**UNIVERSITEIT VAN DIE VRYSTAAT**



**FAKULTEIT REGSGELEERDHEID**

**UNIVERSITY OF THE FREE STATE**

**FACULTY OF LAW**

**RESEARCH PROPOSAL**

|  |  |  |  |  |  |  |  |
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| LL.D-Proefskrif  LL.D. Thesis |  | LL.M.-Verhandeling  LL.M. Dissertation | **\*** | LL.M. Uitgebreide navorsingskripsie  LL.M. Extended research essay |  | Projek  Project |  |

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| --- | --- | --- |
| Surname and initials of student/researcher | **Marais A.J.** | |
| Student number | |  |  |  |  |  |  |  |  |  |  | | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | | **2** | **0** | **0** | **4** | **1** | **7** | **5** | **6** | **6** | **3** | | |
| Cell number and e-mail address | **084 522 9634 marais.hannes@gmail.com** | |
| Proposed supervisor | **Miss Karlien Kitching and prof. Snyman-van Deventer** | |
| **Recommendation of proposed supervisor** | | |
|  | | |
| Signature of proposed supervisor | |  |
| **Recommendation of department and date of approval** | | |
|  | | |
| Signature of chairperson of department |  | |

**1. Descriptive title**

The Efficiency Defence in South African Competition Law: Application and Recommendations.

**2. Academic and practical reasons for selecting the topic**

The purpose of the South African Competition Act[[1]](#footnote-2) is to promote and maintain competition[[2]](#footnote-3) in the Republic of South Africa in order to enhance, among other things, the development and efficiency of the South African economy, employment, consumer welfare and the competitiveness of South African producers in international markets.[[3]](#footnote-4)

In general, competition is essential in achieving the above-mentioned objectives. Hence, the Competition Act[[4]](#footnote-5) prohibits conduct that it perceives as being anti-competitive in nature. There are however certain instances in which an increase in competition could be detrimental to achieving the above-mentioned objectives.[[5]](#footnote-6) In order to control for these instances the efficiency defence was included in the Competition Act[[6]](#footnote-7) to allow for greater flexibility with regard to the interpretation and application of this Act.[[7]](#footnote-8)

The efficiency defence[[8]](#footnote-9) is a legal defence that can be raised by a contravening firm in which that contravening firm can argue that even though its conduct is prohibited by the Competition Act,[[9]](#footnote-10) that the potential pro-competitive effects of its conduct outweighs the potential anti-competitive effects thereof. The competition authorities are then obligated to balance this efficiency defence against the potential anti-competitive effects of the relevant conduct. If the efficiency defence outweighs the anti-competitive effects of that specific conduct, the competition authorities despite the anti-competitive nature thereof will permit that conduct.[[10]](#footnote-11)

The academic and practical reason for this paper is thus to contribute to this Act[[11]](#footnote-12) achieving its purpose and hence also the above-mentioned objectives. This Act[[12]](#footnote-13) is still in its infancy and therefore there are a number of grey areas with regard to its interpretation and application. One of these areas of uncertainty is the area pertaining to the efficiency defence. This paper will thus contribute to the legal certainty pertaining to the interpretation and application of the efficiency defence in South African competition matters.

**3. Outline of the research topic and key questions to be answered**

This paper is going to determine how the efficiency defence is interpreted and applied by the South African competition authorities. This paper will then determine how the efficiency defence is interpreted and applied by the competition authorities of the United States of America, the European Union and Canada. This paper will then compare the interpretation and application of the efficiency defence in South Africa with its interpretation and application in the United States of America, the European Union and Canada. Based on this comparison, this paper will make certain recommendations on how the South African competition authorities should amend, if any, their policies with regard to the interpretation and application of the efficiency defence in South African competition matters in order to contribute to the attainment of the purpose and objectives of this Act.[[13]](#footnote-14)

The most important legal principles of the Competition Act[[14]](#footnote-15) that are relevant for this study pertains to the prohibitions contained within the Competition Act.[[15]](#footnote-16) Broadly speaking the Competition Act[[16]](#footnote-17) contains 2 types of prohibitions.[[17]](#footnote-18) Firstly, the Competition Act[[18]](#footnote-19)contains *per se* prohibitions. These *per se* prohibitions are prohibitions for which there are no defences. This means that the efficiency defence, nor any other defence for that matter, cannot be raised as a defence in instances where a *per se* prohibition was contravened.

The second type of prohibitions contained within the Competition Act[[19]](#footnote-20) is the so-called rule of reason prohibitions.[[20]](#footnote-21) The contravention of these prohibitions can be justified by way of the efficiency defence. This means that in instances where a rule of reason prohibition was contravened, the contravening party can raise the efficiency defence in order to justify that specific conduct. When the efficiency defence has been raised, the competition authorities are obligated to balance the efficiency defence against the potential anti-competitive effects of the relevant conduct. If the efficiency defence outweighs the potential anti-competitive effects, then the competition authorities regardless of its potential anti-competitive effects must permit that specific conduct.

