that the merger may yet be saved if it

‘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 from the merger, and would not likely be obtained if the merger is prevented’.<sup>2</sup>

Mergers can be between vertically related firms that are on different levels in the distribution chain, or between firms that are not in related markets: so-called conglomerate mergers. These types of mergers seldom raise serious competition concerns. However, horizontal mergers, that is mergers between firms that compete in the same markets, are central to merger regulation in competition law. In this contribution the impact of s 12(1)(a)(i) on horizontal mergers will be evaluated.<sup>3</sup>

Most legal systems allow bodies that consider the competitive conse-

\* This contribution originated in a paper presented at the First Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law and Policy held on 21 May 2007. The invaluable inputs of my co-presenter Geoff Parr is gratefully acknowledged.

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<sup>1</sup> Section 12A(1) read with ss 13(5)(b), 14(1)(b), 16(2) and 17(3).

<sup>2</sup> Section 12A(1)(a)(i).

<sup>3</sup> For the distinction between horizontal, vertical and conglomerate mergers see Philip Sutherland & Katharine Kemp *Competition Law of South Africa* (2000 — updated to service issue 10) ch 10 and, for the impact on s 12A(1)(a)(i) in mergers that that are not horizontal, see paras 10.10.1–2 of the same work.

quences of horizontal mergers to take account of efficiencies.<sup>4</sup> In Europe the EC Merger Regulation does not provide for an efficiency defence, but such a defence is set out in the EC Horizontal Merger Guidelines.<sup>5</sup> Similarly, antitrust law in the United States does not formally provide for an efficiency defence, but it has crept into the case law and US Horizontal Merger Guidelines despite the reservations of several commentators.<sup>6</sup> The South

<sup>4</sup> See Ann-Britt Everett & Thomas W Ross *The Treatment of Efficiencies in Merger Review: An International Comparison* Report for the Canadian Competition Bureau (2002) 25ff; Canadian Competition Bureau *Treatment of Efficiencies in the Canadian Competition Act* Consultation Paper (September 2004) 30; and the OECD Report *Competition Policy and Efficiency Claims in Horizontal Agreements* (OECD 96/65) (1996) for a comparison of the position in various legal systems.

<sup>5</sup> But see the EC Merger Regulation 139/2004 para 29; and see the EC Horizontal Merger Guidelines OJ [2004] C 31/5 Part VII. See generally on the development of the efficiency defence in Europe: Mark A Warner 'Efficiencies and merger review in Canada, the European Community and the United States: Implications for convergence and harmonization' (1994) 26 *Vanderbilt Journal of Transnational Law* 1059 at 1091–9; Margarida Afonso 'A catalogue of merger defenses under European and United States antitrust law' (1992) 33 *Harvard International LJ* 3. The efficiency defence was for some time given short shrift in Europe and efficiencies were sometimes regarded as a reason for treating a merger with suspicion — see Damien Nevan et al *Mergers in Daylight* (1993) 62 and 116–17, referred to in *Trident Steel (Pty) Ltd/Dorbyl Ltd* 89/LM/Oct00 paras 46–7, and Daniel J Gifford & Robert T Kudrle 'Rhetoric and reality in the merger standards of the United States, Canada and the European Union' (2005) 72 *Antitrust LJ* 423 at 458–61. See also Everett & Ross op cit note 4 at 55–6. The tribunal observed, with reference to Alan A Fisher & Robert H Lande 'Efficiency considerations in merger enforcement' (1983) 71 *California LR* 1580 at 1591, that this was previously also the attitude of the FTC in the United States (see especially at 1593ff). See also the European cases *AT&T/NCR IV/M050* paras 28–30; *Aerospatiale/Alenia/DeHavilland* Case IV/M157 paras 65–71; *MSG Media Service IV/M* 469 paras 100–1; *Nordic Satellite Distribution IV/M* 490.

<sup>6</sup> Phillip E Areeda & Herbert Hovenkamp *Antitrust Law* (2004) para 970c; Mark N Berry 'Efficiencies and horizontal mergers: In search of a defense' (1996) 33 *San Diego LR* 515; United States Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines (1992, revised 1997) part 4 (henceforth 'US Horizontal Merger Guidelines 1992'); Joseph Kattan 'Efficiency in merger enforcement' (1994) 62 *Antitrust LJ* 513 at 515–21; William J Kolasky & Andrew R Dick 'The merger guidelines and the integration of efficiencies into antitrust review of horizontal mergers' (2003) 71 *Antitrust LJ* 7; Paul Rogers 'The limited case for an efficiency defense in horizontal mergers' (1983) 58 *Tulane LR* 503; Warner op cit note 5 at 1100–10; Gregory J Werden 'An economic perspective on the analysis of merger efficiencies' (1997) 11 *Antitrust* 12; David Balto 'The efficiency defense in merger review: Progress or stagnation' (2001) 16 *Antitrust* 74; Gifford & Kudrle op cit note 5 at 446–51; Everett & Ross op cit note 4 at 72ff; Lars-Hendrik Röller, Johan Stennek & Frank Verboven *Efficiency Gains from Mergers* Report for EC Contract II/98/003 (2000) 57–63. For criticism from Chicago scholars, see Robert Bork *The Antitrust Paradox: A Policy at War with Itself* (1993) at 426–9; Richard Posner *Antitrust Law: An Economic Perspective* (1976) 8; Gifford & Kudrle op cit note 5 at 431–2; and Warner op cit note 5 at 1068–9.

African provision is based on s 96 of the Canadian Competition Act,<sup>7</sup> which reads as follows:

‘The Tribunal shall not make an order under section 92 [that is prohibit a merger] if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.’

Echoing Captain Kirk of *Star Trek* fame, the South African tribunal has observed that the Canadian legislator is unique in ‘boldly treading where other authorities were still too reticent to go’.<sup>8</sup> The defence creates many problems:<sup>9</sup> it raises challenging theoretical questions and is difficult to apply to factual situations.<sup>10</sup> However, an efficiency defence, despite its flaws, is probably necessary in a small economy such as that of South Africa, where high market shares and concomitant increases in market power often will be necessary in order to achieve much-needed production efficiency.<sup>11</sup> At most, these difficulties should cause adjudicating authorities to approach efficiency arguments with a healthy and realistic skepticism.<sup>12</sup>

#### EFFICIENCY AS A TRUE DEFENCE

In South Africa the efficiency defence is a ‘defence’ in the true sense of the word.<sup>13</sup> The Act envisages that efficiencies will become relevant only once it

<sup>7</sup> 1985, C-34. See on the history of this part of this Act *Commissioner of Competition v Superior Propane Inc* (2002) 18 CPR 4th 417 (Can Comp Trib) para 270ff; Canadian Competition Bureau op cit note 4 at 9–18.

<sup>8</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 48; Margaret Sanderson ‘Efficiency analysis in Canadian merger cases’ (1997) 65 *Antitrust LJ* 623 at 624. But see the preamble to the EC Merger Regulation 139/2004 para 29, which foresees that efficiency issues may be considered.

<sup>9</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 81.

<sup>10</sup> *Ibid* paras 43–5 with reference to Richard Posner op cit note 6 at 112; Fisher & Lande op cit note 5 at 1625, 1652ff and 1660–9; Donald G McFetridge ‘The prospects for the efficiency defence’ (1996) 26 *Canadian Business LJ* 357. See also generally Bork op cit note 6; Kattan op cit note 6, especially at 521; Dennis A Yao & Thomas N Dahdou ‘Information problems in merger decision making and their impact on the development of an efficiency defense’ (1993) 62 *Antitrust LJ* 23 at 29. On evidential difficulties see generally the text to notes 36, 99–101 and 113–17 below.

<sup>11</sup> *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 141–2; Sanderson op cit note 8 at 624; Canadian Competition Bureau op cit note 4 at 32; Canadian Competition Bureau *Report of the Advisory Panel on Efficiencies* (2005) 26–38 and 49ff; Sutherland & Kemp op cit note 3 para 10.74.

<sup>12</sup> *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* 83/LM/Jul00 paras 98, 99 and 101–3, with reference to the US case of *United States v Philadelphia National Bank* 374 US 321 (1963) 371. See Yao & Dahdou op cit note 10 at 30–5; and Röller et al op cit note 6 at 118 on the strict approach.

<sup>13</sup> *Commissioner of Competition v Superior Propane Inc* (2000) 7 CPR 4th 385 (Can Comp Trib) para 399; Sutherland & Kemp op cit note 3 para 10.75. See also Cana-

is found that the merger substantially prevents or lessens competition.<sup>14</sup> Accordingly, the enquiry into the economic consequences of a merger is divided into two discrete stages. In this sense, the efficiency defence in South Africa can be contrasted with the European or American defences<sup>15</sup> as well as so-called failing-firm arguments in South Africa.<sup>16</sup> In Europe efficiencies must be considered with all other factors when determining whether a merger is anti-competitive.<sup>17</sup> In the United States an efficiency defence

‘is not . . . a defense to a final conclusion that a merger “lessens competition” or is “illegal”. Rather the defense terminology refers to the rebuttal of a first-order inference from a portion of the evidence . . . that a merger presumptively lessens competition and violates the statute. That is, it is a defense to a prima facie case.’<sup>18</sup>

It may be difficult to bifurcate the consideration of a merger in the manner mandated by the Act in actual merger evaluations.<sup>19</sup> What, for instance,

dian Competition Bureau op cit note 4 at 32–4 for an evaluation of this approach in Canada. See Everett & Ross op cit note 4 at 14–18, where this approach is contrasted with various others. See the strong views expressed in *Commissioner of Competition v Superior Propane Inc* supra note 7 at 134–7.

<sup>14</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 41; *Schumann Sasol (South Africa) (Pty) Ltd/Price’s Daelite (Pty) Ltd* 10/CAC/Aug01 at 6; *Distillers Corporation (SA) Ltd v Stellenbosch Farmers Winery Group Ltd* 08/LM/Feb02 paras 210–11.

<sup>15</sup> See also, for New Zealand, the New Zealand Commerce Commission’s Merger and Acquisitions Guidelines 2005 para 7.4; Kattan op cit note 6 at 513.

<sup>16</sup> See *Iscor Ltd/Saldanha Steel (Pty) Ltd* 67/LM/Dec01 paras 100–3; *JD Group Ltd/Profum Ltd* 60/LM/Aug02 para 108; Sutherland & Kemp op cit note 3 para 10.7.1.9 on the failing-firm argument. See Areeda & Hovenkamp op cit note 6 para 970d2 on the relationship between the failing-firm argument and the efficiency defence.

<sup>17</sup> The EC Horizontal Merger Guidelines op cit note 5 para 76 require ‘an overall competitive appraisal of the merger’, while para 77 of these guidelines requires that efficiencies be considered as part of the ‘overall assessment of the merger’.

<sup>18</sup> Areeda & Hovenkamp op cit note 6 para 970c. But efficiencies have only been relied upon by courts in cases where mergers were not found to be anticompetitive: *United States v Carillon Health System* 707 F Supp 840 (WDVA 1989) 849; *United States v Country Lake Foods* 754 F Supp 669 (D Minn 1990) 680. There is no US case where efficiencies have been accepted to offset the prima facie conclusion that a merger must be condemned: see *FTC v University Health* 938 F2d 1206 (11 Cir 1991) 1222; *US v Rockford Memorial Corporation* 717 F Supp 1251 (ND Ill 1989) 1289–91; *FTC v Staples* 970 F Supp 1066 (DDC 1997); *United States v United Tote* 768 F Supp 1064 (D Del 1991) 1084–5. The only two mergers approved on the basis of efficiency were *FTC v Butterworth Health Corp* 946 F Supp 1285 (USWD Mich 1997); *United States v Long Island Jewish Medical Center* 983 F Supp 121 (US ED NY 1997), but they both concern non-profit organizations. See *Commissioner of Competition v Superior Propane Inc* supra note 7 para 125 and also paras 134–7. See also Timothy J Muris ‘The government and merger efficiencies: Still hostile after all these years’ (1999) 7 *George Mason LR* 729 at 751.

<sup>19</sup> *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 paras 538–45; Sanderson op cit note 8 at 624; the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 20–1. The South African Competition Commission has suggested that a factor approach would be more appropriate, even though that is not reflected in the South African system:

should be made of the argument that a merger is between a number of small firms, allowing them to compete more effectively with larger competitors? Clearly, this is an efficiency argument in the broader sense. However, it may be relevant both to determine whether the merger is anti-competitive and whether it can be justified on the basis of efficiency.<sup>20</sup> Efficiency may be considered to establish the motive for a merger, which may be relevant to determining whether it is anti-competitive — and again when establishing whether it can be justified on the basis of efficiency. Accordingly, there are some South African cases where the reasons for considering efficiency arguments are not clear.<sup>21</sup>

Still, the South African two-stage approach can be justified. Efficiency concerns in Europe and the United States can be collapsed into the general determination of the competition merits of the merger because the focus with regard to the efficiency defence in both countries is on the protection of consumers.<sup>22</sup> South African law, like Canadian law, seems to separate competition and efficiency concerns.<sup>23</sup> They thereby allow a much broader area of application for the efficiency defence. Once efficiency is considered on a wider front, a clear and separate analysis of competition and other efficiency arguments is required — as is a neat balancing of anti-competitive and efficiency consequences. This is the most convincing justification for separating the consideration of anti-competitive effects and efficiency.

The consideration of efficiency is complex and the splitting-up of the consideration of anti-competitive and efficiency concerns means that it is frequently possible to side-step efficiency arguments.<sup>24</sup> However, too much should not be made of this. Efficiency issues, on the face of the matter, do not appear to be consistently more complicated than many of the other aspects that have to be considered in merger analysis. It is not inconceivable that there may be cases where it will be easier to show that a merger is efficient than it will be to prove that it is not anti-competitive. There may be even more cases where it will be useful to consider the efficiencies generated by the merger in order to support a marginal conclusion that the merger is not anti-competitive.

