

COMPETITION LAW'S
INCLUSION OF
PUBLIC INTEREST
CONSIDERATIONS IN MERGERS
AND BEYOND:
A POTENTIAL PARADOX?

Nicholas Meyer

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Supervisor: Judge Dennis Davis

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1. Introduction:

When South Africa elected to adopt competition law legislation that included public interest provisions, this served to spark immediate controversy and proved divisive amongst policy makers and economists.¹ With the Competition Act² of 1998 introducing these considerations, heated debate was ignited with regards to how such public interest concerns would be applied in practice when a merger is proposed, or when a case involves prohibited conduct.³ The competition authorities have been confronted with addressing this task and clarifying the surrounding uncertainty, having grappled in recent years with mergers of a high profile nature, and excessive pricing cases (particularly in the context of previously state-owned entities), which implicate the public interest, necessitating development in somewhat uncharted terrain: the incorporation into competition policy of what would, traditionally-speaking, be non-competition objectives, in merger cases such as *Momentum/Metropolitan*⁴, *Kansai/Freeworld*⁵ and *Wal-Mart/Massmart*⁶, and prohibited conduct cases such as *Nationwide Poles v Sasol*⁷, *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*⁸, and *Competition Commission v Sasol Chemical Industries Limited*⁹.

The traditional purpose of Competition law has primarily been the protection and enhancement of consumer welfare.¹⁰ There are significant challenges which present themselves when attempting to reconcile this objective with the public interest considerations which the statute now enshrines.¹¹

¹ Boshoff, Dingley & Dingley 'The Economics of Public Interest Provisions In South African Competition Policy' (2012) 1.

² Competition Act 89 of 1998.

³ Supra note 1.

⁴ *Metropolitan Holdings Ltd v Momentum Group Ltd* (41/LM/Jul10) [2010] ZACT 87 (9 December 2010).

⁵ *Kansai Paint Co. Ltd v Freeworld Coatings Ltd* (53/AM/JUL11) [2012] ZACT 7 (20 January 2012).

⁶ *Minister of Economic Development and others v Wal-Mart Stores Inc. and others* (110/CAC/Jun11 and 111/CAC/Jun11) [2012] ZACAC (9 March 2012).

⁷ *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5.

⁸ *Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another* 70/CAC/APR07.

⁹ *Competition Commission v Sasol Chemical Industries Limited* 48/CR/Aug10.

¹⁰ Supra note 1 at 2.

¹¹ Ibid.

The underlying rationale behind including public interest in South African Competition policy is to satisfy our pressing economic redistributive justice needs.¹² Upon the advent of our Constitutional democracy in 1994, the government found itself presented with daunting economic and social obligations, particularly regarding the previously disadvantaged.¹³ David Lewis, who formerly acted as chairperson of the Competition Tribunal (doing so for a decade from when it was first founded in 1999), advocated including public interest factors during the evaluation of mergers, and further asserted that considerations of this nature are weightier in developing nations such as South Africa when contrasted with their lesser significance in developed countries.¹⁴ Lewis supports this stance through highlighting that in developing nations, the role of industrial policy is more prominent.¹⁵ Lewis posits that if a competition statute failed to be cognizant of its impact on ensuring that black ownership is promoted (salient in the South African context), or how it affects employment, then the completion authorities would be discredited.¹⁶

The realisation of moral and political values is identified by Hantke-Domas as the essential function of public interest considerations in the context of Competition law.¹⁷ Decision-makers should adopt such a conception to inform their deliberations and to assist in the resolution of disputes where the public interest is in issue.¹⁸ These values are both generally and specifically articulated in the Competition Act, with their inclusion in the preamble and purpose sections, along with provisions in the legislation which directly address them.¹⁹

s 12A, the merger review section of the Competition Act, obliges that competition authorities consider whether public interest grounds can or cannot justify a transaction being proposed.²⁰ The public interest considerations included in the Act are: the effect on “a particular industrial sector or region; employment; the ability of small businesses, or firms

¹² Yongama Njisane 'The rise of Public Interest: Recent high profile mergers' (2011) 3.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Michael Hantke-Domas 'The Public Interest Theory of Regulation: Non Existence or Misinterpretation?' (2003) 15(2) *European Journal of Law and Economics*.

¹⁸ Ibid.

¹⁹ Supra note 1 at 2.

²⁰ Supra note 2 at section 12A.

controlled or owned by historically disadvantaged persons, to become competitive; and the ability of national industries to compete in international markets”.²¹

When approaching proposed mergers, the Act also requires that the Competition authorities consider whether these are “likely to substantially prevent or lessen competition”.²² If such a deleterious impact on competition proves to be present, a consideration becomes necessary of whether the merger in question will nonetheless likely result in “technological, efficiency, or other pro-competitive gain” that can be balanced against the detrimental impact on competition.²³ Thus the Act inherently considers traditional welfare effects which arise from the transaction, “which typically includes an analysis of allocative, productive and dynamic efficiencies”.²⁴

It is arguable that when analysing mergers, certain cases may involve tension between equity and efficiency, with an apparent trade-off between these caused by the conflict between welfare and public interest which can arise in practice.²⁵ Lewis took cognizance of these tensions, stating that he was “quite comfortable with the requirement that we must balance competition and public interest considerations”.²⁶ Lewis acknowledged that this may be challenging in practice, further elaborating:

“It makes for complex decision making... *realpolitik*, at least, dictates that we do not insist on eliminating either the "political economy" or distributional objectives or "the pure economy" or allocative efficiency objectives. The trick is reconciling them in practice, and this in turn, is tied up, first, with the process of building a new, broad-based constituency for antitrust and, second, with the mode of implementation of policy and regulation”.²⁷

Lewis expresses his support for reconciling these sometimes conflicting objectives, however this attitude was not initially favoured by the Competition Tribunal, which in the past preferred a deferential approach in which other governmental agencies specifically mandated with the task of addressing these public interest factors could do so; the Tribunal

²¹ Supra note 2 at section 12A(3).

²² Ibid at section 12A(1).

²³ Ibid at section 12A(1)(a)(i).

²⁴ Supra note 1 at 2.

²⁵ Ibid at 3.

²⁶ Lewis, D, Presentation entitled 'The Political Economy of Antitrust', *Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy* (2001) October 25 & 26, at 4.

²⁷ Ibid.

conceived their own role as secondary to these other agencies.²⁸ The merger in *Shell/Tepco*²⁹ is illustrative of such a deferential attitude.³⁰ Due to Tepco's status as a black empowerment oil company, the Commission submitted the recommendation that the transaction be approved only on the condition that Tepco's continued independence was ensured, with it being controlled by both Thebe and Shell.³¹ The Commission sought to honour the Act's public interest provisions by proposing that this merger be conditional in this way. If Tepco's status as an independent participant in the petroleum industry was to be removed, the ability of a firm controlled by historically disadvantaged individuals to become competitive would be impeded.³² Despite this reasoning, the Tribunal proceeded to dismiss the Commission's recommendation: the Tribunal identified legislative instruments that they considered to be more appropriate to address these issues, stating that the case should rather refer to the Skills Development Act, the Employment Equity Act, and the Petroleum Charter.³³ Furthermore, the Tribunal cautioned that the Commission should not misconstrue its required function in relation to the public interest, warning that this should not operate in an "over- zealous manner lest they damage precisely those interests that they seek to protect".³⁴

A salient question therefore becomes apparent: when balancing welfare and public interest considerations, are the competition authorities the most appropriate institutions to do so?³⁵ It is possible that doing so may pose a threat to democratic values, as identified by Gal.³⁶ This potential threat becomes evident when one acknowledges that officials within the Competition authorities are not in their position through the democratic process of a general election – there is an absence of any mandate from the electorate to make public policy determinations.³⁷ There are often complex economic, social, political and cultural implications which flow from decisions which are taken in the public interest.³⁸ These

²⁸ Supra note 1 at 3.

²⁹ *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd* (66/LM/Oct01) [2002] ZACT 13 (22 February 2002).

³⁰ Supra note 1 at 3.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ Supra note 29 at para 58.