This paper will discuss several relevant issues[[21]](#footnote-22) with regard to the efficiency defence.[[22]](#footnote-23) The 1st issue will be that of when does a joint venture constitute a merger. This issue is relevant because joint ventures and mergers are regulated by different sections of the Competition Act[[23]](#footnote-24) and accordingly the procedures and requirements of forming a joint venture and a merger are very different from each other.[[24]](#footnote-25)

The 2nd issue that will be considered is the issue of how the potential anti-competitive effects are measured by the South African competition authorities.[[25]](#footnote-26) The 2nd issue leads to the 3rd issue that will be addressed in this paper namely how do the South African competition authorities verify the efficiency defence raised by the contravening party. Stated differently, how do the South African competition authorities determine that the efficiency defence raised by the contravening party is indeed an accurate version of the facts?[[26]](#footnote-27)

The 4th issue that will be considered is the issue of the different types of efficiency, technological and other pro-competitive gains that are recognised by the South Africa competition authorities. The South African position will then be compared with that of the United States of America, the European Union and Canada.

The 5th issue that will be discussed is that of how the efficiency defence is weighed against the potential anti-competitive effects by the South African competition authorities. Again, the South African position will be compared to that of the United States of America, the European Union and Canada. The 6th issue that will be dealt with will be that of in whose favour the South African competition authorities should interpret and apply the efficiency defence.[[27]](#footnote-28) The South African position will then be compared to that of the United States of America, the European Union and Canada.

The 7th issue will consider the advantages and disadvantages of having an efficiency defence such as the efficiency defence contained within the Competition Act.[[28]](#footnote-29) The 8th and last issue that will be discussed in this paper will be whether the public interest defence contributes or subtracts from the attainment of the purpose and objectives of this Act.[[29]](#footnote-30)

**4. Research methodology**

Broadly speaking this paper will be using the comparative method of legal writing.[[30]](#footnote-31) However, this paper will also include elements of informative, analytical and argumentative papers. This paper will be informative in the sense that it will set out the interpretation and application of the efficiency defence in competition matters not only in South Africa but also in the United States of America, the European Union and Canada. Furthermore, this paper will be analytical in the sense that it breaks the efficiency defence down into all its different elements. Lastly, this paper will be argumentative in the sense that it will make certain recommendations on how the South African competition authorities should amend their policies on the interpretation and application of efficiency defence. These recommendations will be based upon the comparison of the position of the efficiency defence in South Africa with its position in the United States of America, the European Union and Canada. Furthermore, these recommendations will also be backed by economic theory.

The resources to be used in this paper include the following: legislation,[[31]](#footnote-32) case law,[[32]](#footnote-33) journal articles,[[33]](#footnote-34) textbooks[[34]](#footnote-35) and the internet.[[35]](#footnote-36)

**5. Structure of the thesis**

Chapter 1: Introduction.

Section 1: Introduction and problem statement.

Section 2: Purpose of the paper.

Section 3: Scope of the paper.

Chapter 2: The historical development and underlying principles of the South African Competition Act.[[36]](#footnote-37)

Section 1: Historical development of the South African Competition Act.[[37]](#footnote-38)

Section 2: Purpose and objectives of the South Africa Competition Act.[[38]](#footnote-39)

Section 3: The underlying principles of the South Africa Competition Act.[[39]](#footnote-40)

Chapter 3: The South African Competition Act.[[40]](#footnote-41)

Section 1: Definition and necessity for the efficiency defence.

Section 2: The onus of the efficiency defence and the circumstances in which it can be used.

Section 3: Miscellaneous prerequisites for the efficiency defence.

Section 4: The relevant market.

Section 5: Definition and measurement of the potential anti-competitive effects.

Chapter 4: The efficiency defence.

Section 1: Requirements and verification of the efficiency defence.

Section 2: Types of efficiencies recognised and the reason for their recognition.

Section 3: Types of technological and other pro-competitive gains recognised and the reason for their recognition.

Section 4: Balancing the efficiency defence against the potential anti-competitive effects.

Section 5: Who should benefit from the efficiency defence?

Chapter 5: Other policy considerations.

Section 1: Should the South African Competition Act[[41]](#footnote-42) contain an efficiency defence?

Section 2: The public interest defence.

Chapter 6: Conclusion.

Section 1: Concluding remarks.

**6. Preliminary study**

*American Soda Ash Corporation/ Competition Commission of South Africa case no 12/CAC/Dec01*

(This case examines the jurisdiction of the efficiency defence in South African competition matters.)