The facts that are necessary to prove that a merger is efficient will often be peculiarly within the knowledge of the merging parties. The separation of

see the Canadian *Report of the Advisory Panel on Efficiencies* at 46 and at 54, where the Panel observes that complete bifurcation should not take place. See also Warner op cit note 5 at 1068–9 and the sources referred to there.

<sup>20</sup> See Areeda & Hovenkamp op cit note 6 para 970b on this type of argument.

<sup>21</sup> See for instance *Clicks Organisation (Pty) Ltd/Milton and Associates (Pty) Ltd* 24/LM/May03 para 36.

<sup>22</sup> See the text to notes 77 et seq below.

<sup>23</sup> *Industrial Development Corporation of South Africa Ltd/Anglo-American Holdings Ltd* 45/LM/Jun02 46/LM/Jun02 (23 October 2002) para 22. See the text to notes 124 and 139 below.

<sup>24</sup> If a merger does not raise competition concerns, the need to look at efficiency will not arise (OECD Report op cit note 4 at 5).

issues will allow the onus to prove efficiency to be placed on the parties to the merger.<sup>25</sup> It will be argued, however, that an onus in the traditional sense is inappropriate in the context of South African merger analysis.<sup>26</sup> Other burdens to put evidence before the court will not necessarily require a separation of issues in the manner provided for in s 12A — but perhaps the splitting-up of competition and efficiency issues makes it easier to place such burdens on the merging parties.

Furthermore, South African competition law requires a consideration of public interest when evaluating a merger. The effect of the merger on public interest must be considered after evaluation of the competitive and efficiency consequences of the merger.<sup>27</sup> The public-interest criteria against which mergers may be measured are specifically listed in the Act.<sup>28</sup> Some of them, for example ‘the ability of national industries to compete in international markets’, will overlap with matters that will be evaluated in determining the efficiencies of a merger. Careful lines will have to be drawn. There will be cases where the same facts will have to be considered for both purposes. In terms of s 12A(1)(a)(i) they will be considered in determining whether the merger is economically efficient, but under s 12A(1)(a)(ii) they will be evaluated in order to establish whether the merger should be approved despite being economically inefficient, because public interest requires it.<sup>29</sup> Conversely, the question whether previously disadvantaged persons would have greater access to a particular market is only a public-interest issue and it should therefore not impact on the efficiency analysis.<sup>30</sup> The public-interest element of the South African test could thus both give direction to the efficiency defence and allow for that defence to follow its own course.<sup>31</sup>

<sup>25</sup> Ibid.

<sup>26</sup> See the text to note 41 below.

<sup>27</sup> Section 12A(1)(b); See, on public interest in South Africa, Sutherland & Kemp op cit note 3 para 10.11.

<sup>28</sup> Section 12A(3).

<sup>29</sup> See also the criticism of the distinction between competition and efficiency issues in the text to notes 19–21 above.

<sup>30</sup> This was not done properly in *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd* 11/LM/Mar05 para 240.

<sup>31</sup> Compare the position in Australia: Australian Merger Guidelines 1999, available at <http://www.accc.gov.au/content/index.phtml/itemId/304397> (last accessed on 29 June 2008) paras 5.16–7, 5.171–4 and 6.39–6.41, where much of the consideration of efficiencies takes place in the context of the public-interest evaluation. A new draft set of Merger Guidelines was published for comment in February 2008, available at <http://www.accc.gov.au/content/item.phtml?itemId=809866&nodeId=a59169488e28c51ff679799d3ade40b8&fn=Merger%20guidelines%20draft%202008.pdf> (last accessed on 29 June 2008).

## ASPECTS OF THE EFFICIENCY DEFENCE

The tribunal has distinguished five questions that have to be answered in respect of the efficiency defence.<sup>32</sup> They can be consolidated into four issues:

- Who bears the onus of proving efficiency?
- What types of gains may be recognized for an efficiency defence?
- How should efficiency gains caused by a merger be balanced against its anti-competitive consequences?<sup>33</sup>
- Efficiency must be merger-specific for purposes of the defence, but when are efficiency benefits merger-specific?

These issues will be addressed below and three further aspects will be added to the discussion:

- First, the question whether only efficiencies that will be likely, timely and substantial may form the basis of an efficiency defence will be evaluated.
- Secondly, although the tribunal considered whether, and if so how, efficiencies should be verified as part of the third question mentioned above, this issue will be considered separately.
- Finally, the fate of different types of recognized efficiencies in South Africa will be evaluated against the criteria for an efficiency defence.

*Onus or the duty to put facts before the adjudicating authority*

The tribunal has accepted that the onus of proving that a merger should be justified on the basis of efficiencies rests with the merging parties<sup>34</sup> and it has asserted that this is the approach followed in other countries, including the United States and Canada.<sup>35</sup> It has been stressed that

- efficiencies are difficult to prove at the notification stage and before the merger has taken place and that it is for the merging parties to show that such efficiencies exist;<sup>36</sup> and that

<sup>32</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 49. See also Sutherland & Kemp op cit note 3 para 10.74.

<sup>33</sup> The tribunal in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 49 divides this issue into two questions but they are merged here.

<sup>34</sup> *Ibid* para 51; *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 para 100; *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* 46/LM/May05 para 113; *Sasol Ltd/Sasol Oil Ltd* 101/LM/Dec04 para 545; Sutherland & Kemp op cit note 3 para 10.74–5.

<sup>35</sup> For the United States see *FTC v Staples Inc* 970 F Supp 1066 (D DC 1997) 1089, and for Canada see *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada Ltd)* (1992) 41 CPR 3rd 289 (Can Comp Trib) para 141. Despite the somewhat narrow wording, this is apparently what the tribunal intended: *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 400–3; *Commissioner of Competition v Superior Propane Inc* [2001] 3 FC 185 (Fed Ct App) paras 143–54 and 176. See also generally Röller et al op cit note 6 at 118.

<sup>36</sup> See the US Horizontal Merger Guidelines 1992 op cit note 6 part 4. See also the argument of Thomas W Ross & Ralph A Winter ‘The efficiency defence in merger law: Economic foundations and recent Canadian developments’ (2005) 71 *Antitrust*



- knowledge of efficiencies is normally uniquely within the knowledge of the merging parties.<sup>37</sup>

Yet, in the South African context, there are also strong arguments against saddling the merging parties with a full-blown onus to prove efficiencies. It is doubtful whether the US case relied on by the tribunal supports its view;<sup>38</sup> and it is also doubtful whether a true onus to prove efficiency rests on the merging parties in Europe. The EC Merger Guidelines merely state that ‘it is incumbent on the parties’ to provide information that will show that the merger can be justified on the basis of efficiency.<sup>39</sup> But perhaps too much should not turn on these differences. Both the European and US regimes differ fundamentally from South African law as they do not provide for a separate efficiency defence — and this may be the reason why merging parties are not saddled with a full-blown onus in these systems. In Canada the onus to prove efficiency is indeed on the merging parties, but the tribunal’s reliance on Canadian law is equally problematic. Despite the importance of Canadian merger law for South Africa, the procedural framework in which mergers are considered in Canada seems to be more formal and accusatorial than merger proceedings before the tribunal in South Africa. It is doubtful whether there is a place for a true burden of proof in the South African inquisitorial merger proceedings.<sup>40</sup> In the OECD Report (in which the tribunal finds support for its conclusion) it is stressed that these arguments sometimes only culminate in a ‘burden of going forward with evidence of efficiencies’.<sup>41</sup> This would suffice also for South Africa.

*LJ* 471 at 479. See generally on evidential difficulties the text to note 10 above as well as the text to notes 99–101 and 113–7 below.

<sup>37</sup> OECD Report op cit note 4 at 5; Yao & Dahdou op cit note 10 at 30–5. See the EC Horizontal Merger Guidelines op cit note 5 para 87, although too much should not be made of this: in the context of the efficiency defence the problem is often that even the merging parties have informational difficulties. See Yao & Dahdou op cit note 10 at 43–4. In Canada there may generally be no incentive for merging parties to disclose efficiency information as it may be viewed as an admission that a merger is otherwise anti-competitive. See the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 4. It should be noted that the problem may be exaggerated in Canada because of the unique procedures for merger analysis in that country.

<sup>38</sup> *FTC v Staples Inc* 970 F Supp 1066 (DDC 1997) at 1089.

<sup>39</sup> For the EU, see EC Horizontal Merger Guidelines op cit note 5 para 87. See similarly the US Horizontal Merger Guidelines 1992 op cit note 6 part 4, where the competition agencies in the US state that ‘the merging parties will have to substantiate efficiencies’, but the guidelines make it clear that they do not at any stage impose an onus: see para 0.1.

<sup>40</sup> Ironically the same criticism can be brought against the approach to failing firms in South Africa, although this issue forms part of the broad analysis of whether a merger is anti-competitive: see *Iscor Ltd/Saldanha Steel (Pty) Ltd* 67/LM/Dec01 and Sutherland & Kemp op cit note 3 paras 9.4.2, 10.1.7.9.

<sup>41</sup> OECD Report op cit note 4 at 5.



*What types of efficiency gains may be recognized for the purpose of the efficiency defence?*

The tribunal has distinguished three types of efficiencies:<sup>42</sup>

First, dynamic efficiencies, ie efficiencies in innovation, constitute the most beneficial form of efficiency. Innovation improves product and service quality and the use of resources: precisely those benefits which competition law seeks to promote.<sup>43</sup> In the new Canadian Merger Enforcement Guidelines 2004 it is stated that dynamic efficiencies include 'those attained through the optimal introduction of new products, the development of more efficient production processes, and the improvement of product quality and service'.<sup>44</sup> Innovations may be imitated by competitors, even though they may be protected as intellectual property, and in this sense innovations may have the quality of public goods.<sup>45</sup> However, the difficulties of calculating and verifying dynamic efficiencies will reduce their significance.<sup>46</sup>

Secondly, production efficiencies allow firms to produce more or better products from the same inputs. They concern resource savings in the production process that are of an economic nature.<sup>47</sup> The different forms of production efficiencies, which will be discussed below, fall broadly into four types:<sup>48</sup>

- product-level, plant-level and multi-plant-level savings in the cost of

<sup>42</sup> Sutherland & Kemp op cit note 3 para 10–76. See also the efficiencies initially distinguished in *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 para 104. See the list of efficiencies in Canadian Competition Bureau op cit note 4 at 47–8; and see Everett & Ross op cit note 4 at 11–14, where different types of efficiencies are clearly distinguished. The authors also distinguish transactional efficiency.

<sup>43</sup> The tribunal in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55 stated that it is the benefit that 'competition seeks to induce', but this formulation does not appear to be entirely accurate. See also the reliance on s 2(a) in para 79.

<sup>44</sup> Para 8.15 (issued by the Canadian Competition Bureau, available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01245e.html> (last accessed on 29 June 2008). See also the Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II (available at [http://strategis.ic.gc.ca/pics/ct/meg\\_full.pdf](http://strategis.ic.gc.ca/pics/ct/meg_full.pdf) (last accessed on 29 June 2008)). See Canadian Competition Bureau op cit note 4 at 44. See also Michael E Porter 'Competition and antitrust: Toward a productivity-based approach to evaluating mergers and joint ventures' (2001) 46 *Antitrust Bulletin* 919, but see the criticism of Gifford & Kudrle op cit note 5 at 439–42.

<sup>45</sup> Kattan op cit note 6 at 513, 514–15, referred to in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55; see also Kattan at 522–7.

<sup>46</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55; OECD Report op cit note 4 at 6 with reference to Appendix II of the Canadian Merger Enforcement Guidelines supra note 44; US Horizontal Merger Guidelines 1992 op cit note 6 para 4; Fisher & Lande op cit note 5 at 1634ff; the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 47 and 57.

<sup>47</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55; and see the reliance on s 2(a) in para 79.

<sup>48</sup> Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.13.

production brought about by the merger through economies of scale and specialization;

- plant and multi-plant efficiencies achieved with regard to purchasing, distribution, advertising, capital raising, complementary resources and research and development;
- savings in transaction costs brought about by the integration of functions that were previously performed outside the firm; and
- savings derived from the transfer of superior production techniques and know-how from one part of the merged firm to another.

Thirdly, the tribunal referred to what it called ‘pecuniary efficiencies’. It observed that they are not considered real savings in resources and are ‘less favoured’<sup>49</sup> — even though it may be easy to put numbers to these ‘efficiencies’. Tax savings and lower input costs brought about by greater bargaining power will fall into this category.<sup>50</sup> But from an economic perspective it is not correct to refer to pecuniary benefits as ‘efficiencies’. Pecuniary benefits only lead to a redistribution of resources.<sup>51</sup> To declare that such benefits are merely ‘less favoured’ is to view these benefits too positively. It is very difficult to see how pecuniary benefits can rationally serve as a basis for an efficiency defence.<sup>52</sup> It is contended that the tribunal was wrong in regarding these benefits as protectable in terms of the efficiency defence. Accordingly, the tribunal cannot be supported<sup>53</sup> in so far as it viewed production efficiencies as an intermediate type of efficiency which lies somewhere between dynamic efficiencies and pecuniary efficiencies.<sup>54</sup>

<sup>49</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55.

<sup>50</sup> Cf *Balto* op cit note 6 at 77–8.