³⁵ Supra note 1 at 3.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

implications would not necessarily be confined to the public interest consideration directly in issue: at face value, a case may appear to involve a single company experiencing job losses, but in reality there could be a multitude of knock-on effects resulting from this.³⁹ Ascertaining and responding to these potentially far-reaching effects could be a task which competition authorities find themselves ill-equipped to grapple with.⁴⁰ It has always been the domain of government to determine public policy.⁴¹ Competition authorities may lack the most effective and efficient tools needed to truly advance the public interest, when they are confronted with considerations which compete with one another.⁴² For example, when a remote region characterised by significant unemployment levels is impacted by a merger, it is unclear whether the competition authorities are in the best position to establish what economic consequences (be they direct or indirect) which result from the merger will be experienced in this region.⁴³ The Act does not entirely ignore such deficiencies, in that it acknowledges that with regards to bank mergers, it is possible that competition authorities are not in the best position to make these decisions: the Minister of Finance is empowered by the Act to issue a notice excluding the merger from the jurisdiction of the Competition Act.⁴⁴ This serves as an official recognition by the legislature that the competition authorities are not always the best bodies to see that public interest is served, although this is limited to bank mergers as a specified exception.⁴⁵

However, a contrary perception could be that through these public interest provisions, the state can use competition law and its institutions as an additional means for achieving its objectives.⁴⁶ More recent South African merger cases seem to support a shift in attitudes which is aligned with such an approach.⁴⁷

³⁹ Supra note 1 at 3.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Gal, M, Presentation entitled 'Reality Bites (or Bits): The Political Economy of Antitrust in Small Economies', *Fordham Corporate Law Institute's 28th Annual Conference on International Antitrust Law and Policy* (2001) October 25 & 26, at 13.

⁴³ Supra note 1 at 4.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

2. Significant merger cases involving public interest considerations:

The *Wal-Mart/Massmart* merger is particularly salient. A proposed merger of Wal-Mart Stores Inc. and Massmart Holdings Limited, despite causing controversy and being met with extensive resistance, was ultimately approved by the Competition Appeal Court (CAC).⁴⁸ However, this approval had been heavily opposed by multiple intervening parties who had attempted to obstruct the merger: the Minister of Economic Development (the "Ministers"), the Minister of Agriculture Forestry and Fisheries, the Minister of Trade and Industry; the South African Small Medium and Micro Enterprises Forum; and unions (FAWU, SACCAWU, and NUMSA).⁴⁹

The primary concern of the Ministers was how the logistical capabilities of the global procurement network which Wal-Mart operates would affect South African imports.⁵⁰ According to the Ministers' submissions, local producers would be threatened by low-cost foreign producers situated in Asia, with the merger resulting in procurement shifting from the former to the latter.⁵¹ The Ministers argued that the consequences of such a procurement shift would be the stifling of domestic industries' development, and widespread closure of small and medium sized businesses, along with a detrimental impact on employment.⁵²

The CAC remained cognizant of the relevant public interest concerns implicated by the merger, despite having approved it, and expressly stated:

"The introduction of the largest retailer in the world to the South African economy may pose significant challenges for the participation of South African producers in global value chains which, as the evidence indicates within the retailing sector, is dominated by Wal-Mart. Failure to engage meaningfully with the implications of this challenge posed by globalisation can well have detrimental economic and social effects for the South African economy in general and small and medium sized business in particular".⁵³

⁴⁸ Supra note 1 at 4

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Supra note 6 at 158.

The CAC emphasised the incorporation in our Competition Act of public interest considerations that are distinct, clear and obligatory: competition authorities must apply them.⁵⁴ However, in this case, the CAC believed they had not been applied effectively.⁵⁵

The CAC further elucidated their position:

“Given Wal-Mart’s size and expertise... the proposal for a condition which would seek to enhance the participation of South African small and medium size producers in particular, in global value chains which are dominated by Wal-Mart so as to prevent job losses, at the least, and, at best, to increase both employment and economic activity of these businesses protected under s 12 A must form part of the considerations which this Court is required to take into account in considering a merger of this nature... This flows from the model of competition law chosen by the legislature and in particular as set out in s 12 A. It also forms part of the mandate given to the Tribunal and, on appeal, to this Court when faced with the inquiry as to whether a merger should be approved”.⁵⁶

The conditions that had been imposed by the Competition Tribunal were thoroughly evaluated by the CAC, namely the condition that local suppliers be assisted through the establishment of a procurement fund.⁵⁷ The CAC was disparaging of the formulation of this condition, regarding it as inadequately interrogated.⁵⁸ The CAC made an order to the effect that the merging parties, along with the government and unions, must nominate experts who would be responsible for conducting a study determining the “most appropriate means together with the mechanisms by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby”.⁵⁹

With regards to concerns pertaining to maintaining employment, the Tribunal’s approach had been to order that when employment opportunities became available, the merged entity must give a preferential right to these positions to the 503 employees who had suffered retrenchment in June 2010.⁶⁰ This response was viewed as entirely inadequate by

⁵⁴ Supra note 1 at 5.

⁵⁵ Ibid.

⁵⁶ Supra note 6 at 162.

⁵⁷ Supra note 1 at 5.

⁵⁸ Ibid.

⁵⁹ Supra note 6 at 109.

⁶⁰ Supra note 1 at 6.

the CAC, which issued an order reinstating these employees – this was a necessary measure as the CAC, when examining the merger and these retrenchments, had identified a sufficient causal connection between these.⁶¹ The CAC was still not satisfied, however, and therefore elected to impose further employment-specific conditions: that there be a two year moratorium on retrenchments which result from the merged entity’s operational requirements; and that the merged entity must honour its current labour agreements, as well as its existing bargaining practices with SACCAWU, the largest representative union.⁶²

In *Metropolitan/Momentum*, the Competition Tribunal addressed labour regulation extensively, on account of its public interest nature.⁶³ Labour itself insisted that this occurred, as opposed to the government intervening.⁶⁴ The merging parties proposed that, in the three years immediately subsequent to the merger being implemented, there would be an upper limit of 1000 job losses that were related to the merger.⁶⁵ They further proposed that an offer of support be included, which covered “core skills training to affected unskilled and semi-skilled employees, outplacement support and counselling, and to use their best endeavours to redeploy affected employees within the merged entity”.⁶⁶ The Competition Commission viewed these conditions as acceptable, recommending an approval of the merger subject to the implementation of the merging parties’ agreed-upon support measures.⁶⁷

NEHAWU, a minority union comprising 6% of Momentum’s employees, argued that the merging entities had not satisfactorily substantiated how this particular number of acceptable retrenchments (1000) had been calculated and deemed appropriate.⁶⁸ NEHAWU further challenged the legitimacy of this 1000 retrenchments figure, arguing that inadequate justification had been provided for why any job losses were necessary at all.⁶⁹

⁶¹ Supra note 1 at 6.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

Consequently, the union pursued an order prohibiting the merger, or in the event of it being approved, that this merger would occur with no jobs being lost.⁷⁰

The response of the Competition Tribunal was to approve the merger, making this subject to the condition that for two years following the effective date of the transaction, zero retrenchments should result from the merger (with senior managers being an exception).⁷¹

The Tribunal further voiced its scepticism with regards to addressing redundancy concerns with “soft” initiatives, emphasising that re-skilling and redeployment had a tendency to be ineffective in the Tribunal’s experience.⁷²

The Tribunal went on to elevate the status of employment within public interest considerations, stating that if the merging parties neglected to address how the transaction affected the employment sector, then even mergers which would serve to increase competition could be prohibited.⁷³

The notion of connecting loss of jobs and efficiencies is the landmark characteristic of this case.⁷⁴ The Tribunal identifies in their assessment of the facts that it is necessary to precisely articulate the process followed to determine the loss of employment figures that the merging parties were submitting as acceptable, as well as the need to establish and make explicit the link between these proposed figures and public (not private) efficiencies which are anticipated to follow the merger.⁷⁵ In conclusion, the Tribunal noted the merging parties’ failure to demonstrate “a rational connection between the efficiencies sought from the merger and the job losses claimed to be necessary”.⁷⁶ The Tribunal further remarked that it was only when the potential loss of jobs was of a significant magnitude, that it became necessary to adopt a considered approach of this nature.⁷⁷

There needs to be a clear connection between the efficiencies to be gained and the negative public impact that is envisaged – there could be no arbitrary condonation of such a negative

⁷⁰ Supra note 1 at 6.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid at 7.

⁷⁴ Supra note 12 at 5.

⁷⁵ Ibid at 6.

⁷⁶ Supra note 4 at 92.