Blignaut L and du Plessis L and Lurie J

2009. *Vertical Integration and the Refusal to Supply Scarce Goods – A Legal and Economic Framework for Analysis of Prohibited Practices*. http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-3A/Vertical-integration-and-refusal-to-supply-scarce-goods-LB-LdP-JL-final.pdf

(accessed on 4 March 2001)

(This article contains an in depth discussion on vertical mergers. More specifically this paper considers, among other things, the potential anti-competitive and pro-competitive effects of vertical mergers. It also contains a discussion on case law on the interpretation of exclusionary acts in South Africa and in the European Union.)

Broder DF

2005. *A Guide to US Antitrust Law*. 1st ed. London: Thomson.

(This textbook contains a detailed exposition on the competition law of the United States of America.)

*Cancun Trading No 24/Seven-Eleven Corporation SA (Pty) Ltd case no 18/IR/Dec99*

(This case answers the question of whether the efficiency defence is available for *per se* prohibitions.)

Cseres KJ

2005. *Competition Law and Consumer Protection*. The Hague: Kluwer Law.

(This textbook contains a detailed exposition on the relationship between consumer protection and competition law from an economic perspective.)

Deneys Reitz Attorneys Inc.

2002. *Implications for M&A Activities - The Evolution of Competition Law in Relation to Mergers*.

http://www.deneysreitz.co.za/index.php/tools/print/implications\_for\_mactivities\_the\_evolution\_of\_

compeition\_law\_in\_relati/news (accessed on 4 March 2011)

(This article contains meaningful information in relation to the issue discussed in this paper with regard to mergers and joint ventures.)

*Distillers Corporation (SA) Ltd/Stellenbosch Farmers Winery Group Ltd case no 08/LM/Feb02*

(This case touches upon the different requirements of the efficiency defence in South African competition matters. This case also considers the application of the public interest defence in South Africa competition matters.)

*Glaxo Wellcome (Pty) Ltd/National Association Of Pharmaceutical Wholesalers case no 15/CAC/Feb02*

(This case determined that section 8(c) and 8(d) of the Competition Act 89/1998 are indeed rule of reason prohibitions and accordingly the efficiency defence is applicable on these sections.)

Global Competition Review

2001. *Merger Control 2011*. 2001 ed. London: Law Business Research Ltd.

(This article contains meaningful information in relation to mergers in the context of the Competition Act 89/1998.)

Hawthorne R and Morris K

2008. Policy Approaches to Margin Squeeze in the Telecommunications Sector in South Africa. *Development Policy Research Unit*: Cape Town: UCT.

(This article examines the anti-competitive effects of monopolies as well as the application of the efficiency defence in the European Union.)

*Harmony Gold Mining Company Ltd/Gold Fields Ltd case no 93/LM/NOV04*

(This case sets out the procedure for a merger consideration by the South African competition authorities.)

Holmes WC

2002. *Antitrust Law Handbook*. 2002 ed. ST. Paul: West Group.

(This textbook contains a detailed exposition on the competition law of the United States of America.)

Ilzkovitz F and Meiklejohn R

2003. European Merger Control: Do We Need An Efficiency Defence? *Journal of Industry, Competition and Trade* 3(1):57-85.

(This article considers whether an efficiency defence is necessary with regard to the consideration of mergers in the European Union.)

International Competition Network

2008. *Report on Single Branding/Exclusive Dealing*. http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf

(accessed on 4 March 2011)

(This article contains a discussion on exclusive dealing (exclusionary act) which causes foreclosure. This article sets out the circumstances in which exclusive dealing should be illegal. This paper also considers the efficiency defence with regard to exclusive dealing.)

International Competition Network

2010. *Trends and Developments in Cartel Enforcement*.

www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf (accessed on 4 March 2011)

(This article contains a broad overview of the South African Competition Act 89/1998 as well as an overview of similar legislation in other countries.)

*Iscor Ltd/Saldanha Steel (Pty) Ltd case no 67/LM/Dec01*

(This case examines the difference between the efficiency defence and the failing firm defence with regard to South African competition matters.)

Korah V

2004. *An introductory guide to EC Competition Law and Practice*. 8th ed. Oxford: Portland Oregon.

(This textbook contains a detailed exposition on the competition law of the European Union.)

Neuhoff M and Govender M and Versfeld M and Dingley D

2006. *A Practical Guide to the South African Competition Act*. 1st ed. Durban: LexisNexis.

(This textbook contains brief discussions on most of the topics that will be discussed in this paper. It also contains definitions on certain economic principles that are relevant for the interpretation and application of the Competition Act 89/1998.)

Norton A

2000. *South Africa: Efficiency Arguments in Favour of Mergers and Acquisitions*.

http://www.mondaq.com/article.asp?articleid=8565 (accessed on 4 March 2011)

(This paper contains meaningful information on the application of the efficiency defence in terms of the Competition Act 89/1998.)

Pace LF

2007. *European Antitrust Law*. 1st ed. Cheltenham: Edward Elgar.