<sup>51</sup> The OECD Report op cit note 4 at 6, to which the tribunal refers, does not use the term ‘pecuniary benefits’. The tribunal in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 81 appeared to regard redistribution and pecuniary benefits as different things, but they are not.

<sup>52</sup> The OECD Report op cit note 4 at 6 also uses the expression ‘less favoured’, but see especially s 96(3) of the Canadian Competition Act 1985, which states that a ‘redistribution of income’ will not be an efficiency: *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 430 and 495; *Commissioner of Competition v Superior Propane Inc* supra note 35 para 82; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 339–45; Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.3. Areeda & Hovenkamp op cit note 6 para 970 call these mere ‘pecuniary’ or ‘personal’ economies, but accept that they ‘cannot form the basis for an efficiencies defence’. Warner op cit note 5 at 1059 and 1072–4 argues that pecuniary benefits should be acknowledged in terms of the efficiency defence.

<sup>53</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 55.

<sup>54</sup> Pecuniary benefits were not taken seriously in the following cases: *Massmart Holdings Ltd/Moresport Ltd* 62/LM/Jul05 para 201 and *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd* 11/LM/Mar05 para 239. See also the strict approach initially followed in *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 paras 99 and 103. But cf the Australian position: *Everett & Ross* op cit note 4 at 19.

The tribunal collectively referred to ‘technological, efficiency and other pro-competitive gains’, referred to in the Act, as efficiency gains.<sup>55</sup> It is not quite clear how the three types of gains mentioned in the Act should be distinguished. The tribunal observed that

‘our concept of efficiency is used in . . . combination with the words “technological or other pro-competitive gain”. Adopting an *eiusdem generis* approach and trying to discern a common meaning between these three words, this would suggest that in this context, efficiencies that equate to “technological gains” i.e. dynamic efficiencies or “pro-competitive gains” i.e. those that constitute real economies, not mere pecuniary gains, are to be favoured.’<sup>56</sup>

This is a valiant attempt to make sense of the three terms used in s 12A. However, it is not clear that ‘technological efficiencies’ can be equated with dynamic efficiencies or ‘other pro-competitive gains’ with real economies. The dictum cannot be accepted in so far as it suggests that ‘efficiency’ could mean more than economic or real efficiency. It probably would have sufficed if the legislator had merely provided that a merger could be justified on the basis of efficiency gains.<sup>57</sup>

The tribunal has left open the question whether only reductions in marginal cost will be relevant for the efficiency defence and whether savings of fixed costs also may be taken into account.<sup>58</sup> After all, fixed costs do not influence pricing decisions in the short run.<sup>59</sup> The better view is that both can support an efficiency defence. The distinction between fixed and variable cost applies to the short run, whereas in the long run, all costs are variable. Therefore, costs that are fixed in the short run will influence pricing in the long term and the line between fixed and variable cost is impossible to draw clearly. However, less weight may be attached to a saving in fixed costs if there will be long delays in the realization of such efficiencies.<sup>60</sup>

<sup>55</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 41.

<sup>56</sup> *Ibid* para 78.

<sup>57</sup> This is the approach followed in s 6 of the Canadian Competition Act, which refers only to ‘gains in efficiency’. Apparently the expression ‘technological, efficiency or other pro-competitive gains’ was created by combining elements of art 81 of the European Community Treaty and elements of the Canadian Competition Act 1985.

<sup>58</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 60 with reference to Kattan op cit note 6 at 533. See Kattan on the differences regarding savings in fixed and variable costs where a plant is closed post-merger because of excess capacity. See Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.13n97. See also Röller et al op cit note 6 at 116 on ‘pass through’ and the distinction between fixed and variable costs.

<sup>59</sup> *FTC v HJ Heinz* 246 F 3d 708 (DC Cir 2001).

<sup>60</sup> *Areeda & Hovenkamp* op cit note 6 para 974d; *Warner* op cit note 5 at 1070. See EC Horizontal Merger Guidelines op cit note 5 para 80 which attach greater weight to savings in variable costs. Para 8.14 of the Canadian Merger Enforcement Guidelines 2004 (op cit note 44) shows clearly that both are relevant. See on timeliness the text to notes 167–8 below.

*How should efficiency gains be measured and balanced against anti-competitive effects?*

The tribunal in the *Trident* matter lumped together three questions, namely how should

- efficiencies and losses caused by a merger be measured;
- efficiencies be verified; and
- the competitive losses caused by the merger and the efficiencies that arise from it be compared?<sup>61</sup>

These concerns should ideally be separated, however, and therefore the measurement and comparison of competitive losses and efficiency benefits will be discussed here while the verification of efficiencies will be taken up later.<sup>62</sup>

#### TYPES OF EFFICIENCIES

Under the influence of the Chicago School, it has become trite that the purpose of competition law is to promote efficiency through competition.<sup>63</sup> Normally, efficiency in this context means allocative efficiency.<sup>64</sup> The purpose of competition law is to ensure that competitive markets allocate the production of products and the purchase of products by consumers efficiently. In a perfectly competitive market the marginal cost, or cost of the last unit produced, will equal the price that consumers will be charged for the product. The cost to society of producing it will be equal to the price that the last consumer will pay for it. Where a firm has market power, it will charge a price that will exceed the marginal cost of the last unit that it will produce. Output will be lower, and prices will be higher than in a competitive market. Society will suffer a dead-weight loss, as some consumers will no longer purchase the product. The cost of purchasing the product will be higher than both the cost to society of producing it, and the amount of money that the last consumers, who would have purchased it in a competitive market,

<sup>61</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 63–7.

<sup>62</sup> See the text to notes 164–77 below.

<sup>63</sup> See generally on the different efficiency goals of competition law Herbert Hovenkamp *Federal Antitrust Policy* (1999) para 2.3c; Berry op cit note 6 at 530ff; F M Scherer 'Antitrust, efficiency and progress' (1987) 62 *New York University LR* 998; Warner op cit note 5 at 1062ff; Joseph F Brodley 'The economic goals of antitrust: Efficiency, consumer welfare and technological progress' (1987) 62 *New York University LR* 1020 at 1025–30; John J Flynn 'Antitrust policy, innovation efficiencies, and the suppression of technology' (1998) 66 *Antitrust LJ* 487 at 494–8. See also the discussion of efficiency in *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 paras 99 and 103.

<sup>64</sup> Flynn op cit note 63 at 489, who speaks of the 'current preoccupation with allocative efficiencies as the sole or primary value of antitrust policy'; Hovenkamp op cit note 63 para 2.2b, with reference to Bork op cit note 6 at 91: 'The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.'

would have been prepared to pay for it. These consumers will then have to purchase alternative products from which they will not derive the same utility.

It is sometimes said that competition law also promotes production and dynamic efficiency, but both these types of efficiencies play a supporting role to allocative efficiency. The promotion of production efficiency is not regarded as conflicting with the achievement of allocative efficiency. This is normally illustrated by means of a highly stylized model: In a perfectly competitive market, the price that firms will receive will equal marginal cost. If firms receive a price that is higher than the average cost of producing that output, then they will receive an economic profit even though the price received for the last unit produced equals its cost. New firms will enter the market, total supply in the market will increase, prices will be reduced, and the existing firms will again reduce their output to ensure that their marginal costs still equal the price received in the market. This process will continue until all firms produce at the point where their marginal costs equals average costs which, mathematically speaking, will in every case be at the point where average cost is at its lowest point and where firms produce most efficiently. This position is referred to as producing 'at capacity'. Where a firm produces for a price at which marginal cost is lower than average cost, it makes a loss and will have to exit the market if that situation continues. Only the firms that produce for a price that at least covers their average cost will ultimately survive.

Competition law is only beginning to accommodate dynamic efficiency into its structures. When it comes to innovation, it is impossible to generalize. In some situations the existence of market power may promote innovation and in others competition may hinder it. Knowledge about the factors that determine whether a merger will promote dynamic efficiency even if it creates market power is still in the process of being developed.<sup>65</sup>

#### *The Williamson trade-off*

However, where a competition authority has to decide whether a merger can be justified on the basis of dynamic or production efficiency, adjudicating bodies are concerned with a possible head-on conflict between

<sup>65</sup> Hovenkamp op cit note 63 para 1.3c; Scherer op cit note 63 at 1010–12; and Richard J Gilbert & Steven C Sunshine 'Incorporating dynamic efficiency concerns in merger analysis: The use of innovation markets' (1995) 63 *Antitrust LJ* 569, especially at 573, where it is stated that '[f]or many years, innovation shared the general neglect bestowed by antitrust authorities on other forms of non-price competition. However, innovation's crucial role in generating economic growth and in enhancing global competitiveness warrants a more central role in antitrust analysis.' See also S Ahn *Competition, Innovation and Productivity Growth: A Review of Theory and Evidence* OECD Economics Department Working Paper No 317 (2002); the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 40ff.

production or dynamic efficiency and allocative efficiency.<sup>66</sup> This conflict was described by the economist Oliver Williamson,<sup>67</sup> who pointed out that

- a merger may create market power and allocative inefficiency in the form of a dead-weight loss, which will constitute a welfare loss;
- but that a merger may also achieve more efficient production, which will constitute a welfare gain;
- and that it can be shown mathematically that the welfare gain through production efficiency will often exceed the loss caused by allocative inefficiency caused by the merger.

However, even Williamson was conscious of the limits of his model.<sup>68</sup> It is dependent upon assumptions that are seldom reflected in real-world markets. He assumed that the merger was concluded in a perfectly competitive market and caused the market to become monopolistic.

Where the merging firms already have market power before the merger, an increase in market power will lead to a greater increase to the dead-weight loss than in the circumstances modelled by Williamson. At the competitive price the benefit received by consumers from purchasing a product equals the cost of producing it. The welfare lost by an increase in price from this point will be small. But where a merger between firms which already charge prices that are above the competitive level allow the merged firm further to increase prices, then it will affect consumers who derive utility from that product that far exceeds the cost of producing it. The welfare lost from similar increases in price will therefore differ depending on whether the increase is made from the competitive price or a price above the competitive price.<sup>69</sup>

If the merger does not lead to the merged firm's becoming a single-firm monopoly, other firms may also charge higher prices but the efficiency gains will be realized only by the merged firm.<sup>70</sup> The benefit received from the efficiency gain will be smaller than in the situation where the merged firm

<sup>66</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.1. Gifford & Kudrle op cit note 5 at 426–7.

<sup>67</sup> O E Williamson 'Economies as an antitrust defence: The welfare tradeoffs' (1968) 58 *American Economic Review* 18–36, referred to in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 42–3. See Fisher & Lande op cit note 5 at 1624ff; Sutherland & Kemp op cit note 3 para 10.81–2. Kattan op cit note 6 at 513 observes that the contribution of Williamson has spurred a cottage industry that researches the impact of his work.

<sup>68</sup> O E Williamson 'Economies as an antitrust defense: Correction and reply' (1968) 58 *American Economic Review* 1332; 'Allocative efficiency and the limits of antitrust' *American Economic Review Papers and Processes* (1969) 105; 'Economies as an antitrust defense: Reply' (1969) 59 *American Economic Review* 954; 'Economies as an antitrust defence: The welfare tradeoffs revisited' (1977) 125 *University of Pennsylvania LR* 699.

<sup>69</sup> Areeda & Hovenkamp op cit note 6 para 970e; *Commissioner of Competition v Superior Propane* supra note 7 paras 163–9.

<sup>70</sup> Areeda & Hovenkamp op cit note 6 para 970e. See also *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 65, with reference to W Kip Viscusi, John M Vernon

becomes a single-firm monopolist, and the dead-weight loss will have to be calculated on the basis of higher prices charged by other firms if they also increase their prices.<sup>71</sup>

Moreover, the Williamson trade-off assumes that productive efficiency cannot be achieved without a merger and without increasing the market power of the firms achieving the efficiency. In an expanding market, firms may improve efficiency without obtaining market power. If this possibility exists, then the efficiencies realized by the merger do not include the efficiencies that would have been realized without the merger. Furthermore, the dead-weight loss will have to be calculated with reference to the lower marginal cost that would have prevailed if efficiencies were achieved without the merger. The benefits of the merger will be much reduced and may become nil if the same production efficiencies could have been achieved without the merger. In such circumstances a large dead-weight loss will be the only legacy of the merger.<sup>72</sup>

Next, the Williamson trade-off does not discount possible so-called X-inefficiencies. A firm that has market power may become slack and this may cause inefficiencies. However, it is controversial whether these inefficiencies will occur in practice. Even monopolists may still be driven by the urge to maximize profits.<sup>73</sup>

Finally, the Williamson trade-off assumes that transfers of surplus will be irrelevant.<sup>74</sup> Where the merging firms obtain some market power, it will create a dead-weight loss as well as a redistribution of surplus away from consumers<sup>75</sup> and in favour of producers.<sup>76</sup> Williamson accepts that the redistribution of surplus should be ignored in determining the impact of efficiency on economic welfare. But it should be asked whether efficiencies ought to be acknowledged in competition law only if they are passed on to consumers or if consumers are not harmed by mergers that achieve efficiency.

& Joseph E Harrington *Economics of Regulation and Antitrust* 2 ed (1995) 203 (somewhat strangely referred to in the case).

<sup>71</sup> Cf the argument in Kattan op cit note 6 at 513 and 514–5 about diffusion of efficiencies through a market, and the text to note 45. See also on positive and negative externalities caused by mergers Röller et al op cit note 6 at 32–3 and 116–17. See *Commissioner of Competition v Superior Propane* supra note 7 paras 220–2 and 227–8.

<sup>72</sup> Areeda & Hovenkamp op cit note 6 para 970e.