⁷⁷ Supra note 12 at 6.

impact in the absence of this nexus being made evident.⁷⁸ Efficiencies by themselves are insufficient to justify a prejudicial effect on employment.⁷⁹ Parties continue to be obliged to demonstrate that there are justifications of a public nature which would allow for these employment losses – these reasons need to be public in order to offset interest that the public has in the preservation of jobs.⁸⁰

Kansai/Freeworld involved a hostile takeover on the part of Kansai (a coatings manufacturer) over Freeworld (a performance and decorative coatings manufacturer and distributor).⁸¹ The merger was approved by the Commission, provided that certain public interest and welfare conditions be met, namely: “(1) no merger related retrenchments for a period of three years (includes the inability to redeploy); (2) Kansai will divest of Freeworld's entire automotive coatings business; (3) Kansai will continue to manufacture decorative coatings for 10 years; (4) Kansai will invest in research and development in decorative coatings in South Africa; (5) Kansai will implement a Black Economic Empowerment (BEE) deal within two years of approval; and (6) Kansai will establish an automotive coatings manufacturing facility in South Africa within 5 years.”⁸²

Kansai found the divestiture condition particularly dissatisfactory, and responded with a request for consideration which alleged that this divestiture condition had been imposed based on incorrect findings made by the Commission.⁸³ The Commission initially opposed this request for consideration.⁸⁴

The Department of Trade and Industry (DTI) applied successfully for rights to intervene.⁸⁵ The DTI had made several public interest and welfare related submissions regarding this merger to the Commission, prior to these formal intervention proceedings.⁸⁶ The content of these preceding submissions claimed that, because Freeworld was the sole manufacturer of automotive coatings that supplied to the domestic automotive industry, the take-over

⁷⁸ Supra note 12 at 6.

⁷⁹ Ibid.

⁸⁰ Ibid at 7.

⁸¹ Supra note 1 at 7.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

would present a direct threat to the government's localisation initiative.⁸⁷ The DTI was concerned that employment levels would suffer if Kansai reduced or ceased entirely to locally manufacture automotive coatings.⁸⁸ The DTI also expressed concern that there would be a detrimental impact on innovation markets if the merger were to occur, as Freeworld developed unique South African automotive coatings products.⁸⁹ The final concern of the DTI was that Freeworld would cease to hold its essential BEE character if the merger were to be concluded – especially as Freeworld was considered to be an “exemplar with respect to black economic empowerment”.⁹⁰ The DTI adamantly stated that rather than being opposed to it, they recognised the necessary and important role of foreign direct investment in increasing competition which would lead to the development of local industry and the economy – this would be a positive step towards addressing the structural weaknesses confronted by our system.⁹¹

Ultimately the DTI opted to withdraw from its intervention, in spite of it having actively participated in the initial merger review stages, as it was satisfied that its concerns would be adequately represented by the Commission to the Tribunal.⁹² The Commission and the merging parties then entered into negotiations, which culminated in the withdrawal of the divestiture condition, along with the condition that automotive coatings be locally manufactured.⁹³ These were substituted with behavioural conditions relating to toll manufacturing fees and flows of information.⁹⁴

The Tribunal asserted in *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited*⁹⁵ that mergers which are not anti-competitive could still be prohibited on account of public interest considerations, and such public interest considerations could also serve to redeem an anti-competitive merger.⁹⁶

⁸⁷ Supra note 1 at 7.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid at 8.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ (08/LM/Feb/02) [2003] ZACT 36 (18 June 2003).

⁹⁶ Supra note 12 at 11.

*Harmony Gold Mining Company Limited and Gold Fields Limited*⁹⁷ provided a valuable summary of the Tribunal's interpretation of the role that public interest considerations play:

"all that it needs to establish, having found as we have earlier that it will not have a likely anti-competitive effect, is that the merger will not have a substantial negative effect on the public interest".⁹⁸ The Tribunal's emphasis was that when analysing a merger, an assessment of public interest grounds will be secondary to the primary evaluation of the effect on competition.⁹⁹ A merger which does not pass the competition test may still be approved after applying the public interest test; and mergers may still be prohibited for failing to pass the public interest test despite satisfying the competition test.¹⁰⁰

3. The issue of onus:

When a substantial public interest concern has been raised, the burden of proof will fall on the merging parties, according to the Tribunal in *Metropolitan/Momentum*: i.e. raising public interest grounds of a substantial nature that would serve to support the merger being prohibited, will result in a shift of the evidential burden onto these merging parties.¹⁰¹ This principle is not necessarily generally applicable, however, as the Tribunal had a limited scope which applied to the particular facts at hand: when the employment losses would be substantial

and re-employment prospects were not promising.¹⁰² The confines of principles relating to onus were elaborated on in the *Wal-Mart/Massmart* merger: public interest impact claims require substantiation, be it in the form of oral or documentary evidence which would need to be sufficiently particular to the issue at hand, and there would need to be further evidence provided which would support how any potential effects being alleged were established.¹⁰³ The Tribunal conceived the evidentiary test as involving proof that the process followed for deciding how many retrenchments may occur is reasonable, and that "the public interest in preventing employment loss is balanced by an equally weighty, but

⁹⁷ (93/LM/NOV04) [2005] ZACT (18 May 2005).

⁹⁸ *Ibid* at 61.

⁹⁹ *Supra* note 12 at 12.

¹⁰⁰ *Ibid*.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*.

¹⁰³ *Ibid*.

countervailing public interest, justifying the job loss and which is cognizable under the Act.”¹⁰⁴ It would be inadequate to counter job losses by raising efficiency grounds.¹⁰⁵ Countervailing grounds used to justify such job losses would need to be of a public nature: considerations of private efficiency gains would be excluded.¹⁰⁶

4. Balancing public interest factors and the principle of merger-specificity:

A case may present conflicting public interest factors, as recognised in *Distillers Corporation (SA) Limited and Stellenbosch Farmers Winery Limited*, where a specific region may benefit whilst employment is prejudicially effected: this case considered sacrificing a substantial number of jobs in order to prevent the closure of a factory which was of significant economic value to a region.¹⁰⁷ Such sentiments were echoed in *Harmony Gold* where the Tribunal noted that different public interest factors may point to opposing conclusions: a loss of employment may be necessary in order to establish a national champion through a merger.¹⁰⁸ Thus the Tribunal’s task inherently involves an attempt to establish the net impact on the public interest by balancing potentially conflicting factors.¹⁰⁹ Negative public interest effects were coupled with enhanced consumer welfare outcomes in the *Wal-Mart/Massmart* merger, which necessitated that the issue of balancing be addressed.¹¹⁰ The positive consumer welfare effects that would result from the merger were not disputed: vulnerable consumers would surely benefit from the resultant lower prices.¹¹¹ These welfare effects, however, would need to be weighed against the threat to local industries that this merger would present.¹¹² This would require a strict application of the law to the case’s particular facts: a balancing act which is informed by the factual context at hand.¹¹³ The public interest as an abstract cause must not be pursued by competition authorities in a broad, open-ended fashion – rather only those public interest considerations that are

¹⁰⁴ Supra note 4 at 70.

¹⁰⁵ Supra note 12 at 13.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid at 14.

¹¹² Ibid.

¹¹³ Ibid.

specifically implicated by a merger should be addressed.¹¹⁴ Merger-specificity is paramount when the public interest is assessed during a competition evaluation, and any balancing must be guided by this principle.¹¹⁵ This was made explicit by the Tribunal: “Subject matter and substantiality are not the only limitations in considering public interest. A further consideration is that the public interest must be merger specific. Expressed in less technical language, unless the merger is the cause of the public interest concerns, we have no remit to do anything about them. Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a specific transaction”.¹¹⁶

The Tribunal articulated its cognizance of the limitations on the scope of its public interest mandate, whilst accepting that it is responsible for protecting labour rights as they currently exist:

“Whilst in this case protecting existing collective rights is a legitimate concern that our public interest mandate allows us to intervene on because we are protecting existing rights from the apprehension that they may be eroded post-merger, we must be careful how far down this path we go. Protecting existing rights is legitimate, creating new rights is beyond our competence”.¹¹⁷

The process for determining conditions designed to alleviate any potentially negative impact on the public interest is of central focus in this case.¹¹⁸ Intervening parties must only propose “appropriate, proportional and enforceable” remedies.¹¹⁹

5. The legitimacy of intervening in the public interest:

The phenomenon of active use of competition law by the government in order to achieve policy objectives is relatively recent.¹²⁰ Ensuring that jobs are preserved during mergers has often been the primary concern in public interest considerations, as evident in the cases discussed above, but it is arguably socio-politically narrow and myopic for labour to

¹¹⁴ Supra note 12 at 14.

¹¹⁵ Ibid.

¹¹⁶ *Walmart Stores Inc v Massmart Holdings Ltd* (73/LM/Dec10) [2011] ZACT 28 (31 May 2011) at 32.

¹¹⁷ Supra note 116 at 68.

¹¹⁸ Supra note 12 at 14.

¹¹⁹ Supra note 116 at 121.