(This textbook contains a detailed exposition on the competition law of the European Union.)

*Patensie Sitrus Beherend Beperk/The Competition Commission case no 16/CAC/Apr02*

(This case defined an exclusionary act in terms of the Competition Act 89/1998. Furthermore, this case also sat out some of the requirements for the use of the efficiency defence in South Africa.)

Sutherland P

2008. Steel and Propane: The Efficiency Defence and Horizontal Mergers. *South African Law Journal* 125(2):331-370.

(This article contains meaningful information on the requirements and application of the efficiency defence in South African competition matters.)

*South African Raisins (Pty) Ltd/SAD Holdings Ltd case no 04/IR/Oct/1999.*

(This case contains a discussion on the abuse of dominance prohibition and the use of economies of scale in the efficiency defence.)

Tardiff TJ

2009. Efficiency Metrics For Competition Policy In Network Industries. *Journal of Competition Law & Economics* 6(4):957-972.

(This paper considers the relative importance of the different types of efficiencies and concludes that the most important efficiency for competition matters is that of dynamic efficiencies.)

*Telkom South Africa ltd/Business Connexion Group Ltd case no 51/LM/Jun06*

(This case contains valuable information on horizontal mergers as well as the different types of efficiencies that are recognised by the South Africa competition authorities with regard to the efficiency defence.)

*Tiger Brands (Pty) Ltd/Langeberg Foods International (Pty) Ltd case no 46/LM/May05*

(This case addressed several issues that will be discussed in this paper for example it contains a discussion, among other things, on the need to balance the anti-competitive effects against the deficiency defence and it also considers the issue on whom should be favoured by the South African competition authorities with regard to the efficiency defence.)

*Trident Steel (Pty) Ltd/Dorbyl Ltd case no 89/LM/Oct00*

(This case laid the foundation for the different types of efficiencies that are recognized by the South African competition authorities with regard to the efficiency defence. This case also laid the foundation for several other issues with regard to the application of the efficiency defence in South Africa, some of which will be discussed in this paper.)

Van Heerden HJO and Neethling J

1995. *Unlawful Competition*. 1st ed. Durban: LexisNexis Butterworths.

(This textbook contains a detailed discussion on the development of the Competition Act 89/1998.)

Williamson OE

1968. Economies as an Antitrust Defence: The Welfare Tradeoffs. *The American Economic Review* 58(1):18-36.

(This article laid the foundation for the maximisation of consumer welfare in competition matters. In this article, the author formulated a mathematical algorithm, which can be used to balance the anti-competitive effects against the pro-competitive effects.)

**7. Research schedule**

|  |  |  |  |
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| Dates | Time Period | Work to be done | Outcomes |
| 11 – 18 March. | 1 Week. | Preparation of research proposal. | Hand in the research proposal. |
| 18 – 25 March. | 1 Week. | Research, write and hand in chapter 1. | Hand in chapter 1. |
| 25 March – 29 April. | 5 Weeks. | Research, write and hand in chapter 2. | Hand in the 1st draft of chapter 2. |
| 29 April – 9 Mei. | 10 Days. | Marking and feedback on chapter 2. | Learn from your mistakes. |
| 9 Mei – 16 Mei. | 7 Days. | Rewrite and hand in chapter 2. | Fix the inadequacies in your first draft. |
| 16 Mei – 17 June. | 5 Weeks. | Research, write and hand in chapter 3. | Hand in the 1st draft of chapter 3. |
| 17 - 27 June. | 10 Days. | Marking and feedback on chapter 3. | Learn from your mistakes. |
| 28 June – 5 July. | 7 Days. | Rewrite and hand in chapter 3. | Fix the inadequacies in your first draft. |
| 5 July – 15 August. | 6 Weeks. | Research, write and hand in  chapter 4. | Hand in the 1st draft of chapter 4. |
| 15 – 25 August. | 10 Days. | Marking and feedback on chapter 4. | Learn from your mistakes. |
| 25 Aug. – 1 Sept. | 7 Days. | Rewrite and hand in chapter 4. | Fix the inadequacies in your first draft. |
| 1 Sept. – 30 Sept. | 4 Weeks. | Research, write and hand in  chapter 5. | Hand in the 1st draft of chapter 5. |
| 30 Sept – 10 Oct. | 10 Days. | Marking and feedback on chapter 5. | Learn from your mistakes. |
| 10 – 17 October. | 7 Days. | Rewrite and hand in chapter 5. | Fix the inadequacies in your first draft. |
| 17 Oct. – 29 Nov. | 6 Weeks. | Write the conclusion and put the final touches on your thesis. | Ensure that your conclusion bind the whole thesis together. |
| 30 November. | 1 Day. | Hand in the complete thesis. | Obtain your degree. |

**8. Principal references**

*American Soda Ash Corporation/ Competition Commission of South Africa case no 12/CAC/Dec01*

Blignaut L and du Plessis L and Lurie J

2009. *Vertical Integration and the Refusal to Supply Scarce Goods – A Legal and Economic Framework for Analysis of Prohibited Practices*. http://www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-3A/Vertical-integration-and-refusal-to-supply-scarce-goods-LB-LdP-JL-final.pdf

(accessed on 4 March 2001)

Broder DF

2005. *A Guide to US Antitrust Law*. 1st ed. London: Thomson.