<sup>73</sup> See Scherer op cit note 63 at 1004–6; Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.29; *Commissioner of Competition v Superior Propane* supra note 7 para 232. See generally Röller et al op cit note 6 at 19–24; Everett & Ross op cit note 4 at 12.

<sup>74</sup> Fisher & Lande op cit note 5 at 1644ff.

<sup>75</sup> Consumer surplus is the difference between the monetary value that particular consumers place on a product and the price that they pay for it in the market: see Ross & Winter op cit note 36 at 474, especially n11.

<sup>76</sup> Producer surplus is the difference between the price which a producer receives for a product and the cost of producing it: see Ross & Winter op cit note 36 at 473n10.



The question whether the distributional effects of a merger should be taken into account cannot be answered without an investigation of the very soul of competition law. It is not surprising that this conundrum has been solved in different ways in different jurisdictions.

*The standards that protect consumers*

In Europe and the United States efficiencies will be considered by adjudicating authorities only if consumers will not be harmed by the merger.<sup>77</sup> Three consumer-welfare standards have crystallized by which harm to consumers can be discounted.

In most legal systems the *price standard* is applied.<sup>78</sup> According to this standard, efficiencies may be considered only if post-merger prices will not exceed pre-merger prices, despite any increase in market power. If the merged firm acquires market power through the merger, then the depression in prices caused by efficiencies must outweigh the increase in price brought about by an exercise of market power by the merged firm. The tribunal in *Trident* criticized this type of test on the basis that it, like other price-control remedies, was inappropriate because it meant that the regulator would become a price-setter.<sup>79</sup> However, this criticism is unwarranted. An adjudicating body that uses the price standard does not set prices. This is done by the market both pre-merger and post-merger. The body merely determines whether that price would be appropriate from the perspective of competition law. It is often argued that the price standard is easier to apply than other standards. In some cases this may be true, since adjudicating authorities have experience in predicting and evaluating price movements. However, this benefit must not be exaggerated. It may sometimes be difficult to predict the movement of prices post-merger.<sup>80</sup>

According to the *consumer-surplus standard* the consumer surplus must not

<sup>77</sup> *FTC v University Hospital* 938 F2d 1206 (11th Cir 1991) 1223; *FTC v Staples Inc* supra note 18 at 1090; US Horizontal Merger Guidelines 1992 op cit note 6 part 4; EC Horizontal Merger Guidelines op cit note 5 paras 76–84. See the discussion of the United States position in Canada in *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 114–59. See the criticism of the requirement that benefits must be ‘passed on’ to consumers by Gifford & Kudrle op cit note 5 at 443–6 and the discussion of the US approach at 451–4. See generally Sutherland & Kemp op cit note 3 para 10.82–4.

<sup>78</sup> US Horizontal Merger Guidelines 1992 op cit note 6 part 4. See the description of this standard in *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 87–9; Gifford & Kudrle op cit note 5 at 435–6; Everett & Ross op cit note 4 at 20–1. New Zealand’s Merger and Acquisitions Guidelines op cit note 15 at para 7.4. In *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 87–9 the tribunal was critical of what it called the ‘modified’ price standard.

<sup>79</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 75. The statement of the tribunal was made generally, although it follows the question whether a merger can be unscrambled if efficiencies are not achieved.

<sup>80</sup> Röllner et al op cit note 6 at 25ff and the authorities mentioned; Ross & Winter op cit note 36 at 479; and see the text to notes 91 and 99–101 below.

be reduced by the merger.<sup>81</sup> This standard has almost the same effect as the price standard, but the focus is not on price and therefore it accounts for non-price benefits to consumers. Moreover, some of the difficulties in determining prices may be avoided. Nevertheless, the precise calculation of the shifts in welfare will throw up its own difficulties. Adjudicating bodies generally are quite used to dealing with, as well as predicting, prices but they will find it difficult to calculate consumer surplus, producer surplus and the dead-weight loss.

In terms of the *resource-saving standard* only the increase in the producer surplus brought about by the resource saving realized through the merger must be compared to the dead-weight loss and the part of the consumer surplus transferred to the producer because of the merger. The merger should be allowed only if the former exceeds the latter.<sup>82</sup> The same difficulties that arise with regard to the previous standard will also be prevalent here.

Furthermore, all these standards can be criticized on the basis that they do not accurately balance the welfare consequences of a merger. Generally, the redistribution of surplus is not regarded as relevant in competition law. Where surplus is transferred from consumers to producers it benefits the shareholders of producers. These producers may be rich but they may also be the pension funds of blue-collar workers. These standards do not pay sufficient attention to the nature of the consumers and producers affected by the redistribution.<sup>83</sup> A redistribution is not a loss to the economy. Moreover, macro-economic tools such as taxes and subsidies are better at ensuring an equitable distribution of wealth.<sup>84</sup> If all redistributive effects of a merger are to be taken into account, it will limit the realm of the efficiency defence considerably.<sup>85</sup>

<sup>81</sup> See the discussion and criticism in *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 90–4; Everett & Ross op cit note 4 at 21.

<sup>82</sup> Gifford & Kudrle op cit note 5 at 436 and the reference to the Canadian sources in notes 47 and 48, where it is called the consumer surplus standard.

<sup>83</sup> *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 428–30; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 93–4, 160, 182–215, 328–32 and 372.

<sup>84</sup> Warner op cit note 5 at 1066; *Commissioner of Competition v Superior Propane Inc* supra note 13 para 438. But see the criticism of Ross & Winter op cit note 36 at 479 and 500–1.

<sup>85</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 69 especially n54; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 187–91 and especially paras 375–6; Areeda & Hovenkamp op cit note 6 para 971b. See Robert Pitofsky 'Proposals for revised United States merger enforcement in a global economy' (1992) 81 *Georgetown LJ* 192 at 207–8, who called the pass-through requirement a 'killer requirement'; Gifford & Kudrle op cit note 5 at 428–9. See also the refined argument of Stephen F Ross 'Afterword — did the Canadian Parliament really permit mergers that exploit Canadian consumers so the world can be more efficient?' (1997) 65 *Antitrust LJ* 641 at 647–8. For a powerful argument that supports these standards, see Duarte Brito & Margarida Catalao-Lopes *Mergers and Acquisitions: The Industrial Organization Perspective* (2006) at 160–8. The authors state that these standards may prevent costly bidding and stimulate more efficient mergers.

*The total welfare standard*

In Canada the majority of the tribunal in its first *Superior Propane* decision<sup>86</sup> applied the *total-welfare standard* that accords with the approach of Williamson.<sup>87</sup> According to this standard a merger that creates some market power for the merged firm should be allowed as long as the surplus created through greater efficiency exceeds the dead-weight loss attributable to the merger. The distributional effects of the merger will be ignored and the interests of consumers will not be directly protected.

It may also be argued that this standard cannot be applied effectively because of evidential difficulties, but it does not seem more difficult to apply than any of the other standards.<sup>88</sup> It has been contended that the total welfare standard may make it difficult for competition authorities to prohibit a merger.<sup>89</sup> However, ironically, the limits of the Williamson trade-off further justify the application of a total-welfare standard. Clearly, efficiencies will not always serve to justify a merger and the application of the total welfare standard will not make merger reviews redundant.<sup>90</sup> Furthermore, those who regard the protection of consumers as the main purpose of competition law reject this standard, since it sacrifices consumer surplus on the altar of efficiency<sup>91</sup> — to which the counter-argument is, of course, that consumers do not have a monopoly on direct competition-law protection. But even if the purpose of competition law is viewed more broadly, namely as the promotion of efficiency through competition, the standard may still be unacceptable. Competition law is not there to promote efficiency generally. An answer to this statement may be that the efficiency defence is not meant to ensure that competition law meets its main objective, but rather that it is

<sup>86</sup> *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 422–47, where the tribunal interpreted the term ‘effects’ in s 96 and gave a number of reasons why it believed that the total-welfare standard had to be applied.

<sup>87</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 paras 5.1 and 5.5 (although this part no longer applied after *Commissioner of Competition v Superior Propane Inc* supra note 35); Brian A Facey et al ‘The Canadian competition tribunal gets it right’ (2000) 15 *Antitrust* 70; Sanderson op cit note 8 at 626; Gifford & Kudrle op cit note 5 at 437–8; Michael Trebilcock *Canadian Competition Policy* (2002) at 147–8. See Ross & Winter op cit note 36 at 473–4 for the meaning of total-surplus or welfare standard.

<sup>88</sup> Rogers op cit note 6 at 524; Berry op cit note 6 at 542. See also Yao & Dahdou op cit note 10 paras 41–4. Fisher & Lande op cit note 5 at 1638 criticize the total-surplus standard on the basis that ‘[t]hese additional considerations reinforce our conclusion that merger enforcement officials would virtually never be able to quantify the costs and benefits of particular mergers accurately enough for the kind of objective balancing that the naive model makes appear so simple’. But see Ross & Winter op cit note 36 at 479, who comment on the relative simplicity of the total welfare standard.

<sup>89</sup> Alan A Fisher, Robert H Lande & Stephen F Ross ‘The Canadian Competition Tribunal gets it wrong’ (2000) 15 *Antitrust* LJ 71 at 78–9.

<sup>90</sup> Sanderson op cit note 8 at 629; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 160–73.

<sup>91</sup> Fisher & Lande op cit note 5 at 1644ff.

intended to see to it that the promotion of competition does not take place at the expense of efficiency, especially as efficiency also forms the rationale for the promotion of competition.<sup>92</sup> However, the distributional effects of efficient mergers have remained a source of controversy.<sup>93</sup>

*The balancing-weight standard*

In the second *Superior Propane* decision<sup>94</sup> of the Canadian tribunal, the redetermination judgment, a via media between the two extremes was taken after the courts rejected the total-welfare standard expounded in the first judgment: the *balancing-weight* approach takes the distributive effects of an efficient merger into consideration, but does so in a more subtle manner than the total-welfare standard. It will make sense to apply this test only if the merger meets the total-surplus standard but consumers will be worse off post-merger. According to this standard, the benefit to producers owing to greater efficiency and redistribution from consumers must be compared to the loss suffered by consumers both because of dead-weight losses caused by the merger and the redistribution of surplus to producers. A weight must then be attached to the loss to consumers that balances this loss with the benefits of producers. The impact of the redistribution must then be evaluated in the circumstances of the particular case. It must be determined whether it will be possible to adjust the loss to consumers by an amount that is equal to, or greater than, the balancing weight: if so, then the merger should not be allowed on the basis of efficiency; if not, the merger should be approved on the basis of efficiency. Thus, the balancing weight *W* must be

<sup>92</sup> *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 412–13. See Ross & Winter op cit note 36 at 474 and Kolasky & Dick op cit note 6 at 207 and *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 71–7.

<sup>93</sup> Fisher, Lande & Ross op cit note 86 especially at 77; Ross & Winter op cit note 36 at 475–7; Canadian Competition Bureau op cit note 4 at 45 and the sources cited there. The acceptance of the total-welfare standard in *Commissioner of Competition v Superior Propane Inc* supra note 13 was rejected by the Federal Appeal Court in *Commissioner of Competition v Superior Propane Inc* supra note 35 paras 75–142 and 160ff. See the summary in paras 8–37. See also the discussion in *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 95–101. See further the critical approach earlier expressed by Reed J in *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada Ltd)* supra note 35 para 131, discussed by Calvin S Goldman & John D Bodrug ‘The Hillsdown and Southam decisions: The first round of contested mergers under the Competition Act’ (1993) 38 *McGill LJ* 724 at 735ff; Warner op cit note 5 at 1088–9.

<sup>94</sup> *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 102–13, 212–3 and 333–8; Sutherland & Kemp op cit note 3 paras 10.84–5. It was originally proposed for the Commission by Professor G C Townley, but was rejected in *Commissioner of Competition v Superior Propane Inc* supra note 13: see paras 387 and 420. It was favoured by the Federal Appeal Court in *Commissioner of Competition v Superior Propane Inc* supra note 35 paras 141–2. This approach was affirmed on appeal *Commissioner of Competition v Superior Propane Inc* [2003] 3 FC 529 (Fed Ct App). See also Gifford & Kudrle op cit note 5 at 438 and 454–6; Ross & Winter op cit note 36 at 472–3 and 487ff.

calculated as follows:  $1(A+B) = W(A+C)$  where A is the redistributed surplus B is the efficiency gain and C is the dead-weight loss. If the weight attached to the interests of consumers is equal to or exceeds W then the merger should not be allowed on efficiency grounds.

How, then, according to the Canadian tribunal, was the weight given to the interests of consumers to be calculated? The Tribunal evaluated the extent to which consumers were likely to benefit indirectly from the redistribution and stated that<sup>95</sup>

‘the correct weight should be established by society or should reflect social attitudes toward equity among different income classes. There may be several sources from which the proper weighting can be inferred, one such being the tax system, which is explicitly, although not solely, concerned with equity’.

Despite its obvious strengths,<sup>96</sup> this standard also has met with some resistance.<sup>97</sup>

First, consumers cannot be treated as a homogeneous group. The interests of different groups of consumers may be considered in determining the balancing weight, but ultimately a single weight will have to be given to consumer interests. This is not ideal, but the balancing-weights standard is an improvement on the price and total-welfare standards.<sup>98</sup> In many cases it will remain very difficult accurately to calculate producer and consumer surplus as well as the dead-weight loss. The balancing-weight standard is vague and allows adjudicating authorities considerable discretion.<sup>99</sup> Nevertheless, a competition system that wants to consider distributional effects appropriately will have to live with these uncertainties. Adjudicating authorities should not require precise calculation of each aspect, but should be prepared to make impressionistic decisions where accurate quantitative information is not available.<sup>100</sup> Moreover, the standard must not be applied in a static way and

<sup>95</sup> *Commissioner of Competition v Superior Propane Inc* supra note 7 para 110, and see also para 325ff. See further Ross & Winter op cit note 36 at 489ff.