¹²⁰ Supra note 1 at 8.

intervene with support from authorities in the way that it has.¹²¹ “The politically effective group” – those individuals who are already employed – have their interests protected, whilst broader, more pressing goals such as sustainable, long-term job creation along with the achievement of an efficient market are neglected.¹²²

In spite of the merging parties submitting that there would not be a direct negative impact on employment resulting from the merger (with an increase in employment being more likely to occur in practice), the government still opted to support employment-related conditions in *Wal-Mart/Massmart*.¹²³ It is argued by Lewis that the real underlying motivator for the state intervening in this way is that employment levels in local manufacturing would decline due to a foreign acquiring firm shifting its procurement offshore.¹²⁴ Industrial policy was effectively being implemented through competition institutions: the decisive considerations were how foreign direct investment would affect domestic industries, rather than the direct impact of the transaction on target and acquiring firms’ levels of employment.¹²⁵ The government appears to be preoccupied with how local procurement is effected and the ownership of local firms by foreign companies – this is indicative of an “industrialisation” policy, which exceeds the defined ambit of public interest considerations as contemplated by the Competition Act.¹²⁶

The government intervening as it did in *Wal-Mart/Massmart* and *Kansai/Freeworld* could arguably be seen as arbitrary, which may suggest that government is conceiving competition law as a surrogate for trade or industrial policy.¹²⁷ This is manifestly problematic and an unsound approach to public policy, as industrial policy is not being applied to the economy as a whole as it should be – it is being applied in each individual merger case.¹²⁸ Government intervention of this nature introduces significant uncertainty, as there appears to be arbitrary inclusion of the values of this apparent “industrialisation” policy, over and above the frequent employment considerations.¹²⁹

¹²¹ Supra note 1 at 10.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ David Lewis 'Thieves at the Dinner Table' (2012) 293.

¹²⁵ Supra note 1 at 11.

¹²⁶ Ibid.

¹²⁷ Ibid at 12.

¹²⁸ Ibid.

¹²⁹ Ibid.

Prior to these relatively recent merger decisions, government intervention was minimal, which could reflect the practical realisation that public interest objectives may be more effectively secured by competition authorities or other agencies and statutes.¹³⁰ The state intervening in the processes of competition law in an apparently arbitrary nature, which has characterised recent cases, could be a symptom of the sector regulatory process performing poorly.¹³¹ The legitimate public purposes which underlie the establishment of regulatory agencies are often frustrated due to mismanagement, according to Posner.¹³² The state has thus turned to the competition authorities in order to realise its objectives.¹³³ Arbitrary government intervention could more simply be explained as indicating that the government views competition law and its institutions as policy implementation tools.¹³⁴ If such a stance is accepted, the government has clearly failed to develop a comprehensive competition and industrial policy due to uncertainty, arbitrariness and a lack of transparency.¹³⁵

6. The tension between efficiency and equity:

Achieving more equitable allocation of resources is a fundamental aim of the public interest provisions established by the Act, which is a progressive addition to the traditional competition law notions of efficiency and welfare.¹³⁶ However, with the reallocation of resources, the incentives faced by individuals and firms are altered and competitive outcome efficiencies become distorted.¹³⁷ Value judgements are inherent in the very nature of notions of equity – such value judgements are generally suggestive of political objectives.¹³⁸ There are thus far-reaching implications within the market being targeted, related markets and the economy as a whole with regards to income distribution, efficiency and welfare, when a merged entity has public interest conditions imposed on it.¹³⁹ There is a well-established and generally accepted trade-off between efficiency and equity.¹⁴⁰ With

¹³⁰ Supra note 1 at 12.

¹³¹ Ibid.

¹³² Richard A. Posner 'Theories of Economic Regulation' (1974) 5(2) *The Bell Journal of Economics and Management Sciences*.

¹³³ Supra note 1 at 13.

¹³⁴ Supra note 1 at 13.

¹³⁵ Ibid.

¹³⁶ Ibid at 16.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

government intervention comes the alteration of incentives for firms, which although may be aimed at improving equity, arguably also results in distortion of choices and sacrificed efficiency.¹⁴¹

The competition authorities used a consumer welfare standard in order to assess the merger in *Wal-Mart/Massmart*.¹⁴² Wal-Mart's ability to run a markedly efficient logistics operation would make production more efficient and decrease prices, which would benefit consumers.¹⁴³ Efficiencies in production mean lowered costs, with these cost savings being passed on to consumers who enjoy decreased product prices and greater allocative efficiency.¹⁴⁴ Consumer surplus will increase as the price begins to approach marginal cost.¹⁴⁵ The gain in consumer surplus is partly due to local producer surplus decreasing, and partly due to the total surplus increasing.¹⁴⁶ Domestic producer surplus is eroded when local firms fail to compete with the cheaper price of imports: as a result, domestic firms may be forced to reduce output or even close.¹⁴⁷ However, cheaper imports will result in the total surplus increasing, with lowered prices of goods, and a consequent increase in consumer consumption.¹⁴⁸

However, this analysis still fails to capture the nuance and subtle interplay between potential consequences flowing from the merger in *Wal-Mart/Massmart*: local producers – provided that they attain efficiency – would be provided with the opportunity to supply to new markets following Wal-Mart's entry into the domestic market, and local firms could thus experience growth.¹⁴⁹

¹⁴¹ Supra note 1 at 16.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid at 17.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

7. Limiting retrenchments and re-deployment strategically to maintain employment:

It is salient to note that creating jobs and protecting jobs are distinct notions.¹⁵⁰ Efficiency and welfare are implicated when conditions are imposed on mergers which serve to prohibit retrenchments.¹⁵¹ Merging parties will face higher costs when they are not allowed to allocate their labour in a way which maximises efficiency: production costs rise, in the absence of any corresponding output increase.¹⁵² The firm's production is less efficient and the waste of resources is evident.¹⁵³ There is a reduction in the consumer surplus and allocative efficiency that the merger would have created, with costs being passed on to consumers in the form of increased prices.¹⁵⁴

Conditions relating to retrenchments and re-employment essentially function in order to temporarily protect jobs that will not ultimately be secured; this is coupled with the costs associated with retaining redundant employees (which operate in many ways like an indirect tax on the owners of these firms).¹⁵⁵ Households, individuals, tax transfers and pension funds are just some of the broad range of groups to which these firms' profits are distributed.¹⁵⁶ There are likely to be far-reaching distributional effects flowing from the distortion created by conditions.¹⁵⁷ Conditions in this form therefore offer short-term job protection, with a temporary redistribution of wealth from the firm to labour: consumers will suffer as a result of this, as will the various recipients of a firm's rents.¹⁵⁸ Re-deployment conditions will also compromise productive efficiency.¹⁵⁹

¹⁵⁰ Supra note 1 at 18.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

8. Substantiality:

Enhancing consumer welfare is the fundamental focus of competition regulation.¹⁶⁰ Consumers benefit through lower prices due to rivalry between competitors, there is an increase in output, and an encouragement of innovation.¹⁶¹ Thus the broad public interest is served by traditional conceptions of competition.¹⁶² Despite this, the introduction of public interest factors in the Act potentially creates a paradox.¹⁶³ By focusing on protecting employment - particularly when the jobs being lost are a result of synergies between merged firms which increase efficiency - the efficiency of the merged firm will be decreased.¹⁶⁴ A decrease in competition, higher prices, and less innovation will all be associated knock-on effects.¹⁶⁵ The competitive analysis is undermined through making public interest a priority in this particular way, and the traditional competition policy objective of advancing the broad “public interest” is detrimentally affected.¹⁶⁶

However, when analysing mergers, it is desirable, perhaps even necessary, to permit evaluating competition law and public interest issues simultaneously.¹⁶⁷ If entirely separate authorities decided these distinct issues, extensive lobbying would be encouraged, which would lack the transparent and open character needed by our unified process – this was observed by David Lewis in May 2002.¹⁶⁸ Conditions are imposed when necessary, using a single forum and following a holistic inquiry.¹⁶⁹ In the absence of such an approach, there would be a wholly uncoordinated consideration of the issues.¹⁷⁰

There is an unequivocal requirement in our Act which would serve to trigger these public interest issues becoming relevant within the sphere of competition law: they need to be “substantial”.¹⁷¹ However, strict adherence to this principle has not been followed in recent

¹⁶⁰ Justin Balkin & Michael Mbikiwa 'Narrow 'public interest' can harm the common good' *Business Day* 31 March 2014, available at <http://www.bdlive.co.za/opinion/2014/03/31/narrow-public-interest-can-harm-the-common-good>, accessed on 22 October 2015.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

cases: investigations can be sparked by even a single retrenchment, with the possibility of conditions being imposed.¹⁷²

*Aon/Glenrand*¹⁷³ involved job losses, following a merger, which occurred as a result of duplicated roles: an estimated job loss of 220 employees out of 1500.¹⁷⁴ However, there were some highly skilled employees being retrenched who had strong prospects of finding a new job.¹⁷⁵ The Commission disregarded these considerations and nonetheless recommended that the approval of the merger be conditional on retrenchments being limited as follows: employees with an income of under R30 000 per month should be exempt from retrenchment.¹⁷⁶ This condition would in effect see the merged entity become entirely uncompetitive, with an inefficient base of employees that would cost much more than its rivals.¹⁷⁷ Upon request, the Competition Tribunal reconsidered and narrowed this: for a period of two years, retrenchment of employees earning below R15 000 would be prohibited, and there would be a revised cap on retrenchments of 24 employees earning between R15 000 and R30 000.¹⁷⁸ In order to resolve the issue, the merging parties had tendered this, however at most 54 employees were affected according to Aon's forecasts.¹⁷⁹

*Glencore/Xstrata*¹⁸⁰ involved a conditional approval of the transaction: a maximum of 80 unskilled and semi-skilled worker retrenchments, and that the total retrenchments that could ultimately be caused by the merger could not exceed 100 – these conditions were to be met within 90 days of the date on which the antitrust arrangement was approved.¹⁸¹

These cases clearly involve public interest issues where the substantiality of these is highly questionable.¹⁸² Answering the question of substantiality is contingent on whether a single transaction context is used to assess this (the affected proportion of the merging parties' employees), or whether the impact that the transaction has on the economy in its entirety is

¹⁷² Supra note 160.