*Cancun Trading No 24/Seven-Eleven Corporation SA (Pty) Ltd case no 18/IR/Dec99*

Cseres KJ

2005. *Competition Law and Consumer Protection*. The Hague: Kluwer Law.

Deneys Reitz Attorneys Inc.

2002. *Implications for M&A Activities - The Evolution of Competition Law in Relation to Mergers*.

http://www.deneysreitz.co.za/index.php/tools/print/implications\_for\_mactivities\_the\_evolution\_of\_

compeition\_law\_in\_relati/news (accessed on 4 March 2011)

*Distillers Corporation (SA) Ltd/Stellenbosch Farmers Winery Group Ltd case no 08/LM/Feb02*

*Glaxo Wellcome (Pty) Ltd/National Association Of Pharmaceutical Wholesalers case no 15/CAC/Feb02*

Global Competition Review

2001. *Merger Control 2011*. 2001 ed. London: Law Business Research Ltd.

Hawthorne R and Morris K

2008. Policy Approaches to Margin Squeeze in the Telecommunications Sector in South Africa. *Development Policy Research Unit*: Cape Town: UCT.

*Harmony Gold Mining Company Ltd/Gold Fields Ltd case no 93/LM/NOV04*

Holmes WC

2002. *Antitrust Law Handbook*. 2002 ed. ST. Paul: West Group.

Ilzkovitz F and Meiklejohn R

2003. European Merger Control: Do We Need An Efficiency Defence? *Journal of Industry, Competition and Trade* 3(1):57-85.

International Competition Network

2008. *Report on Single Branding/Exclusive Dealing*. http://www.internationalcompetitionnetwork.org/uploads/library/doc355.pdf

(accessed on 4 March 2011)

International Competition Network

2010. *Trends and Developments in Cartel Enforcement*.

www.internationalcompetitionnetwork.org/uploads/library/doc613.pdf (accessed on 4 March 2011)

*Iscor Ltd/Saldanha Steel (Pty) Ltd case no 67/LM/Dec01*

Korah V

2004. *An introductory guide to EC Competition Law and Practice*. 8th ed. Oxford: Portland Oregon.

Neuhoff M and Govender M and Versfeld M and Dingley D

2006. *A Practical Guide to the South African Competition Act*. 1st ed. Durban: LexisNexis.

Norton A

2000. *South Africa: Efficiency Arguments in Favour of Mergers and Acquisitions*.

http://www.mondaq.com/article.asp?articleid=8565 (accessed on 4 March 2011)

Pace LF

2007. *European Antitrust Law*. 1st ed. Cheltenham: Edward Elgar.

*Patensie Sitrus Beherend Beperk/The Competition Commission case no 16/CAC/Apr02*

Sutherland P

2008. Steel and Propane: The Efficiency Defence and Horizontal Mergers. *South African Law Journal* 125(2):331-370.

*South African Raisins (Pty) Ltd/SAD Holdings Ltd case no 04/IR/Oct/1999.*

Tardiff TJ

2009. Efficiency Metrics For Competition Policy In Network Industries. *Journal of Competition Law & Economics* 6(4):957-972.

*Telkom South Africa ltd/Business Connexion Group Ltd case no 51/LM/Jun06*

*Tiger Brands (Pty) Ltd/Langeberg Foods International (Pty) Ltd case no 46/LM/May05*

*Trident Steel (Pty) Ltd/Dorbyl Ltd case no 89/LM/Oct00*

Van Heerden HJO and Neethling J

1995. *Unlawful Competition*. 1st ed. Durban: LexisNexis Butterworths.

Williamson OE

1968. Economies as an Antitrust Defence: The Welfare Tradeoffs. *The American Economic Review* 58(1):18-36.

**Appendix 1**

*Chapter 1: Introduction.*

This chapter will contain 3 sections. Section 1 will contain the problem statement of this study. Section 2 will explain the purpose and practical reasons for this study and section 3 will specify scope of this study.