<sup>96</sup> Ross & Winter op cit note 36. See how this test was expanded by Gifford & Kudrle op cit note 5 at 463ff.

<sup>97</sup> Sanderson op cit note 8 at 627–8.

<sup>98</sup> See *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 334–5 and 338 as well as 100, albeit in a slightly different context.

<sup>99</sup> *Ibid* paras 327 et seq illustrates the difficulties that arise here; see also paras 372–4; the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 54.

<sup>100</sup> Canadian Competition Bureau op cit note 4 at 27–9; the Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.4 and the reference therein to measurable and immeasurable aspects. See on the discussion of the qualitative and quantitative approach *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 233, 241, 247, 283, 310, 335 and 376, as well as the dissent in paras 400, and 425–30; *Commissioner of Competition v Superior Propane Inc* supra note 35 paras 80 and 110–9; *Commissioner of Competition v Superior Propane Inc* supra note 94 paras 34–8 and 64; Canadian Competition Bureau op cit note 4 at 29; Canadian Merger Enforcement Guidelines 2004 op cit note 44 paras 8.15 and 8.21; Sanderson op cit note 8 at 630. See also *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 448 and 460 (although this was stated in the context of the total welfare standard and the strong views expressed in the minority judgment of Christine Lloyd in para 503ff).

changes to the market must be taken into account — although the consideration of dynamic efficiency will remain difficult.<sup>101</sup>

Secondly, a merger also may have effects on related markets.<sup>102</sup> Where consumers in the relevant market are intermediate firms and they pass price increases on to their consumers, it may be necessary to consider these redistributive effects.<sup>103</sup> But it may be almost impossible to calculate the effects of a merger on these markets, and it will be even more difficult to determine the value that should be placed on these losses for purposes of doing the trade-off in the relevant market where the merger occurs. However, this difficulty can be overcome if the traditional approach which focuses on the market on which the merger occurs and clearly related markets, is followed.

Thirdly, it may be asked whether distributional effects of mergers can be considered in reverse. Why should an anti-competitive merger of a firm that produces luxury goods, but in which a trade union has a large interest, not be allowed on the basis that many of its shareholders are poor blue-collar workers, even if it does not lead to any efficiencies?<sup>104</sup> Why not consider the interests of employees of the merging firms? Perhaps if distributional effects enter the evaluation here, there is also an argument for acknowledging pecuniary benefits of the merger as something that should count for or against the merger depending on the circumstances of the case. Nevertheless, the answer to these contentions is that the balancing-weight standard should only be allowed to tip the scales in favour of consumers because of their central role as a protected class in competitive law.

Hence, despite its weaknesses, it seems that the balancing-weight standard is preferable to the other standards described above. After the final *Superior Propane* case a Bill that was to amend s 96 of the Canadian Competition Act was proposed.<sup>105</sup> This Bill was to make it clear that benefit to consumers had

See Ross & Winter op cit note 36 at 479, who argue that the onus in Canada, which is on the merging parties, will mean that the price standard will often apply de facto. Similar arguments will apply where the approach to onus suggested in this contribution is followed, eg in South Africa. See the text to note 41 above. See generally on evidential difficulties the text to notes 10 and 36 above as well as to notes 113–7 below.

<sup>101</sup> *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 256–8 and 414–16; Gifford & Kudrle op cit note 5, especially at 434–40 and 463ff, perhaps take it too far, although they give some indication of a dynamic application of this approach. See the criticism of Fisher & Lande op cit note 5 at 1631.

<sup>102</sup> See Ross & Winter op cit note 36 at 483–7 and 494–5.

<sup>103</sup> *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 250–5 and 302 et seq, where the Canadian imperative of considering the interests of small and medium enterprises (duplicated in South Africa in s 2 of the Act) was considered. See also paras 358–64, and in the minority judgment paras 410–13; as well as *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 65.

<sup>104</sup> See Trebilcock op cit note 87 at 149–50 and *Commissioner of Competition v Superior Propane Inc* supra note 7 para 329ff.

<sup>105</sup> RS, 1985, C-34.



to be considered in terms of s 96. The Bill was passed by the House of Commons but, following an election, it died on the Order Paper of the Canadian Senate.<sup>106</sup>

### *The South African approach*

How have South African competition authorities responded to the problem of weighing positive consequences against negative effects? The Act states that efficiencies will justify a merger only when they are 'greater than, and offset' the anti-competitive effects of the merger.<sup>107</sup> On the face of it, this requires a balancing of efficiencies and anti-competitive consequences. This is initially how the Tribunal viewed the matter. Indeed, the view was originally expressed that mergers could be approved on the basis of efficiencies only if the efficiency benefits clearly exceeded anti-competitive losses by some margin.<sup>108</sup> The scene was set for the development of a standard for performing this balancing act.

However, the tribunal tried to side-step these issues in the *Trident* case.<sup>109</sup> It distinguished between a formulaic approach and a discretionary approach to trade-off analysis. It asserted that a formulaic approach was followed by the Canadian tribunal in the first *Superior Propane* case. According to the formulaic approach, the problem of balancing the effects of increased market power and efficiency has to be considered 'as an economist would do in a classroom demonstrating Williamson's trade off'. Efficiency claimed and the dead-weight loss have to be calculated in terms of a formula and then compared.<sup>110</sup> The tribunal contrasted this with the discretionary approach, which it thought prevailed in the United States.<sup>111</sup> This approach relies on discretion rather than an equation.

The tribunal accepted that the discretionary approach leads to uncertainty

<sup>106</sup> Canadian Competition Bureau op cit note 4 at 3–4.

<sup>107</sup> Section 12A(1)(a)(i). Compare the position in Canada in the Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.4. See the interpretation of the term 'offset' in *Commissioner of Competition v Superior Propane Inc* supra note 44 para 449; and *Commissioner of Competition v Superior Propane Inc* supra note 35 para 80.

<sup>108</sup> *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 para 99, especially nn19 and 103; on the notion expressed here that the comparison of benefits and losses has to concern like interests, see *Commissioner of Competition v Superior Propane Inc* supra note 7 para 57. See also *Inzuzo Furniture Manufacturers (Pty) Ltd/PG Bison Holdings (Pty) Ltd* 12/LM/Feb04 at 10, where the tribunal asserted that the imposition of conditions made it unnecessary to weigh efficiencies and anti-competitive effects.

<sup>109</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 65–75; Sutherland & Kemp op cit note 3 paras 10.79–10.81.

<sup>110</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 65, referring to *Commissioner of Competition v Superior Propane Inc* supra note 13 and Fisher & Lande op cit note 5. See also Ross & Winter op cit note 36 at 471–2.

<sup>111</sup> With reference to the US Horizontal Merger Guidelines 1992 op cit note 6 part 4. Areeda & Hovenkamp op cit note 6 probably contributed to this perception — see the text to notes 114 and 115 below. Fisher & Lande op cit note 5 at 1664ff analyze prosecutorial discretion as an alternative to the full Williamson trade-off.



and, conversely, that it may be difficult to compare the benefits and losses caused by a merger in terms of the formulaic approach, because they are often incomparable and may not be achieved in the same markets. It therefore attempted to find common ground between these approaches, stating that they are not mutually exclusive, since it should be possible to recognize and weigh the evidence of a formulaic result as part of a flexible approach.<sup>112</sup> The tribunal finally confirmed that the making of the trade-off is not an exact science.<sup>113</sup>

Part 4 of the US Horizontal Merger Guidelines determines that the relevant agencies 'will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies'. These guidelines go on to state that the extent of efficiencies that have to be proved will depend on post-merger concentration. The trade-off according to this test will not be made by means of the direct calculation and comparison of efficiency benefits and competitive losses. It uses broader measures to achieve more specific policy goals.<sup>114</sup> In this sense it is discretionary, but perhaps the term 'discretionary' shifts the focus from the real difference between the US and Canadian approaches.<sup>115</sup> The Canadian approach is more direct than the US one — and the two approaches represent different ways in which adjudicating authorities realize their policy goals in the face of difficulties regarding proof that a particular trade-off standard has been met.<sup>116</sup>

The tribunal did not clearly express the relation that should exist between the policy that is adopted and the test according to which the trade-off is made. It is fundamental, however, that a clear policy should be laid down and that it should form the basis for the applicable test. It may be too difficult to determine directly whether a particular policy goal is achieved, and then an indirect test for making the trade-off may become appropriate. (This is the real lesson of the US approach.) It may also be decided that precise evidence will not be required, but that an adjudicating body will make an impressionistic decision. But neither of these approaches detracts from the need to formulate a clear theoretical basis upon which a trade-off has to be made.

(Of course, the policy approach that a particular competition system prefers may be changed because of the difficulty of establishing whether that policy has been achieved on the facts of a particular case, but this should be done only in appropriate circumstances. However, it does not seem that the

<sup>112</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 66.

<sup>113</sup> With reference to Sanderson op cit note 8. See *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 67; and see also the authority quoted in notes 141 and 143.

<sup>114</sup> US Horizontal Merger Guidelines 1992 op cit note 6 part 4. See also Gifford & Kudrle op cit note 5 at 463 and Kattan op cit note 6 at 518–19, referring to the sliding-scale approach. See Areeda & Hovenkamp op cit note 6 para 976c.

<sup>115</sup> Of course the two systems also differ when it comes to the policies that they follow.

<sup>116</sup> On these difficulties generally, see also the sources quoted in notes 10, 36 and 99–101.

problems of proof in the case of the efficiency defence are so extreme that they call for such a solution.)<sup>117</sup>

Instead of determining what policy had to be followed in determining the trade-off, the tribunal in the *Trident* case merely enquired whether an efficiency gain had to be passed on to consumers. It did not clearly view the requirement as one of a number of trade-off standards.<sup>118</sup> Moreover, the *Trident* case was decided after only the first decision of the Canadian tribunal in *Superior Propane* had been handed down, and the tribunal did not have the benefit of the careful analysis in later decisions in this matter.

The tribunal contrasted the position in Canada with that in the United States. It noted that the total-surplus standard was favoured by the majority of the Canadian tribunal in its first *Superior Propane* case. However, it also took notice of the dissenting voices both in the *Hillsdown*<sup>119</sup> case and in the minority judgment in *Superior Propane*.<sup>120</sup> It then acknowledged that the approach in United States anti-trust law was not settled either, but that the majority of authorities required that efficiencies had to benefit consumers or lead to lower prices.<sup>121</sup> This approach was called 'less complicated'. The tribunal concluded that the simplicity of the US approach could in part be ascribed to the fact that the efficiency test was a common-law creation. These statements cannot, however, be supported. Perhaps the consumer-oriented standards are easier to understand in the sense that they focus on consumers and prices. Yet it was shown above that their application is not necessarily easier than other standards.<sup>122</sup> Moreover, the major contributing factor to the structure of the US approach — which the tribunal seemed to have overlooked — was that efficiency is considered as part of the broad competition analysis and that it is not separated out by legislation in the same way as in South Africa and Canada.<sup>123</sup> The tribunal concluded that the United States test is a 'discretionary tool' that 'does not require a trade off analysis bedeviled by statutory interpretation'.<sup>124</sup> This dictum is based on the tribunal's somewhat perplexing distinction between discretionary and formulaic tests — and it is open to two interpretations.

First, it may mean that no trade-off between benefits and losses of the

<sup>117</sup> Ross & Winter op cit note 36 at 479 state that 'simplicity alone is not enough to justify a criterion that is otherwise without foundation'. See the argument of Brito & Catalao-Lopes op cit note 85 at 160–8.

<sup>118</sup> See *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 68–9.

<sup>119</sup> *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada Ltd)* supra note 35 and the comments on this case cited above in note 93.

<sup>120</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 69.

<sup>121</sup> *Ibid* paras 69–74, with reference to Areeda & Hovenkamp op cit note 6; *FTC v University Health Inc* supra note 18 at 1223; *FTC v Staples Inc* supra note 18 at 1090; and the US Horizontal Merger Guidelines 1992 op cit note 6 part 4.

<sup>122</sup> See the text to note 91.

<sup>123</sup> See the text to note 23 above as well as that to note 139 below. On the reasons why US law is different from Canadian law, see Ross op cit note 85 at 642.

<sup>124</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 74.

merger is made in the United States. Such an interpretation would be problematic. The standards that focus on the interests of consumers are as much a trade-off standard as the total surplus standard. To determine whether consumers will not pay higher prices after the merger, the losses caused by the merger have to be traded off against the efficiency benefits.<sup>125</sup>

Secondly, it may connote that a trade-off is required even according to the US approach but that the trade-off is not bedevilled by statutory interpretation; that the US approach allows adjudicating authorities greater leeway to lay down indirect tests in terms of which the trade-off can be made. This interpretation seems preferable. If this is how the statement is to be understood, it serves as a warning that indirect tests for determining the impact of efficiencies caused by a merger will have to remain within the bounds set by statute in South Africa and Canada. But it should then be asked whether the tribunal heeded its own warning.