¹⁷³ *Aon South Africa (Pty) Ltd & Glenrand MIB Ltd and The Competition Commission* (37/AM/Apr11) [2011] ZACT (24 November 2011).

¹⁷⁴ Supra note 160.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ *Glencore International plc and Xstrata plc* (33/LM/Mar12) [2012] ZACT (11 December 2012).

¹⁸¹ Supra note 160.

¹⁸² Ibid.

being assessed.¹⁸³ A total societal welfare approach was adopted in *Wal-Mart/Massmart*: positive consumer welfare effects flowing from the merger would need to be balanced against any potential prejudice to the public interest.¹⁸⁴ The market as a whole must be looked at to determine consumer welfare, therefore if one wants to accurately compare job losses to this, the jobs being lost must be assessed in terms of their impact on the whole economy.¹⁸⁵

The Tribunal chose to protect 100 jobs in *Glencore/Xstrata*, but they failed to take cognizance of the fact that thousands of jobs are lost each month in this particular sector.¹⁸⁶ Obviously one should not dismiss each employee's individual suffering as trivial, but when looking at the context of the economy broadly, the scale of jobs lost proves to be insignificant, the impact cannot be said to be substantial, and imposing public interest conditions would be exceeding the scope of the competition authorities' mandate.¹⁸⁷ Broad competition objectives would be compromised (which themselves function to further the public interest) if only a few retrenchments could justify a merger being prohibited.¹⁸⁸ This is not to say that retrenched employees are left with no remedies available to them: the procedural and substantive fairness of their rights are protected by labour law, in the event of their dismissal.¹⁸⁹

The question of whether competition authorities are the appropriate bodies to address public interest issues is inextricably bound with the question of whether the test being applied is appropriate.¹⁹⁰ Only when the correct test is being applied – that is, being curtailed by considerations of substantiality – is it appropriate for competition authorities to grapple with public interest issues.¹⁹¹ When the public interest issues implicated are insubstantial (such as the retrenchment of a handful of employees), there are other, better-equipped forums available to tackle these.¹⁹²

¹⁸³ Supra note 160.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid.

9. A Global Comparison: A look into international approaches and trends in including public interest factors in antitrust merger control

It is valuable to reflect on how several jurisdictions have increased their focus on public interest factors in merger reviews in recent years.¹⁹³ The legitimacy of the role of public interest policy considerations in merger reviews has vexed foreign jurisdictions.¹⁹⁴ Certainty, timeliness and transparency - for all stakeholders in the merger review process - are generally accepted principles that are valued and widely proposed as worthy of being upheld.¹⁹⁵ The crux of the issue is whether such general propositions are consistent with a consideration of public interest in the merger review process.¹⁹⁶

Mergers are not in and of themselves detrimental to consumers or the economy as a whole.¹⁹⁷ Rather, they can often maximise welfare by facilitating improved efficiency in the allocation of scarce resources.¹⁹⁸ From the perspective of economic stability, merger control focuses on mergers which result in the merged firm having enhanced incentives or ability to exercise market power, which is likely to harm competition.¹⁹⁹ This can occur through rival firms co-ordinating with one another or unilaterally.²⁰⁰ The end result is slower innovation, reduced quality, or prices increasing above a level which is competitive for a significant period of time.²⁰¹

The International Competition Network (ICN) states in its Recommended Practices for Merger Analysis:

¹⁹³ Maria Coppola 'Consideration of Public Interest Factors in Antitrust Merger Control' *CPI* 24 March 2015, available at <https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-in-antitrust-merger-control/>, accessed on 13 March 2016.

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

“The legal framework for competition law merger review should focus exclusively on identifying and preventing or remedying anticompetitive mergers. A merger review law should not be used to pursue other goals”.²⁰²

Standard economic theory would suggest that in nearly all circumstances consumers benefit from the existence of competitive markets, as the competitive process ought to ensure that there is an efficient allocation of scarce resources through competitive markets, with goods and services that are competitively priced being delivered.²⁰³ Quantifying and addressing public interest factors is significantly more challenging with regards to how these can be attained through market forces.²⁰⁴ Considerations of this nature tend to vary over time and involve complicated public policy assessments, making them all the more challenging to grapple with.²⁰⁵ Examples of public interest factors which have come to international attention in these sorts of considerations are: defence and national security, social and welfare outcomes, and socially or politically motivated media diversity.²⁰⁶

Despite the issues which arise with applying non-competition public interest factors in practice, these factors are still included in the merger review processes of several jurisdictions.²⁰⁷ Due to the questionable desirability and difficulty of application of such policies, it is vital to clearly articulate and differentiate the public interest factors being taken into account in a manner which does not hinder timeous and transparent consideration of competition conditions.²⁰⁸

The salient question which arises is whether the core policy of merger control – that mergers “do not jeopardize conditions for competition” – is consistent with including public interest factors in merger reviews.²⁰⁹ The ICN Recommended Practices for Merger Notification Procedures states that:

²⁰² Supra note 193.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

“If a jurisdiction’s merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent.”²¹⁰

There is a trend developing which sees broad public interest considerations intruding in merger control.²¹¹ There should be a clear articulation of any public interest considerations which are included, when merger control goes further than meeting the economic objectives of enhanced consumer welfare and resource allocation efficiency.²¹² This is essential in order to consider these public interest considerations alongside competition policy’s core values.²¹³

Article 21(4) of the EU Merger Regulations (EUMR), permits EU member states to take appropriate measures (which must be compatible with the general principles and other provisions of EU law) to protect “legitimate public interests” that the EUMR does not currently take into consideration.²¹⁴ Therefore, member states have some freedom to include public interest considerations in their merger review processes, but any measures taken to this effect must remain non-protectionist, and principles like the freedom of movement of capital, and the operation of the EU internal market, must not be undermined.²¹⁵

There are three legitimate public interests provided in Article 21(4) of the EUMR, namely plurality of the media, public security, and prudential rules (relevant with regards to financial services).²¹⁶

The UK’s 2002 Enterprise Act (as amended) similarly permits intervention in mergers by the UK Secretary of State when these mergers do not fall within the EUMR’s jurisdiction and an “exceptional public interest” may be adversely affected, such as the UK financial system’s stability, media plurality, or national security.²¹⁷ High profile pharmaceutical sector mergers that have recently occurred internationally sparked debate as to whether UK legislation

²¹⁰ Supra note 193.

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Ibid.

should include a public interest test to empower the UK Competition and Markets Authority, in relation to EU mergers, to invoke broader legitimate public interests – which would go further than Article 21 of the EUMR’s three expressly recognised interests.²¹⁸

South Africa’s Competition Act appears to provide more extensively for public interest considerations in the assessment of mergers, relative to most foreign jurisdictions, by including considerations of “employment, the ability of small businesses or those owned by previously disadvantaged individuals to compete, international competitiveness of domestic firms and the impact of a merger on an industrial sector or region”.²¹⁹ With the recent release of the draft Guidelines for the Assessment of Public Interest Provisions in Mergers (“Draft Guidelines”), South Africa’s Competition Commission has sought to shed light on how these considerations are to be realised in practice.²²⁰

The Draft Guidelines background note recognises the growing international trend towards increased inclusion of public interest considerations in merger review processes and the need for clarity as to how to apply this in practice:

“There is a surge of competition authorities, particularly on the African continent, with a public interest mandate in merger regulation; South Africa is not alone on this path. It is therefore imperative to determine the contours of the public interest in merger regulation for policy certainty.”²²¹

When it comes to how South Africa’s Competition Commission may address considerations relating to employment generally, and particularly the data that should be provided when considering this factor, the Draft Guidelines provide useful commentary.²²² Despite this, the issue of balancing or weighting of public interest considerations as a whole remains unclear, with limited guidance being provided by the Draft Guidelines.²²³

²¹⁸ Supra note 193.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Ibid.