*Chapter 2: The Historical development and underlying principles of the South African Competition Act.[[42]](#footnote-43)*

This chapter will consist of 3 sections. Section 1 will contain a brief discussion on the historical development of the South African Competition Act.[[43]](#footnote-44) Section 2 will contain an exposition on the purpose of the South African Competition Act[[44]](#footnote-45) and section 3 will conclude this chapter with an exposition on the relevant micro-economic principles that underlie the South African Competition Act.[[45]](#footnote-46)

*Chapter 3: The South African Competition Act.[[46]](#footnote-47)*

This chapter will consist of 5 sections. In Section 1, the efficiency defence[[47]](#footnote-48) will be defined and the need for considering efficiencies, technological and other pro competitive gains in competition[[48]](#footnote-49) matters will be explained.

Section 2 will consider the existence of an efficiency defence in the South African Competition Act[[49]](#footnote-50) and if such a defence does exist, the circumstances in which it can be raised as a valid defence. Moreover, section 2 will also determine which party carries the burden of proof of the efficiency defence in terms of the South African Competition Act.[[50]](#footnote-51) Lastly, section 2 will briefly define the “failing firm defence” and compare it with the efficiency defence and indicate why it is important not to confuse the failing firm defence with the efficiency defence.

Section 3 will then consider the question of when firms will be regarded as competitors of each other. Section 3 will also discuss the different types of competitors that are recognised by the South African competition authorities. In addition to the different types of competitors section 3 will also consider the questions of when a firm will be regarded as dominant, what constitutes complex monopoly conduct and what is regarded as an exclusionary act[[51]](#footnote-52) in the context of the South African Competition Act?[[52]](#footnote-53) To conclude section 3 will define mergers and joint ventures and consider the question of when a joint venture will constitute a merger.

Section 4 will describe how the relevant market is determined in South African competition matters. Section 5 will then conclude this chapter by defining anti-competitive effects[[53]](#footnote-54) and discussing the measurement thereof in competition matters.

*Chapter 4: The efficiency defence.*

Chapter 4 will consist of 5 sections. Section 1 will set out the requirements for the efficiency defence in South Africa and how the competition authorities can verify the specific efficiency defence that has been raised.

Section 2 will consider the efficiencies[[54]](#footnote-55) recognised by the South African competition authorities as so-called real efficiencies[[55]](#footnote-56) and the reason for their recognition. In addition to the South African position, section 2 will also examine the types of efficiencies recognised by the competition authorities of the United States of America, Canada, and the European Union. Section 2 will then compare these results[[56]](#footnote-57) with the South African position and indicate whether the South African competition authorities should amend its policy on the types of efficiencies they recognise as real efficiencies.

Section 3 will then consider the technological and pro-competitive gains[[57]](#footnote-58) recognised by the South African competition authorities as valid with regard to the efficiency defence and the reason for their recognition. In addition to the South African position, section 3 will also examine the types of technological and pro-competitive gains recognised by the competition authorities of the United States of America, Canada, and the European Union. Section 3 will then compare these results[[58]](#footnote-59) with the South African position and indicate whether the South African competition authorities should amend its policy on the types of technological and pro-competitive gains they recognise as valid for the efficiency defence.

Section 4 will consider the balancing of the anti-competitive effects against the efficiency defence by the South African competition authorities. Section 3 will then consider they way in which the anti-competitive effects are balanced against the efficiency defence by the competition authorities of the United States of America, Canada, and the European Union. Section 4 will then compare these results[[59]](#footnote-60) with the South African position and indicate whether the South African competition authorities should amend its policy on the balancing of the anti-competitive effects against the efficiency defence.

Lastly, section 5 will consider in whose favour the South African competition authorities should interpret and implement the efficiency defence.[[60]](#footnote-61) Section 5 will then consider in whose favour the competition authorities of the United States of America, Canada, and the European Union interpret and implement the efficiency defence. Section 5 will then compare these results[[61]](#footnote-62) with the South African position and indicate whether the South African competition authorities should and are allowed[[62]](#footnote-63) to amend its policy on the interpretation and implementation of the efficiency defence with regard to whom it favours.

*Chapter 5: Other policy considerations.*

This chapter will consist of 2 sections. Section 1 will consider whether the competition laws in the United States of America, Canada and the European Union contain any efficiency defences.[[63]](#footnote-64) This section will then consider the advantages and disadvantages of having an efficiency defence and whether South Africa should indeed have an efficiency defence.[[64]](#footnote-65)

Lastly, section 2 will consider whether the public interest defence[[65]](#footnote-66) facilitates or hinders the realization of the purpose of the Competition Act.[[66]](#footnote-67) Section 2 will also consider whether the public interest defence could potentially nullify the purpose and effect of the efficiency defence.

Chapter 6: Conclusion.

This chapter will contain this papers conclusion.