The tribunal then proposed the following test, which it regarded as according both with the wording of the statute and international best practice:

‘[W]here efficiencies constitute “real” efficiencies and there is evidence to verify them [the efficiencies] of a quantitative and qualitative nature, evidence that the efficiencies will benefit consumers, is less compelling. On the other hand, where efficiencies demonstrate less compelling economies, evidence of a pass through to consumers should be demonstrated and although no threshold for this is suggested, they need to be more than trivial, but neither is it necessary that they are wholly passed on. The test is thus one where real economies and benefit to consumers exist in an inverse relationship’.<sup>126</sup>

There is hardly any aspect of this test that is satisfactory:

First, it merely requires proof of real and verifiable efficiencies for the justification of a merger on efficiency grounds. But the magnitude of the efficiencies derived from the merger relative to the market power created by the merger has to be relevant in establishing the efficiency defence.<sup>127</sup> If the mere existence of real and verifiable efficiencies were to be adequate, then the South African test would go beyond even the total welfare standard. It would mean that the efficiency could justify a merger even in a case where

<sup>125</sup> If this interpretation is accepted it would conflict with the previous description of the US approach as involving a trade-off: see *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 65; see also the text to notes 109–10 and, for a wider use of the term ‘trade-off’, *Commissioner of Competition v Superior Propane Inc* supra note 35 para 163. Although the concept of a trade-off is sometimes used in a narrower sense to refer to the type of situation where losses to consumers exceed gains through efficiency (see Bork op cit note 6 at 110 and 111, referred to in *Commissioner of Competition v Superior Propane Inc* supra note 13 para 426 and Röller et al op cit note 6), this does not appear to be the sense in which the tribunal used the term.

<sup>126</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 81; *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 para 125.

<sup>127</sup> See the views of Fisher & Lande op cit note 5 at 1668–9 on basing the efficiency defence on the magnitude of efficiencies and Yao & Dahdou op cit note 10 at 44 on the importance of looking at the size of the efficiency gain rather than a trade-off.

the efficiency gains from the merger do not exceed the dead-weight loss caused by it. This would conflict directly with the requirement in the statute that the efficiency will have to be 'greater' than and 'offset' the anti-competitive effects of the merger. Even in the *Trident* case the tribunal, in considering the facts, ultimately placed considerable emphasis on the magnitude of efficiency savings and the extent of market power that would have been acquired by means of the merger. It concluded that the efficiencies were overwhelming even though they could not be calculated precisely, while any exercise of market power could take place only up to the import parity price. The pre-merger price was not far below this point.<sup>128</sup> Perhaps the tribunal thought that its test was merely meant to determine whether consumers would benefit from the merger after it had already been determined that the efficiency benefits of the merger exceeded its competitive detriments. Yet the tribunal's formal test does not clearly provide for such a two-stage approach.<sup>129</sup>

Secondly, the test suggests that all real efficiencies should be treated equally. However, it is apparent from the ensuing discussion that the tribunal thought that some real efficiencies should be viewed with greater scepticism than others.<sup>130</sup> The tribunal therefore implied that some weighing of real efficiency would have to be undertaken. But it did not indicate how that should be achieved.<sup>131</sup>

Thirdly, the tribunal regarded benefit to consumers as relevant, but it did not state how and why this interest would have to be taken into account. What does it mean if benefit to consumers is 'less compelling'? Would it mean that a merger would then be condemned only if it were to be shown that consumers would clearly be harmed? If this is how the test is to be interpreted, it would bring some sense to the evaluation, but it is suggested that this type of evaluation could be accommodated within a more focused test.

Fourthly, according to the tribunal's test, 'pass-through' to consumers would have to be shown 'where efficiencies demonstrate less compelling economies'.<sup>132</sup> But what are 'less compelling economies'? If all real and verifiable efficiencies fall into the first category, then only pecuniary benefits could fall into this second category, although it was demonstrated above that pecuniary efficiencies should never form the basis for an efficiency defence.

<sup>128</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 91. In para 92 the tribunal called its test a 'proportionality test'.

<sup>129</sup> See *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 paras 126–9, where a clear trade-off was also made.

<sup>130</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 81.

<sup>131</sup> See *Areeda & Hovenkamp* op cit note 6 paras 975–6; *Sanderson* op cit note 8 at 634–5. They indicate how such weightings can be made.

<sup>132</sup> For severe criticism of the 'pass through' terminology see *Gifford & Kudrle* op cit note 5 at 443ff.

Moreover, even if it were to be accepted that they should,<sup>133</sup> it is clear from the decision that an efficiency defence based on pecuniary benefits is unlikely to succeed. It is therefore difficult to think of a case where pecuniary benefits will be so compelling that it will make sense to determine whether consumers will benefit from them.

The current test is so flawed that a fresh start is required. The new learning provided by the three *Superior Propane* judgments (handed down after the approval of the *Trident* merger) can form the basis for such a reappraisal.<sup>134</sup> It seems that the total-welfare standard also will not be acceptable in South Africa: The purposes of the Act are set out in s 2. It determines that 'efficiency, adaptability and development of the economy'<sup>135</sup> as well as the interests of consumers<sup>136</sup> must be promoted by competition law, together with a number of other goals. It therefore seems that the focus in South Africa cannot merely be on efficiency or on consumers.<sup>137</sup> Distributional effects in South Africa will be of the greatest economic and political importance. Many South Africans are so poor that they will not benefit as direct or indirect shareholders in any redistributed surplus. Conversely, the requirement that consumers must always benefit from the efficiencies unnecessarily limits the ambit of the efficiency defence and does not allow for enough of a focus on efficiency.<sup>138</sup> It undermines the clear separation that is made in South Africa between the consideration of competition and efficiency concerns in merger adjudication.<sup>139</sup>

The balancing-weight test proposed in Canada would therefore be appropriate for South Africa, but it should not be applied in a mathematical fashion here and must involve 'discretionary' elements.<sup>140</sup> The value that should be approached to the interests of consumers cannot be determined according to clear norms. Moreover, as was mentioned above, there is a further problem which the tribunal also tries to cover in its distinction between 'discretionary' and 'formulaic' approaches. It may be very difficult to determine even those aspects that should be precisely determined in terms of economic models, ie the dead-weight loss and the efficiency benefit and

<sup>133</sup> The tribunal distinguishes pecuniary and distributional benefits. Most other authorities do not distinguish these benefits but regard them as the same thing: see the text to notes 49–54 above.

<sup>134</sup> Sutherland & Kemp op cit note 3 para 10.85; *Commissioner of Competition v Superior Propane Inc* supra note 35; *Commissioner of Competition v Superior Propane* supra note 7; *Commissioner of Competition v Superior Propane Inc* supra note 94.

<sup>135</sup> Section 2(a).

<sup>136</sup> Section 2(b).

<sup>137</sup> Cf the position in Canada: *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 404 et seq and 432; but see the interpretation *Commissioner of Competition v Superior Propane Inc* supra note 35 paras 82–109 and 165.

<sup>138</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 69, where this is acknowledged.

<sup>139</sup> See the text to note 23 above.

<sup>140</sup> See the qualitative approach in *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 paras 126–9.

these determinations should be made impressionistically. The tribunal's approach can be supported in so far as it suggests that the courts should not require merging firms to prove by means of exact mathematical calculations that the efficiency aspects of the merger will outweigh its anti-competitive consequences, because measurement will be too difficult.<sup>141</sup> Although mathematical evidence will seldom be available, there may be cases where such evidence will be useful in the analysis of the merger.<sup>142</sup> However, trade-offs should never be regarded as an exact science.<sup>143</sup> Perhaps this must be the final legacy of the *Trident* decision.<sup>144</sup>

Much can be learnt from the United States approach in this context. The tribunal should first look at the increase in market power that will be caused by the merger. If it is great, the tribunal should not approve a merger unless consumer interests carry little weight and it is clear that efficiency benefits will be large. However, if the increase in market power brought about by the merger is small, it should be easier to convince the tribunal that efficiency benefits can justify a merger and the merger should be allowed unless the efficiency gains are clearly insignificant or consumer protection is particularly important. Other pieces of information also may be relevant: for example, where a merger produces a large redistribution of income it may be an indicator that the merger has an anti-competitive motive.<sup>145</sup>

Only three further questions then have to be answered:

The first is whether effects of the merger *in South Africa* should only be taken into account. In considering whether efficiencies could justify a merger, the tribunal in *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty)*<sup>146</sup> accepted that competitive losses would not be suffered in South Africa but that the efficiencies would be achieved here. This suggests that anti-competitive effects of, and efficiencies caused by, a merger outside of South Africa will not carry the same weight as effects inside South Africa. This approach is also taken in other jurisdictions.<sup>147</sup> It may not be possible to

<sup>141</sup> Rogers op cit note 6 at 524; Berry op cit note 6 at 542; Sanderson op cit note 8 at 631 and 637; Sutherland & Kemp op cit note 3 para 10.86; *Commissioner of Competition v Superior Propane Inc* supra note 7 para 333 (on the information needed to determine the distributional effects) and para 431 (on the difficulties of making calculations).

<sup>142</sup> See *Commissioner of Competition v Superior Propane Inc* supra note 7 para 233 and see also the text to note 100 above.

<sup>143</sup> See above the text to notes 23 and 124; and Sanderson op cit note 8 and at 637 on the treatment of quantitative estimates.

<sup>144</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 as discussed in the text to 109–25.

<sup>145</sup> Sanderson op cit note 8 at 630–1.

<sup>146</sup> Supra note 34 paras 126–31.

<sup>147</sup> Ross op cit note 85 at 646–7; the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 54–5; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 154 and 192–8. See generally on the national welfare standard Gifford & Kudrle op cit note 5 at 438–9. See also on consideration of the nationality of shareholders Ross op cit note 85 at 645; Warner op cit note 5 at 1068.

delineate effects nationally, but this issue may also be used to make qualitative judgments and to determine the weight that should be attached to transfers.

The second question is whether a merger can be justified on the basis of efficiency, even if it causes the merged firm to become a monopolist in a relevant market. In Canada it has been accepted that a merger may be approved on efficiency grounds even in these circumstances and that this aspect can be considered only if it has a specific further negative impact.<sup>148</sup> In most other jurisdictions the creation of a monopoly will trump efficiency.<sup>149</sup> Logic would seem to dictate that the Canadian approach should be followed if the balancing-weights or total-welfare standard is accepted. However, in circumstances where it is difficult to determine anti-competitive consequences and efficiency accurately, it may become difficult to show that a merger to monopoly should be approved on efficiency grounds.

The third question is whether a welfare benefits and losses must be determined where a merger involves more than one market. It is argued that each market has to be treated separately, unless it can be shown that benefits in one market will be achieved only if the merged firm increased market power and continued to operate in another market.<sup>150</sup>

#### *Efficiencies must be merger-specific*

The Act determines that an efficiency can justify a merger only if 'it is likely to result from the merger, and would not likely be obtained if the merger is

<sup>148</sup> *Commissioner of Competition v Superior Propane Inc* supra note 13 paras 386 and 414–19; *Commissioner of Competition v Superior Propane Inc* supra note 7 paras 259ff, 277 and 283–5; *Commissioner of Competition v Superior Propane Inc* supra note 94 paras 46–51.

<sup>149</sup> In the US Horizontal Merger Guidelines 1992 op cit note 6 part 4 it is stated that '[e]fficiencies almost never justify a merger to monopoly or near-monopoly'; EC Horizontal Merger Guidelines op cit note 5 para 84; see Everett & Ross op cit note 4 at 58 and the reference to *MSG Media Services IV/M469* paras 100–1. There has also been considerable criticism of the Canadian approach: *Commissioner of Competition v Superior Propane Inc* supra note 35 paras 107–9 and 172–3 and the minority judgment in *Commissioner of Competition v Superior Propane Inc* supra note 94 paras 69 and 72ff; Canadian Competition Bureau op cit note 4 at 34–5; the Canadian *Report of the Advisory Panel on Efficiencies* op cit note 11 at 55–6.

<sup>150</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.2, especially n53; US Horizontal Merger Guidelines 1992 op cit note 6 part 4 (n36); Sanderson op cit note 8 at 632. See also the text to notes 151 et seq on the requirement of merger specificity. The Canadian tribunal in *Commissioner of Competition v Superior Propane Inc* supra note 7 at 138–40 calls for a general weighing-up across markets but does not pay sufficient attention to the fact that efficiencies must be obtained in the least restrictive manner. Cf also EC Horizontal Merger Guidelines op cit note 5 para 79, in which it is stated that efficiencies and competitive detriments 'in principle' must be in the same market; and cf further the US position: Fisher & Lande op cit note 5 at 1659 with reference to *United States v Philadelphia National Bank* 374 US 321 (1963). On the difficulties that may arise here, see Warner op cit note 5 at 1067.



prevented'.<sup>151</sup> Accordingly, efficiencies will be recognized only if they are caused by the merger, that is to say, if they are merger-specific.<sup>152</sup>

The competition authorities will have to consider whether efficiencies can be achieved by other means. It will be particularly important to establish whether the same efficiencies can be reached by internal expansion rather than through merger. There are two reasons why it may be better to require firms to expand internally rather than by way of merger:<sup>153</sup>

- internal expansion is an organic process that is sometimes more likely to succeed; and
- if the firm expands internally it will have to win outlets for its products by competing.

Nevertheless, there may be cases where the achievement of efficiencies through merger will be preferable to internal expansion.<sup>154</sup> First, where efficiencies are achieved through the utilization of complementary resources of merging firms, internal expansion will not be able to achieve these benefits. Secondly, internal expansion may be slower in achieving a particular efficiency and delays in achieving greater efficiency may themselves cause welfare losses. Thirdly, internal expansion may be more costly for firms than merger. Such a saving through merger will be a mere pecuniary gain to the merging firms, but the cost may deter firms from achieving efficiencies through internal expansion. If a merger is barred in such circumstances, it will prevent the merging firms from becoming more

<sup>151</sup> Section 12A(1)(a)(i); Sutherland & Kemp op cit note 3 paras 10.78–9. See the different formulations in OECD Report op cit note 4 at 7. See on the information problems that exist here Yao & Dahdou op cit note 12 at 35–41.