²²² Ibid.

²²³ Ibid.

Broader public interest considerations for merger reviews is highlighted as significant due to the prominence of these jurisdictions and the public debate within these jurisdictions which has been sparked by recent high profile mergers.²²⁴

When considering broader public interest issues, a salient question presents itself independently of any comparisons between these international jurisdictions: how these public interest considerations would be balanced against competition based factors; determining what weight should be given to any particular public interest factor and how to assess the balancing of these against the traditional competition factors – looking at a merger’s negative and positive impacts.²²⁵ Assessing and quantifying these presents a substantial challenge.²²⁶ This can be illustrated through the example of attempting to weigh efficiency considerations (a competition factor) against employment factors of a positive or negative nature.²²⁷ The challenge becomes all the more pronounced when looking at the imposition of remedies, as there is a more heavy focus on competition issues remedies than there is on public interest considerations in merger matters.²²⁸ Assessing the economic impact of public interest considerations becomes problematic, and as these considerations are substantively very different to competition factors, should remedies addressing these be behavioural, structural or limited in time?²²⁹

Furthermore, it is questionable whether competition authorities are in the best position to assess issues that are of a non-competition nature.²³⁰ In the UK, consideration of public interest in mergers is initiated and undertaken by the Secretary of State – should other government departments or agencies such as this address these public interest issues?²³¹ This is a particularly significant issue when the public interest consideration in question does not involve economic factors which independent competition regulators engaging in merger review typically consider, but rather involve express consideration of factors which are

²²⁴ Supra note 193.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

²³¹ Ibid.

political or qualitative in relation to the effect on a certain society that a merger may have.²³²

The inclusion of public interest factors in competition based merger review may involve an inherent tension, however, in spite of this, merger control regimes quite commonly include this as an element.²³³ Transparency and a clear articulation is thus vital when grappling with public interest considerations.²³⁴ With merger transactions becoming increasingly cross-border in their nature, this imperative becomes especially vital, with competition practitioners being required to look at how public interest operates in several jurisdictions.²³⁵ There will be increased accountability, leading to more timely and appropriate merger assessment (which is more likely to be consistent with merger control's overarching economic objective), if these public interest considerations are well-articulated and transparent.²³⁶

In merger review processes, taking non-economic factors into account in the form of broad public interest factors, creates uncertainty in the assessment of merger control processes.²³⁷ The ICN Merger Recommended Practices may continue to serve as useful touchstones and guidance for both governments and competition agencies, when attempting to ascertain what the best practices for merger reviews are, being cognizant of the emphasis on transparent, efficient and timely merger assessments.²³⁸

10. Looking beyond mergers: Public interest considerations during prohibited conduct assessment

Hillel captures, albeit indirectly, the inherent friction existing between public interests - motivated by socio-economic and political considerations as well as communal notions of altruism – and competition law or policy which has the private interest of economic efficiency as an ultimate objective.²³⁹ However, despite these being distinct points of

²³² Supra note 193.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ziyanda Buthelezi & Yongama Njisane *The incorporation of public interest considerations during the assessment of prohibited conduct: a juggling act* (2015) 1.

departure, the maximisation of consumer welfare is still the ultimate aim of competition law/policy and public interest.²⁴⁰

Similar to legislation in other developing nations, the South African Competition Act seeks to incorporate competition principles that could be described as orthodox along with considerations of a public interest nature.²⁴¹ The Act prominently features public interest, with this concept being woven into various parts.²⁴² The Act's preamble explicitly acknowledges the political history of South Africa and the injustices which still exist as a legacy of this.²⁴³ Taking cognizance of this, the Act states that its objectives include "providing all South Africans with equal opportunity to participate in the economy and regulating the transfer of economic ownership in keeping with the public interest".²⁴⁴ Furthermore, the Act seeks to maintain and promote competition in order to "promote employment and advance the social and economic welfare of all South Africans; to enable small and medium sized enterprises ("SME") to participate in the economy; and to promote a wider ownership spread, particularly in relation to historically disadvantaged persons."²⁴⁵ Taking public interest factors into account is an obligatory requirement that the Competition Authorities are tasked with when assessing mergers and acquisitions that are proposed, such as how a proposed merger could potentially impact employment.²⁴⁶ The Act also explicitly incorporates public interest considerations as a ground for exempting conduct that would otherwise be anticompetitive from having the Act apply to it, in the assessment of exemption applications.²⁴⁷ This however is specifically limited to situations where firms controlled or owned by historically disadvantaged persons or SMEs have their ability to become competitive promoted by the otherwise anticompetitive conduct.²⁴⁸

However, when assessing prohibited conduct, it is unclear whether the authorities are obliged to consider the public interest factors enshrined in the Act's objectives and

²⁴⁰ Supra note 239.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid.

preamble, and if so to what extent they should do so.²⁴⁹ The present predicament is such that a sizeable body of jurisprudence has been developed by the Authorities exclusively in relation to merger control, regarding the “balancing act” to be undertaken between orthodox competition law and public interest tests.²⁵⁰ When assessing prohibited conduct, there is an absence of guiding policy, limited guiding jurisprudence, and the Act is silent on public interest incorporation.²⁵¹

It becomes salient to consider whether during the assessment of prohibited conduct (like abuse of dominance) public interest as captured in the objectives and preamble of the Act, should be taken into account by the Authorities.²⁵² Answering this question requires an evaluation of the interplay between competition law/policy and the public interest, as well as an understanding of what the “public interest” really means.²⁵³ These questions must be approached through reviewing the economic and political context which motivated the inclusion in our Act of these public interest considerations.²⁵⁴ Competition legislation incorporation of public interest in various jurisdictions, such as our African counterparts, the USA and the UK should also be considered.²⁵⁵ It is useful to examine South African abuse of dominance cases which considered public interest either directly or indirectly, and attempt to ascertain lessons from these.²⁵⁶

a. Public interest theory and its interface with competition law and policy:

Public interest is an ambiguous concept, as evident in its varying definition in legal and economic literature, with each country conceiving it their own way and depending on the application for which it is intended.²⁵⁷ That being said, socio-economic and political imperatives would always inform the concept of public interest.²⁵⁸ The abundant definitions attached to public interest are acknowledged by Leslie (2012), who notes that they reflect one’s particular political stances as well as considerations of an economic nature such as

²⁴⁹ Supra note 239.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid at 2.

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

access to goods and services of quality that are affordable.²⁵⁹ Leslie furthermore characterises competition law as a kind of public interest law.²⁶⁰ This is not a novel concept in economic literature, and Leslie states that both economic and political arguments would support such a characterisation.²⁶¹

As early as 1966, Bork conducted an analysis of competition law's origins which concluded that consumer protection was the underlying premise behind the passing of the Sherman Act, and that the Congressional Record clearly reflected this legislative intent.²⁶² Posner (2001) posits that antitrust legislation in America throughout the 20th century was responding to populist concerns relating to small business survival and the distribution of income.²⁶³ However, private interests were also recognised as being influential in the origins of competition policy and law, by DiLorenzo (1985) and Boudreaux and DiLorenzo (1993).²⁶⁴ The United States Supreme Court espouses such sentiments, stating that: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."²⁶⁵

The Supreme Court's recognition of the vital public role that competition law and policy plays, implicitly acknowledges that vigorous competition, and the resultant economic efficiency, serves the public interest.²⁶⁶ Posner (2001) in fact argues that the sole goal of competition law is economic efficiency.²⁶⁷ Leslie (2012) would concur, seeing that it is in the public interest to have improved consumer welfare which is achieved through competitive

²⁵⁹ C R Leslie 'Antitrust Law as Public Interest Law' (2012) 2 *UC Irvine Law Review* 885-909.

²⁶⁰ *Supra* note 239 at 2.

²⁶¹ *Ibid.*

²⁶² R Bork 'Legislative Intent and the Policy of the Sherman Act' (1966) October *Journal of Law and Economics* 15-56.

²⁶³ *Supra* note 239 at 2.

²⁶⁴ T J DiLorenzo 'The Origins of Antitrust: An Interest-Group Perspective' (1985) 5(6) *International Review of Law and Economics* 73-90 and D J Boudreaux & T J DiLorenzo 'The Protectionist Roots of Antitrust' (1993) 6(2) *The Review of Austrian Economics* 81-96.

²⁶⁵ *Supra* note 239 at 2.