1. 89/1998: section 2. [↑](#footnote-ref-2)
2. Competition is not defined by the Competition Act 89/1998. For more information in this regard and for a possible definition see Neuhoff *et al* 2006: 25-26. [↑](#footnote-ref-3)
3. Note that the development and efficiency of the South African economy, employment, consumer welfare and the international competitiveness of South Africa are the objectives of the Competition Act 89/1998 which are to be achieved through competition which is the purpose of the Competition Act 89/1998. [↑](#footnote-ref-4)
4. 89/1998. [↑](#footnote-ref-5)
5. See Neuhoff *et al* 2006: 25-26 for more information. [↑](#footnote-ref-6)
6. 89/1998. [↑](#footnote-ref-7)
7. 89/1998. [↑](#footnote-ref-8)
8. The efficiency defence consist of 3 separate defences namely a defence for efficiency gains, a defence for technological gains and a defence for any other pro-competitive gains. The efficiency defence is thus a cumulative name for these 3 separate defences. [↑](#footnote-ref-9)
9. 89/1998. [↑](#footnote-ref-10)
10. Note that the efficiency defence is only considered on a case by case base. [↑](#footnote-ref-11)
11. Competition Act 89/1998. [↑](#footnote-ref-12)
12. Competition Act 89/1998. [↑](#footnote-ref-13)
13. Competition Act 89/1998. [↑](#footnote-ref-14)
14. 89/1998. [↑](#footnote-ref-15)
15. 89/1998. [↑](#footnote-ref-16)
16. 89/1998. [↑](#footnote-ref-17)
17. Note that the prohibitions contained within the Competition Act 89/1998 are for conduct which according to economic theory results in anti-competitive effects. Remember that the purpose of the Competition Act 89/1998 is to promote and maintain competition within the republic of South Africa. [↑](#footnote-ref-18)
18. 89/1998. [↑](#footnote-ref-19)
19. 89/1998. [↑](#footnote-ref-20)
20. The rule of reason prohibitions are contained in sections 4(1)(a); 5(1); 8(c); 8(d); 12A(1)(a)(i) of the Competition Act 89/1998 as well as section 10A of the Competition Amendment Act 1/2009 which is yet to come into force. These sections correspondingly deal with restrictive horizontal practises, restrictive vertical practices, abuse of dominance, mergers and complex monopoly conduct. [↑](#footnote-ref-21)
21. In this proposal an issue is defined as ‘n area of uncertainty i.e. a question for which there is no clear answer. [↑](#footnote-ref-22)
22. Please note that these issues are not the only topics that will be discussed in this paper. There are numerous other topics that will also be discussed. These other topics are however still relevant for to the efficiency defence and the issues since it sets out the background and context of the efficiency defence and the relevant issues. This in turn will bind the whole paper into 1 logical unit. See appendix 1 for a complete list of all the topics that will be covered in this paper. [↑](#footnote-ref-23)
23. 89/1998. [↑](#footnote-ref-24)
24. If a firm where to contravene the Competition Act 89/1998 the competition authorities can impose a fine of up to 10 percent of the firm’s annual turnover. This causes the distinction between joint ventures and mergers to be all the more relevant. [↑](#footnote-ref-25)
25. This question is extremely relevant since the aim of the efficiency defence is to determine whether there is any efficiency, technological and other pro-competitive gains that outweigh the potential anti-competitive effects. This balancing act would be impossible if neither the anti-competitive and/or the pro-competitive gains could be measured. [↑](#footnote-ref-26)
26. The verification process can be troublesome since the competition authorities do not always have access to all the relevant and required information and also because firms tend to overstate the pro-competitive gains. [↑](#footnote-ref-27)
27. In light of the objectives of the Competition Act 89/1998 there are a number of different theories each stating that it is the best theory to use in order to attain these objectives. These theories include the price standard, consumer surplus standard, recourse saving standard, total welfare standard, the balancing weight standard, the Williamson trade off, a formulaic approach and a discretionary approach. For more information in this regard see Sutherland 2008: 346-352. [↑](#footnote-ref-28)
28. 89/1998. South Africa and Canada are the only countries in the world who have an efficiency defence in their competition legislation. All other countries consider any efficiency, technological and other pro-competitive gains in their analyses of the potential anti-competitive effects of the relevant conduct. [↑](#footnote-ref-29)
29. Competition Act 89/1998. The Competition Act 89/1998 authorises the competition authorities to permit certain conduct despite any anti-competitive effects of that conduct regardless of the availability of the efficiency defence. It can be argued that the public interest defence hinders the attainment of the purpose and objectives of the Competition Act 89/1998. [↑](#footnote-ref-30)
30. This paper will include ‘n very brief discussion on the historical development of the Competition Act 89/1998. However in the context of the whole paper this historical part is insignificant with regard to its length. Therefore it cannot be justified describing this paper of using a combination of the historical and comparative methods of legal writing. This paper will be comparative because it will compare the interpretation and application of the efficiency defence in South Africa with its position in the United States of America, the European Union and Canada. [↑](#footnote-ref-31)