<sup>152</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 76–7, 92; *Tongaat-Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 paras 98 and 105–6; *Nasionale Pers Ltd/Education Investment Corporation Ltd* 45/LM/Apr00 paras 44–5; *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 para 130; *Inzuzo Furniture Manufacturers (Pty) Ltd/PG Bison Holdings (Pty) Ltd* 12/LM/Feb04 at 15; *Medicross Healthcare Group (Pty) Ltd/Prime Cure Holdings (Pty) Ltd* 11/LM/Mar05 para 232ff. See the argument in *JD Group Ltd/Ellerines Holdings Ltd* 78/LM/Jul00 at 30–2, where it was argued that the merged firm would be able to provide financial services to the ‘unbanked’. The tribunal rejected the argument on the basis that the merger was not necessary to allow the parties to do so. See the Canadian Competition Act 1985, s 96(1) and the Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 5.2, para 8.7. See also the US Horizontal Merger Guidelines 1992 op cit note 6 part 4, which speaks of merger-specific gains. These guidelines call verifiable and merger-specific efficiencies ‘cognizable’, and this term is sometimes used by the tribunal in South Africa. See *Commissioner of Competition v Superior Propane* supra note 7 paras 147–9, where the position in the US is contrasted with that in Canada. See the contrasting approaches set out in *Canada (Director of Investigation and Research) v Hill-down Holdings (Canada Ltd)* supra note 35, especially para 141, and *Commissioner of Competition v Superior Propane Inc* supra note 13 para 462. See also the EC Horizontal Merger Guidelines op cit note 5 para 85, in which it is stated that the only alternatives that are ‘reasonably practicable in the business circumstances’ will be considered.

<sup>153</sup> Areeda & Hovenkamp op cit note 6 para 973b.

<sup>154</sup> *Ibid* paras 970b and 973b.

efficient. Fourthly, internal expansion may be necessary before firms in a market will achieve efficiency without merger, but the size of the market may not allow all of them to do so.<sup>155</sup> In such a situation the only alternative to the merger will be expansion of some firms and exit of other firms from the market. Investment in expansion by the expanding firms will be wasteful if the same expansion could have been achieved through merger. Fifthly, a major reason why firms will be loath to expand internally is the 'capacity effect'. Expansion will increase the volumes sold in the market and that will suppress prices. The reduction in prices will often exceed the benefit of the realized efficiency. But the capacity effect frequently can be avoided by means of merger. Where two merging firms have inefficiently small plants, it may be possible to rearrange production after a merger in order to achieve more efficient production without exceeding the output previously produced by the separate firms.<sup>156</sup>

The 'capacity effect' will sometimes stand in the way of the realization of efficiency gains through expansion and in such cases it may be preferable to allow a merger on efficiency grounds, even if the merged firm will acquire or strengthen its market power. In accordingly it must be determined whether the capacity effect will deter a firm from expanding internally. The factors that should be considered in determining the impact of the capacity effect are:<sup>157</sup>

- homogeneity of products: the more differentiated the products in the market, the less likely it will be that internal expansion will be able to wrestle market share from other firms;
- size of the capacity increase necessary to achieve the efficiency relative to market size: the greater the required increase in capacity, the greater the likelihood that the capacity effect will deter expansion;
- elasticity and future trends of demand: the higher the elasticity of demand and the greater the expansion in demand, the more likely it is that a firm will expand internally;
- the magnitude of cost savings: the greater the cost saving, the greater the likelihood of expansion despite the capacity effect.

Furthermore, there may be transactional alternatives to mergers.<sup>158</sup> Mostly efficiencies can only be achieved in a part of the businesses of the merging firms. A firm may, for instance, be of an efficient size to assemble components but it may not manufacture all components efficiently. In such a case it should be determined whether efficient production cannot be achieved without a merger.

Where the component can be obtained in the market, the merger should be allowed on efficiency grounds if there are also efficiencies in integrating

<sup>155</sup> The reason for this is that prices will fall as output increases, see the explanation of the capacity effect in the text to note 156 below.

<sup>156</sup> See the text to notes 186–8 and 192–5.

<sup>157</sup> Areeda & Hovenkamp *op cit* note 6 para 973b.

<sup>158</sup> Canadian Merger Enforcement Guidelines 1991 *op cit* note 44 para 8.17. See especially the consideration of other mergers as an alternative.

the production of this component with the assembly of other components in a single firm. Efficiency of integration will depend on whether there is an efficient market for the component and whether the transaction costs in contracting for the input will be high. If two hospitals argue that their merger should be allowed because they both have to maintain inefficiently small laboratories, it must be determined whether such a service can be contracted for more cheaply in the market — and if it is possible, the merger should not be allowed on the basis of the perceived efficiency. The cost saving that should be allowed for the purpose of determining whether the merger ought to be approved will merely be the difference between the cost at which the merged firm will produce and the cost of obtaining it in the market.<sup>159</sup>

It may be possible to achieve the same types of efficiencies by means of a joint venture or a licensing agreement between firms, rather than through merger, even if such components cannot be acquired in the market.<sup>160</sup> However, joint ventures and licensing agreements may increase transaction costs and the likelihood of anti-competitive co-operation between firms.<sup>161</sup> These disadvantages must be balanced against the advantages of allowing the merger even though it may be very difficult to quantify transaction costs.<sup>162</sup> If the manufacture of a component is a significant part of the activities of the merging firms, a joint venture between them will not be a viable alternative to merger since a joint venture will not be markedly different from a merger between the firms, especially if the joint venture is to endure for an unlimited or unspecified time.

Similar arguments will apply where firms produce and supply a range of complementary products. Where all or most products are produced inefficiently, there will be a strong argument for merger. A joint venture in such circumstances will be indistinguishable from a merger. Where only a small number of products is produced inefficiently, a joint venture between firms may be a less invasive vehicle for producing those products efficiently. Furthermore, it may be more effective to purchase in the market the products that are produced inefficiently. Nevertheless, the last alternative will not be viable if complementarity depends on production within one firm.<sup>163</sup>

<sup>159</sup> Areeda & Hovenkamp op cit note 6 para 974c. See especially the argument regarding market power of a supplier. The authors argue that such power will be short-lived if integration is possible.

<sup>160</sup> EC Horizontal Merger Guidelines op cit note 5 para 81: this will then have to be taken into account in the analysis of the joint venture.

<sup>161</sup> Areeda & Hovenkamp op cit note 6 para 973c.

<sup>162</sup> This was not done in *Tongaat Hulett Group Ltd/Transvaal Suiker Bpk* supra note 12 para 106.

<sup>163</sup> Areeda & Hovenkamp op cit note 6 para 975d2, and see on luxury products the text to note 205 below.

*Likelihood that efficiencies will materialize, timeliness and substantiality*

The tribunal has accepted that the likelihood of the achievement of efficiency will have to be verified.<sup>164</sup> But it has not explicitly required that efficiencies be likely.<sup>165</sup> It is suggested that this is an omission. Section 12A(1)(a)(i) applies only to efficiencies that ‘may result or [are] likely to result’ from the merger.<sup>166</sup>

There are indications in the EC Merger Guidelines that an efficiency will only be considered in that jurisdiction if it is shown that it will be realized in a timely manner.<sup>167</sup> There is no need for such a requirement in South Africa, but a delay in the realization of efficiencies should be relevant when it is determined whether a merger can be justified on the basis of that efficiency.<sup>168</sup>

Next, the tribunal has not required that efficiencies be substantial.<sup>169</sup> It has remarked that ‘each claimed cent in cost savings’ cannot be relevant in determining whether a merger is efficient.<sup>170</sup> However, this comment was made when the tribunal considered the types of efficiencies that may be considered for the purpose of the efficiency defence. Conversely, Areeda and Hovenkamp argue that only substantial efficiencies should be recognized. They state that almost all mergers will create some efficiencies, that this is the reason why only substantial anti-competitive effects will lead to a merger becoming illegal, and that if ordinary efficiencies that are not substantial are taken into account they will be counted twice.<sup>171</sup> But this argument is not persuasive.<sup>172</sup> If it is found that efficiencies are insubstantial, they will not be counted twice as they will not convince an adjudicating authority that the merger should be justified on the basis of efficiency. There is no need for a

<sup>164</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 63. See generally on these issues Sutherland & Kemp op cit note 3 para 10.77–8.

<sup>165</sup> But see also the discussion of the credibility of efficiency claims: *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 75.

<sup>166</sup> In US Horizontal Merger Guidelines 1992 op cit note 6 part 4 it is stated that only ‘likely efficiencies will be considered’.

<sup>167</sup> EC Horizontal Merger Guidelines op cit note 5 para 79 where this is mentioned in the context of benefits to consumers.

<sup>168</sup> See also the EC Horizontal Merger Guidelines op cit note 5 para 83: ‘[T]he later the efficiencies are expected to materialize in the future, the less weight the Commission can assign to them.’ See on the discounting of time, the Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.7.1; Kattan op cit note 6 at 519.

<sup>169</sup> Although it has not expressly rejected such a requirement. But see the reference in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 59 to the US Horizontal Merger Guidelines 1992 op cit note 6 part 4, where substantiality is emphasized, and para 85 where it was noted that certain efficiencies were substantial.

<sup>170</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 52.

<sup>171</sup> Areeda & Hovenkamp op cit note 6 para 974a; EC Horizontal Merger Guidelines op cit note 5 para 79 where this is mentioned in the context of benefits to consumers. See also the argument in para 973b8.

<sup>172</sup> See also Sanderson op cit note 8 at 631.

requirement that only substantial efficiencies should be taken into account in terms of the efficiency defence.

### *Verification*

The tribunal looked at verifiability when it analysed the balancing of anti-competitive and efficiency issues, but conceptually this issue should stand on its own.<sup>173</sup> Competition authorities should be careful when considering efficiencies as they are 'easy to assert and sometimes difficult to disprove'.<sup>174</sup> Vague and speculative claims that cannot be verified by reasonable means should not be taken into account. The tribunal has noted that efficiencies have to be assessed quantitatively and that the likelihood that they will occur must be established. But the authorities to which it referred show that verification has to take place on a much broader level.<sup>175</sup> The likelihood, magnitude, time and manner of achievement as well as the merger specificity of claimed efficiencies should be verifiable by reasonable means.<sup>176</sup> Nevertheless, the verification requirement should not be applied too strictly. The emphasis should be on 'reasonable means'. Verification should not undermine the stated preference of the tribunal for approaching evidence of efficiencies impressionistically.<sup>177</sup> In particular, care should be taken when dynamic efficiencies are considered as it will often be difficult to verify these efficiencies.

## THE DIFFERENT TYPES OF EFFICIENCIES CONSIDERED

We have seen that a merger can be justified either on the basis of dynamic efficiency or production efficiency,<sup>178</sup> and these efficiencies can now be evaluated against the requirements for the efficiency defence that have been developed in the preceding sections.<sup>179</sup>

Dynamic efficiencies will seldom be quantifiable and will have to be evaluated qualitatively.<sup>180</sup> Where there are relatively clear synergies in the research conducted by merging firms, a merger will increase their likelihood of being successful with research and development. This will be a strong argument for allowing a merger. But in many cases claims of dynamic

<sup>173</sup> See the text just after note 33 above. See Sutherland & Kemp op cit note 3 para 10.77 on verification generally.

<sup>174</sup> Gifford & Kudrle op cit note 5 at 463.

<sup>175</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 63.

<sup>176</sup> US Horizontal Merger Guidelines 1992 op cit note 6 part 4, referred to in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 63; EC Horizontal Merger Guidelines op cit note 5 paras 86–7; Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.9.

<sup>177</sup> See the text to note 141 above.

<sup>178</sup> See the text to notes 42–60 above.

<sup>179</sup> See Sutherland & Kemp op cit note 3 paras 10.86–10.90. For different typologies of efficiencies, see Röller et al op cit note 6 at 12–14.

<sup>180</sup> See the text to note 46 above and the Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.15.

efficiency will falter because they can be achieved in less restrictive ways, i.e. through joint ventures.<sup>181</sup> Firms will sometimes be loath to invest in research and development because the benefits will also be available to their competitors. A merger may accordingly internalize the benefits of research and development and therefore serve as an incentive for innovation. But other features of relevant markets and the nature of the research may point in a different direction. Firms that have market power, for instance, may be more reluctant to invest in research where the risk of failure is high.<sup>182</sup>

Various types of production efficiencies have been distinguished internationally:<sup>183</sup>

First, several efficiencies may be achieved at plant level.<sup>184</sup> Plant size and specialization efficiencies have often been described as those production efficiencies that are most worthy of protection:<sup>185</sup>

- (i) Economies of scale are achieved where average cost-per-unit is reduced because of the increase in the number of units produced.<sup>186</sup> These efficiencies can be achieved where the production of a plant (that does not produce at its optimum level) can be increased post-merger. Where a merger takes place between firms that produce the same product, the merged firm, at least in the short run, will frequently have merely two inefficient plants. But the firm can of course close one plant and achieve economies in the other. Output can be increased to efficient levels without an increase of total output in the market and a concomitant reduction in prices (the so-called capacity effect).<sup>187</sup> Where output is increased it may allow for greater mechanization of functions that were

<sup>181</sup> Balto op cit note 6 paras 76–8.

<sup>182</sup> Röller et al op cit note 6 at 18.

<sup>183</sup> The South African tribunal mentioned most of these issues in *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 55 et seq with reference to Sanderson op cit note 8, especially at 632–3. See Sutherland & Kemp op cit note 3 para 10.77. See especially the list in the Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II. For the United States, see Balto op cit note 6 at 74; Joseph F Brodley ‘Proof of efficiencies in mergers and joint ventures’ (1996) 64 *Antitrust LJ* 575; Warner op cit note 5 at 1070–2; Werden op cit note 6 at 12; Kattan op cit note 6 at 528–34; Fisher & Lande op cit note 5 at 1599ff.