²⁶⁶ *Ibid.*

²⁶⁷ R A Posner 'ANTITRUST LAW' (2001) 4(9) *University of Chicago Press*.

outcomes such as increased innovation and quality, and reduced prices of goods and services.²⁶⁸ UNCTAD (2011) adopts a slightly different conception of competition policy and law, viewing them together as aspects of a suite of economic development policies which are available to countries, especially developing nations.²⁶⁹ Prohibited conduct could arguably be seen as having an impact on economic growth and development due to the restriction of competition that it results and the deterioration of consumer welfare as prices increase and barriers to entry are created, arising in concerns pertaining to innovation and efficiency.²⁷⁰ This view implicitly recognises that in these countries competition policy and law will in all likelihood capture objectives relating to other developmental policy which would generally be considered as being in the public interest.²⁷¹ The need to weigh public interest concerns against those of economic efficiency is cautioned by UNCTAD (2008), noting that this should be done in the best way possible considering that “it may be difficult to coordinate between the government’s objective of promoting public interest and competition authority’s objective of promoting efficient markets”.²⁷²

In his study of the role that the Federal Trade Commission (FTC) had in promotion of the public interest, Posner (1969) discovered that the FTC lacked any significant positive contribution.²⁷³ Posner concluded that the public interest is seldom the motivation for instituting FTC investigations; rather they are instituted “at the behest of corporations, trade associations and trade unions whose motivation is at best to shift the costs of their private litigation to the taxpayer and at worse to harass competitors”.²⁷⁴

The role that public interest has to play in competition law and policy has tended to divide scholars.²⁷⁵ Reksulak (2010) argues that “the ‘public interest theory’ of antitrust policy is on a retreating path – and that is squarely in the public’s interest.”²⁷⁶ By drawing on several scholarly articles, Reksulak notes that in the application of competition policy, the effects that actually emanate diverge from the public interest objectives competition policy

²⁶⁸ Supra note 239 at 2.

²⁶⁹ Ibid.

²⁷⁰ Ibid at 3.

²⁷¹ Ibid.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ R Posner ‘The Federal Trade Commission’ (1969) 37(47) *University of Chicago Law Review* 47-89.

²⁷⁵ Supra note 239 at 3.

²⁷⁶ Ibid at 4.

purports to hold.²⁷⁷ The author accepts that anticompetitive conduct does exist which results in negative total welfare, but nonetheless recommends “caution with respect to possible remedies, which can be subject to political interference, susceptible to the sway of well-organized interest groups, impacted by activist interpretations of law by the courts and misdirected by the whims of bureaucratic agencies.”²⁷⁸

Voigt (2006) proposes the application of a “robust antitrust policy” in order to avoid unintended negative consequences flowing from the application of antitrust, which as aforementioned has been argued to be designed to further the public interest.²⁷⁹ The author advocates that the driving force underpinning antitrust policy and law application should involve a synergy between resource consciousness, economic reasoning, and the “general consequences of welfare” being explicitly recognised.²⁸⁰

b. Public interest in the context of South Africa:

The creation of South Africa’s present policy regime and competition law was significantly influenced by our economic background and political history.²⁸¹ Shortly after the election of the African National Congress (ANC) into government – the first democratic election in the country’s history – the Competition Act was drafted.²⁸² South Africa was in the midst of an impassioned and sensitive time, during which the ANC was faced with the formidable task of reshaping South Africa’s economy in a way which the international community would deem acceptable.²⁸³ The repressive laws which had prevailed prior to this served to marginalise the black majority – including this majority into the formal economy presented an incalculable task.²⁸⁴ In order to remedy the deep division along economic and racial lines which existed in society, several policy instruments were drafted, seeking to address the aforementioned issues and alter the lingering legacy of apartheid - the current competition policy (as amended) being among these policy instruments.²⁸⁵ Realising these objectives

²⁷⁷ Supra note 239 at 4.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

²⁸⁰ S Voigt ‘Robust political economy: The case of antitrust’ (2006) 19(2-3) *Review of Austrian Economics* 203-215.

²⁸¹ Supra note 239 at 4.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

required synergy between the government's other industrial policy and competition law and policy.²⁸⁶ The performance of traditional competition functions (the maintenance and promotion of competition) needed to be provided for in crafting the Act, whilst including the needs particular to our developing state.²⁸⁷ It became apparent that South Africa needed unique competition policy and law in order to tackle the economic distortions which persisted.²⁸⁸ The plan was to curb the white minority's economic dominance, promote greater private sector efficiency, whilst taking cognizance of international practices and norms.²⁸⁹ The law which existed at that time was ripe for overhaul and review: the relevant legislation from 1979 was revealed by studies to be inadequate, lacking correct political context and with deficient powers.²⁹⁰ Ownership concentration and conglomerate or vertical combinations were not dealt with, and pre-merger notification was absent as well as post-merger control of power which was meaningful.²⁹¹ Furthermore, it had weak prohibitions designed to combat anti-competitive conduct.²⁹²

Uniting the many divergent views and interests, such as those of organised labour through trade unions and those of big business, presented a mean feat – a delicate balancing of the traditional principles of competition law and equity interests.²⁹³ There would need to be assurance offered to all the relevant interest groups that the impending legislation would sufficiently address their concerns.²⁹⁴ The obvious tension between public interest considerations and traditional competition policy or law was identified by big business.²⁹⁵ They therefore resisted the inclusion of public interest considerations in the Act, arguing that other platforms were available which would be more appropriate (like labour courts), and that these considerations are essentially arbitrary and of a political nature.²⁹⁶ Organised labour, however, was vocal about the concerns of adopting an approach to take-overs and mergers which purely concerned itself with efficiency outcomes, as legislation which could

²⁸⁶ Supra note 239 at 4.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Ibid at 5.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

curb job losses flowing from a merger which created a highly efficient merged entity was attractive.²⁹⁷

The government, in the form of the Department of Trade and Industry, was adamant that these were not irreconcilable interests and that they could be balanced: if policy was properly aligned, the developing state's needs and traditional competition law objectives could actually serve to complement one another in practice.²⁹⁸ Private enterprise which still served the public interest could successfully be controlled by competition policy.²⁹⁹ The Proposed Guidelines illustrate such sentiments:

“The competition policy proposed here accepts the logic of free and active competition in markets, the importance of property rights, the need for greater economic efficiency, the objective of ensuring optimal allocation of resources, the principle of transparency, the need for greater international competitiveness, and the facilitation of entry into markets— all within a developmental context that consciously attempts to correct structural imbalances and past economic injustices”.³⁰⁰

The unique challenges which South Africa's economic development faces were reflected in features incorporated into the Act of today, following extensive interaction between the government, labour and business as well as other interested parties.³⁰¹ Considerations pertaining to equity issues such as the impact on SMEs, employment and empowerment are permitted and in certain instances required.³⁰² Consequently, there is a dual role performed by competition law in South Africa, going further than merely achieving market efficiency and stimulating competition: it aspires to encourage broad-based economic growth, to see that the historical economic structure is addressed, and to be an instrument of economic transformation.³⁰³

Understanding the precise meaning of public interest factors and their final expression in the Act, requires viewing these factors through the lens of South Africa's economic and

²⁹⁷ Supra note 239 at 5.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ J Staples & M Masamba 'Fourteen years later: An assessment of the realisation of the objectives of the Competition Act 89 of 1998' (2012) 5.

political history.³⁰⁴ The themes of justice and equity run as a common thread throughout the Act's preamble and other sections of the Act.³⁰⁵ The preamble includes motivations for the Act, such as policies of efficiency, distribution and equity, and refers to the political background.³⁰⁶ It also explicitly states that the Act "seeks to address past practices such as apartheid, which led to excessive concentration of ownership and control, inadequate restraints on anti-competitive trade practices, and unjust restrictions on full and fair participation in the economy".³⁰⁷ The preamble also states that all of the relevant stakeholders' interests should be balanced in the competitive environment, and that there is a focus on all South Africans benefitting from development.³⁰⁸ Due to the South African economy's prior structure, special attention is given to black economic empowerment and SME development.³⁰⁹ Smaller enterprises especially faced barriers to entry in the form of high levels of concentration present in many industries.³¹⁰ Concerns pertaining to South Africa's skewed distribution of wealth and income were reflected in the promotion of a more broad spread of ownership, particularly in relation to persons who were historically disadvantaged.³¹¹ Sustainable and balanced development in the long-term could be ensured through prioritising a spread of ownership that was more even.³¹²

As mentioned above, when proposed mergers and acquisitions are evaluated, merger control provisions in the Act provide a list of public interest factors which is closed.³¹³ The Authorities must apply the orthodox test of substantial lessening of competition, along with:

- The effect that the merger will have on a particular industrial sector or region;
- Effect on employment;
- The ability of small businesses ("SMEs"), or those controlled by historically disadvantaged persons, to become competitive; and

³⁰⁴ Supra note 239 at 6.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Ibid.