31. This includes the South African Competition Act 89/1998 including all its amendments as well as similar legislation found in the United States of America, the European Union and Canada. [↑](#footnote-ref-32)
32. This includes relevant case law found in South Africa, the United States of America, the European Union and Canada. [↑](#footnote-ref-33)
33. These include law journal articles as well as economic journals articles. [↑](#footnote-ref-34)
34. Textbooks will mainly be used to determine the general position of the efficiency defence in South Africa and in the United States of America, the European Union and Canada. Textbooks will also be used to define certain economic principles. [↑](#footnote-ref-35)
35. This includes papers and other writings published by organisations dealing exclusively with competition law as well as papers published by legal practitioners for legal firms and other organisations. [↑](#footnote-ref-36)
36. 89/1998. [↑](#footnote-ref-37)
37. 89/1998. [↑](#footnote-ref-38)
38. 89/1998. [↑](#footnote-ref-39)
39. 89/1998. [↑](#footnote-ref-40)
40. 89/1998. [↑](#footnote-ref-41)
41. 89/1998. [↑](#footnote-ref-42)
42. 89/1998. [↑](#footnote-ref-43)
43. 89/1998. [↑](#footnote-ref-44)
44. 89/1998. [↑](#footnote-ref-45)
45. 89/1998. [↑](#footnote-ref-46)
46. 89/1998. [↑](#footnote-ref-47)
47. The Competition Act 89 of 1998 allows for 3 separate defences with regard to rule of reason prohibitions namely efficiency, technological and other pro competitive gains. These 3 defences are cumulatively known as the efficiency defence. See section 4, 5, 8, 10A and 12 of the Competition Act 89/1998 and Neuhoff *et al* 2006: 15-16, 53-57 for additional information. [↑](#footnote-ref-48)
48. Competition in this paper is defined as any conduct that falls under the scope of the South African Competition Act 89 of 1998 as well as any other similar legislation found in other jurisdictions. [↑](#footnote-ref-49)
49. 89/1998. [↑](#footnote-ref-50)
50. 89/1998. [↑](#footnote-ref-51)
51. Competition Act 89/1998: sec 8(c)-8(d). [↑](#footnote-ref-52)
52. 89/1998. [↑](#footnote-ref-53)
53. Anti competitive effects refer to any conduct that prevents or lessens competition in the relevant market. See the Competition Act 89/1998: sec 4, 5, 8,12 and Neuhoff *et al* 2006: 50-51 for more information. [↑](#footnote-ref-54)
54. Note that efficiencies in this instance refer only to efficiencies and not to technological and/or other pro competitive gains. [↑](#footnote-ref-55)
55. Only real efficiencies are regarded as valid for the efficiency defense. For more information see Neuhoff *et al* 2006: 56 and Trident Steel (Pty) Ltd/Dorbyl Ltd case 89/LM/Oct00. Note that it is outside the scope of this question to define real efficiencies. [↑](#footnote-ref-56)
56. The efficiencies regarded as real efficiencies by the competition authorities of the United States of America, Canada and the European Union. [↑](#footnote-ref-57)
57. Efficiencies are not considered in this section. [↑](#footnote-ref-58)
58. The technological and other pro competitive gains recognised as valid for the efficiency defence by the competition authorities of the United States of America, Canada and the European Union. [↑](#footnote-ref-59)
59. The way in which the anti-competitive effects are balanced against the efficiency defence by the competition authorities of the United States of America, Canada and the European Union. [↑](#footnote-ref-60)
60. The application of the efficiency defence could either favour producers, consumers or the economic society as whole. For more information see Neuhoff *et al* 2006: 57 and Trident Steel (Pty) Ltd/Dorbyl Ltd case 89/LM/Oct00. [↑](#footnote-ref-61)
61. In whose favour the efficiency defence are interpreted and implemented by the competition authorities of the United States of America, Canada and the European Union. [↑](#footnote-ref-62)
62. An interpretation and implementation of the efficiency defence which does not favour the consumer could be argued to be contrary to the purpose of the Competition Act 89/1998 and thus ultra vires. For more information, see the Competition Act 89/1998: sec 2 and Neuhoff *et al* 2006: 13. [↑](#footnote-ref-63)
63. Only South Africa and Canada have an efficiency defence. In other countries, the competition authorities consider any efficiencies during their analysis of the potential anti-competitive effects of the specific conduct. [↑](#footnote-ref-64)
64. The alternative would be to consider any potential efficiency gains that may result from the specific conduct during the competition authorities’ analysis of the potential anti-competitive effects of the aforementioned conduct. [↑](#footnote-ref-65)
65. Section 12 permits the competition authorities of South Africa to approve or prohibit a merger on public interest grounds irrespective of the anti-competitive effects, efficiency, technological or other pro-competitive gains associated with the merger. For more information, see the Competition Act 89/1998: sec 12. [↑](#footnote-ref-66)
66. 89/1998. [↑](#footnote-ref-67)