<sup>184</sup> See especially the Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II and Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.14. See on plant-level efficiencies Scherer op cit note 63 at 1002f. See how certain efficiencies are prioritized in the US Horizontal Merger Guidelines 1992 op cit note 6 part 4.

<sup>185</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 56 with reference to Sanderson op cit note 8 at 632 and Areeda & Hovenkamp op cit note 6 para 975; Kattan op cit note 6 at 530.

<sup>186</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II and Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.14. See Fisher & Lande op cit note 5 at 1600 for the types of circumstances where these types of efficiencies are likely to exist.

<sup>187</sup> Areeda & Hovenkamp op cit note 6 para 975b. See the discussion of the capacity effect above in the text to notes 156–8; Balto op cit note 6 at 74–5.

previously performed manually.<sup>188</sup> In *Trident Steel* an important part of the business of the merging firms was to produce improved surface finish (ISF) products. Trident had machinery for turning low-quality steel into ISF products. But this machinery was under-utilized. After the merger Trident's plant would become an efficient producer of ISF blanks.

- (ii) Greater output may allow a firm to become more efficient through specialization.
- (iii) The Canadian Merger Enforcement Guidelines list the elimination of duplication, reduced down-time, a smaller base of spare parts, smaller inventory requirements, and the avoidance of capital expenditures that would otherwise be required as efficiencies that may arise at plant level as plant efficiencies.<sup>189</sup> A merger that raises the volumes produced by a firm may also justify investment in the building of a new, more efficient plant or the improvement of an existing plant.<sup>190</sup>
- (iv) Economies of scope will exist if products that were separately produced by merging firms can be more efficiently produced together within a particular plant in the merged firm.<sup>191</sup>

Secondly, several multi-plant efficiencies also may be achieved through merger:

- (i) A merger can bring about a division of production between plants that will improve economies of scale in a number of plants. If each of the merging firms produces two differentiated products in a single plant and it causes the output of each product to be inefficiently low, then production of each product can be dedicated to one of the plants post-merger in order to achieve efficient outputs in each plant.<sup>192</sup>
- (ii) Savings may be achieved at multi-plant level through specialization.<sup>193</sup> It may be more costly for firms to have a single plant that produces a range of products than it would be for a merged firm to dedicate production of specific products to particular plants owned by it.<sup>194</sup> In *Trident* one of the merging firms, Baldwins, was forced to tie up a press feed line that was intended for punching holes and dropouts, for the finishing of ISF products. It did not have specialized equipment for producing ISF blanks. In turn Trident, the other merger firm, could

<sup>188</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II and Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.14.

<sup>189</sup> Ibid.

<sup>190</sup> Scherer op cit note 63 at 1008. See also *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 para 130.

<sup>191</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II; Rölller et al op cit note 6 at 16.

<sup>192</sup> Areeda & Hovenkamp op cit note 6 para 975b; US Horizontal Merger Guidelines 1992 op cit note 6 part 4; Balto op cit note 6 at 75; Rölller et al op cit note 6 at 15.

<sup>193</sup> *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 paras 118–20; see Rölller et al op cit note 6 at 16.

<sup>194</sup> Areeda & Hovenkamp op cit note 6 paras 975c–d.



efficiently produce ISF products but was not able to do the type of pressing that Baldwins performed in its plant. After the merger the Baldwins line could be dedicated to the pressing of blanks and the Trident line for manufacturing ISF products. This would make the merged firm more efficient than the merging firms. Apparently there were economies of integration in being able to perform both functions and the merged firm would have the ability to service customers who required pressed blanks.<sup>195</sup>

- (iii) Multi-plant-level savings also can take the form of the rationalization of management, administrative functions (such as sales, marketing, accounting, purchasing, finance and production), and research and development activities.<sup>196</sup> However, these types of benefits often will not be merger-specific or substantial enough to justify an anti-competitive merger.<sup>197</sup> Rationalization frequently takes the form of the dismissal of redundant employees. But there are difficulties with the recognition of these efficiencies? In *Trident* the tribunal observed that one of the public-interest criteria that has to be considered in evaluating a merger in accordance with s 12A(1)(a)(ii) read with 12A(3)(b) is the effect that the merger has on employment, and it then concluded that this meant that efficiency through redundancy cannot be taken into account as '[t]he legislature can hardly be seen to be giving a defence in one section . . . and taking it away in another'.<sup>198</sup> However, there are many situations where greater competition leads to unemployment. In all of these situations the main purpose of competition law is to promote competition. The Act does not contain an absolute prohibition on the dismissal of employees for the sake of efficiency. The public-interest criteria make it possible for an adjudicating body to trade off public interest concerns against conclusions reached in achieving its main goals of promoting and protecting efficiency through competition. Indeed, no merger has been prohibited on the basis that it causes unemployment. There is no reason why efficiencies created by the dismissal of redundant employees should not be taken into account in terms of the efficiency defence. But an adjudicating body must then

<sup>195</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 86. The tribunal stated that these efficiencies would not have been achieved otherwise. It did not ask whether it would have been possible for Baldwins to purchase ISF blanks, but it was apparent that Baldwins was run at a loss: see para 92.

<sup>196</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II and Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.14. See Kattan op cit note 6 at 532–3 on research and development. See generally on rationalization Röller et al op cit note 6 at 14–5.

<sup>197</sup> US Horizontal Merger Guidelines 1992 op cit note 6 part 4. Joint ventures with regard to research and development may achieve the same benefits as mergers; see the EC Horizontal Merger Guidelines op cit note 5 para 81.

<sup>198</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 para 80. The tribunal could have added that one of the purposes of s 2 is to promote employment.

revisit the redundancies when it considers the impact of the merger on the public interest. Perhaps South African competition authorities, unlike their counterparts in most other countries (where legislation does not allow for consideration of public interest), should be even more clinical in considering the efficiency consequences of redundancies under the rubric of the efficiency defence. The public-interest consequences of redundancies will receive adequate attention when the impact of the merger on public interest is considered in the last phase of the adjudication of a merger.

Thirdly, efficiencies at the product level will ordinarily take the form of 'economies of scale'.<sup>199</sup> A merger may spread fixed costs over a larger output of products and may thereby reduce the average unit cost per product.<sup>200</sup>

Fourthly, plant and multi-plant efficiencies also may be achieved with regard to purchasing, distribution, advertising, capital raising, complementary resources and the transferring of superior production techniques or know-how.<sup>201</sup>

- (i) Where a firm is merely able to purchase from suppliers at a lower cost because of its powerful bargaining position, the benefit to the merging firm will be pecuniary.<sup>202</sup> It should not be taken into account in determining whether a merger ought to be allowed. However, if a supplier is able to supply the merged firm more cheaply because of greater efficiency, then real efficiencies are realized. There are efficiencies that may be considered,<sup>203</sup> although it will frequently be possible to show that the same benefits can be achieved by less restrictive means such as joint ventures.<sup>204</sup>
- (ii) A merger may improve the efficiency of distribution. However, merging firms may rely on this type of efficiency only if they can show that there are economies of integration in self-distribution of products. This, for instance, will be the case where a firm supplies luxury products which have to be distributed through integrated exclusive outlets.<sup>205</sup>

<sup>199</sup> Kattan op cit note 6 at 530 states that economies of scale will be particularly relevant in declining markets.

<sup>200</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II.

<sup>201</sup> Ibid and the new Canadian Merger Enforcement Guidelines 2004 op cit note 44 para 8.14; Scherer op cit note 63 at 1008. Transfer of superior production techniques or know-how is mentioned in the Canadian Merger Enforcement Guidelines 1991 Appendix II in the general introduction and where more specific efficiencies are enumerated. In the 2004 version it is mentioned only in the introduction.

<sup>202</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5 paras 55 nn40 and 90, with reference to the Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.3.

<sup>203</sup> Ibid paras 87–90; *Canada (Director of Investigation and Research) v Hillsdown Holdings (Canada Ltd)* supra note 35 para 139n73; Canadian Merger Enforcement Guidelines 1991 op cit note 44 para 5.3. See generally Röller et al op cit note 6 at 18–9.

<sup>204</sup> Areeda & Hovenkamp op cit note 6 para 975i and *Olin Corporation* 113 FTC 400 (FTC 1990).

<sup>205</sup> Areeda & Hovenkamp op cit note 6 para 975e1.

- (iii) Promotional efficiency is achieved when a larger output of products is being advertised. Only a very large output would, for instance, justify nationwide television advertisements. However, merging firms should be allowed to merge to achieve this type of efficiency only if they are at a competitive disadvantage to other firms that are able to advertise and if less restrictive alternatives such as joint ventures are not viable.<sup>206</sup>
- (iv) The question whether the efficiency of capital-raising can be taken into account in terms of the efficiency defence is somewhat controversial. Bulk will be necessary to allow a firm to raise capital in the public financial markets. Greater size may be obtained through merger. Yet, Areeda & Hovenkamp do not believe that efficient capital-raising can help to justify a merger: if mere size is necessary to gain access to sources of capital, firms should rather achieve it through mergers that do not raise competition concerns.<sup>207</sup> However, it will often be more attractive to investors if a firm is focused on a particular type of business in a particular market. This may serve to justify a horizontal merger in order to gain access to capital markets. Especially in South Africa, where markets for capital are not as efficient as they are in the United States, efficiencies in the raising of capital should not be ignored.
- (iv) Areeda and Hovenkamp are also against the justification of a merger on the basis that the merging firms have complementary resources.<sup>208</sup> They give two reasons, namely that these efficiencies can be achieved by less restrictive means and are so pervasive that their acceptance will lead to unjustified increases in market power through mergers. The first argument will not stand in the way of firms that have unique complementarities. The second argument can be rejected out of hand. As long as efficiencies are substantial and real, there is no reason why they should be ignored merely because they are pervasive. Although efficiencies based on complementarity may be pervasive, they will seldom be of a sufficient magnitude to have a profound impact on merger evaluations. Where firms have complementary resources and they are situated close to each other this may form a basis for an efficiency defence, unless it can be shown that some other form of co-operation could achieve the same efficiencies.<sup>209</sup>
- (v) The transfer of superior production techniques and know-how may allow a merged firm to produce more efficiently than the merging

<sup>206</sup> Ibid para 975f. See on promotion and distribution efficiencies: Balto op cit note 6 at 75–6; Röller et al op cit note 6 at 18.

<sup>207</sup> Areeda & Hovenkamp op cit note 6 para 975h. But see Röller et al op cit note 6 at 19.

<sup>208</sup> Areeda & Hovenkamp op cit note 6 para 975k.

<sup>209</sup> Kattan op cit note 6 at 531 and the discussion of the LTV/Republican merger, which in some ways is echoed in South Africa by *Tiger Brands Ltd/Langeberg Food International Ashton Canning Co (Pty) Ltd* supra note 34 paras 119–20, although the tribunal stressed that it concerned specialization. See above note 193. See also Balto op cit note 6 at 75 and Fisher & Lande op cit note 5 at 1622 on this merger.

firms, and should be regarded as relevant to an efficiency defence as long as the same benefits cannot be achieved by less restrictive means such as joint ventures.<sup>210</sup>

Fifthly, one of the major economic justifications for mergers is that they allow assets to end up in the hands of managers who are best able to manage them efficiently.<sup>211</sup> But can more efficient management of a merging firm be an efficiency justification for a merger? This issue has not yet received careful attention in South Africa. Most other jurisdictions, however, do not allow an efficiency defence on this basis. Management skills are seldom so unique that they can be improved only through merger. The shareholders of a company will have the power to see to it that inefficient managers are replaced by more efficient ones.<sup>212</sup>

Sixthly, where production activities that were previously performed outside of the firm by third parties are brought into a firm by means of merger, this may bring about efficiencies in the form of savings of transaction costs. These are real efficiencies. But the saving of transaction costs is so difficult to calculate and to verify that it will seldom play a part in the efficiency defence.<sup>213</sup>

## CONCLUSION

The locus classicus in respect of the efficiency defence in South Africa, *Trident Steel (Pty) Ltd/Dorbyl Ltd*,<sup>214</sup> made a valuable contribution to its development. The defence succeeded in this case and this set the tone at an early stage in the development of competition law in South Africa. The efficiency defence is taken seriously in South Africa and it is possible to justify a merger on the basis of efficiency in this country. However, several specific aspects of the efficiency defence need to be refined. The *Trident* case was decided so early in the life of the tribunal that the judgment does not exhibit the same level of maturity as that present in more recent judgments. Furthermore, it was decided at a time when the law regarding the efficiency defence in the influential jurisdiction of Canada was in a state of flux. The specific test for the application of the efficiency defence is therefore flawed in several fundamental respects, and a sharp change of direction is required to correct these flaws.

<sup>210</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II. The new Canadian Merger Enforcement Guidelines 2004 op cit note 44 sets it out in para 8.13; Röller et al op cit note 6 at 17.

<sup>211</sup> Fisher & Lande op cit note 5 at 1601–2. See also Röller et al op cit note 6 at 18–23.

<sup>212</sup> Areeda & Hovenkamp op cit note 6 paras 974b2 and 975k2; Kattan op cit note 6 at 529. See also the European decision of *Aerospatiale/Alenia/DeHavilland* Case IV/M157 paras 65–9.

<sup>213</sup> Canadian Merger Enforcement Guidelines 1991 op cit note 44 Appendix II.

<sup>214</sup> *Trident Steel (Pty) Ltd/Dorbyl Ltd* supra note 5.