- The ability of local industries to compete internationally.³¹⁴

The prominence of public interest in South Africa outside of the Act has been supported in subsequent years through its inclusion in continuous policy development.³¹⁵ For instance, the approach to sector prioritisation adopted by the Competition Commission has served as an expression for public interest factors.³¹⁶ This gave priority to certain critical sectors of the economy, being a policy decision which highlighted the likes of food and agro-processing as priorities, designed to maximise consumer benefit.³¹⁷ There are three criteria which form the basis of direction of resources towards particular complaints and cases, according to the Commission's prioritization framework: "the potential impact of the conduct on low-income consumers; alignment with the government's broader economic policy objectives; and the likelihood of the conduct being anti-competitive."³¹⁸

The Authorities are recognised as being free of political interference, as they are independent of the ruling government.³¹⁹ The Act also expressly requires this.³²⁰ However, government policy imperatives of a more broad nature are potentially realised by Ministerial involvement during the appointment of the Authorities' collective leadership.³²¹ The Authorities and government would (at least at the level of policy) be expected to have a 'meeting of the minds'.³²² What is clear is that, contrary to prohibited conduct, from the perspective of mergers, the Act provides for the active involvement of government in the proceedings.³²³ Thus, when prohibited conduct is being assessed, the Authorities have sought other avenues through which public interest can be incorporated.³²⁴

In order to understand how this has operated in practice, the abuse of dominance jurisprudence in South Africa should be analysed, which reveals the prominence of public

³¹⁴ The Competition Act 89 of 1998 s 12A(3)(a-d).

³¹⁵ Supra note 239 at 6.

³¹⁶ Ibid.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid at 7.

³²³ Ibid.

³²⁴ Ibid.

interest considerations in such cases, particularly where entities formerly owned by the state are involved.³²⁵

*Nationwide Poles v Sasol*³²⁶

Nationwide Poles CC (Nationwide), a small producer of treated wooden poles, based in the Eastern Cape, brought a case against Sasol Oil Limited (Sasol).³²⁷ Nationwide sourced its wooden poles from sawmills, treating these poles with creosote (a wax additive) or a preservative.³²⁸ The majority of Nationwide's customers were vineyards in the Western Cape.³²⁹ Sasol's process of synthetic fuel production resulted in tar by-product, which it used to produce a range of products, creosote being amongst these.³³⁰ A complaint of price discrimination and collusion was initially lodged with the Commission by Mr Foot, the owner of Nationwide.³³¹ The Commission issued a non-referral notice, having concluded that there was insufficient evidence of a contravention.³³² The Tribunal was subsequently approached by Mr Foot directly, who self-referred the matter.³³³ The allegation against Sasol was that it charged Nationwide a price higher than that which it charged to Nationwide's most important competitor in treated wooden poles' downstream production.³³⁴ The volume of historical purchases was allowed by Sasol's price schedule as a basis for discounted prices – this was not in dispute.³³⁵ The respondent argued that the 3% - 4% cost differential that existed was insubstantial – the most preferred prices were received by the largest creosote customers.³³⁶ It was alleged by Nationwide that Sasol was guilty of a contravention of Section 9 of the Competition Act, with its pricing policy amounting to prohibited price discrimination.³³⁷ The Tribunal identified and acknowledged Sasol's market dominance for the provision of creosote, in its evaluation of the conduct being alleged.³³⁸ Furthermore, it

³²⁵ Supra note 239 at 7.

³²⁶ Supra note 7.

³²⁷ Supra note 239 at 7.

³²⁸ Ibid.

³²⁹ Ibid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

was held by the Tribunal that Sasol “behaved to an appreciable extent independently of its competitors, customers or suppliers” when it set the price of its creosote.³³⁹

In assessing the merits of this allegation, the Tribunal noted that whilst section 8 of the Act generally regards itself with abuse of dominance, the Act intentionally included a separate section for price discrimination.³⁴⁰ The Tribunal posited that “the legislature’s concern with maintaining accessible, competitively structured markets, which markets would accommodate new entrants and enable them to compete effectively against larger and well-established incumbents” was reflected by the separate space in the Act given to price discrimination and its prohibition.³⁴¹ Entering new markets may be more challenging for SMEs, who would struggle to thrive and compete effectively on the merits, when price discrimination was present and the playing field was not level.³⁴² The Tribunal argued that the equitable treatment of SMEs was a stated purpose of the Act, which was a reflection of the legislators’ concern with small business being developed.³⁴³ Supporting SMEs through the principles and instruments of the Act was a legislative intention which was set out in the Act’s explanatory memorandum – the Tribunal referred to this fact.³⁴⁴

It was argued by the Tribunal, referring to the Act’s purposes and preamble, that when assessing price discrimination “although incorporating considerations of equity into competition analysis, which may be anathema to a competition law approach that insists on a pure consumer welfare standard that it is generally referenced by a reduction in output or an increase in price, the utilization of a fairness standard is not alien to the Act and practice. The Tribunal further argued that the mere fact that equity considerations sit uncomfortably in competition economics orthodoxy is no warrant for ignoring the intention by the legislature that such equity considerations play a role in the decisions of the Authorities. The Tribunal thus found Sasol guilty of contravening Section 9 of the Competition Act.”³⁴⁵

³³⁹ Supra note 239 at 7.

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Ibid at 8.

Sasol responded to the Tribunal's decision by lodging an appeal against it, focusing on the Tribunal's interpretation of section 9(1) of the Act in their argument.³⁴⁶ Sasol submitted that a substantial prevention or lessening of competition caused by the volume based discount pricing of the appellant had not been proven as likely, meaning the Tribunal had erred in its finding – no such likelihood had been established.³⁴⁷ The Competition Appeal Court ("CAC") ultimately ruled that there had been insufficient evidence presented by Nationwide to support the view that, within the relevant market, the conduct of Sasol was "likely to substantially prevent or lessen competition".³⁴⁸ Nationwide, despite successfully establishing that its business had been harmed, an impact on the market as a whole flowing from the behaviour of Sasol had not been established.³⁴⁹

The integral role that SMEs protection plays in the Act seems to be acknowledged by the CAC in relation to the Tribunal's adopted public interest approach.³⁵⁰ The remarks of Kyu-Uck Lee, the Korean Competition Advisory Board chair, were quoted by the CAC in support of this position:

"In a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds, of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolize domestic markets that are used and protected through import restrictions. This will give rise to public dissatisfaction since the game itself has is not been played in a socially acceptable, fair manner."³⁵¹

Despite this, the CAC did not support an extension of the objective of protecting SMEs (as enshrined in the Act's objectives and preamble) by the Tribunal into the construction of Section 9.³⁵²

³⁴⁶ Supra note 239 at 8.

³⁴⁷ Ibid.

³⁴⁸ Ibid.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² Ibid.

*Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another*³⁵³

The role of state support in South Africa’s steel market competitive landscape was considered by the Tribunal in a case involving ArcelorMittal and excessive pricing – the Tribunal linked this (along with the pricing conduct of ArcelorMittal) to the impact on downstream manufacturing markets.³⁵⁴ Accordingly, it was indicated by the Tribunal that the pricing behaviour of state support recipient firms would be subject to some state intervention, with the state being “entitled to take an active interest”, and that for these firms “the risks for competition are substantially different”.³⁵⁵ Furthermore, the Tribunal noted that consumers of the intermediate products produced by such firms, where relevant, would benefit from firms being obliged to price these products supportively.³⁵⁶ This reflects that the Tribunal considered that national developmental imperatives were formative in the pricing behaviour of firms receiving support from the state, and that the Tribunal recognised this to be in the public interest.³⁵⁷

*Competition Commission v Sasol Chemical Industries Limited*³⁵⁸

The case against Sasol Chemical Industries (“Sasol”), involving excessive pricing, recently reaffirmed the Tribunal’s approach in this regard.³⁵⁹ The Tribunal emphasised and considered how Sasol was historically afforded state support with regards to how the reasonableness of the difference between the economic value of and the price charged for polypropylene and purified propylene was measured, despite Sasol having been privatised for many years.³⁶⁰ Sasol was a recipient of regulatory interventions and legislative state support, seeking to ensure Sasol’s profitability and sustainability.³⁶¹ The Tribunal assessed the source of Sasol’s market dominance, identifying that it was not risk taking and innovation which had caused them to attain and sustain their cost advantage – rather this was the result of state support, which had the consequence of making Sasol’s costs in the

³⁵³ Supra note 8.

³⁵⁴ Supra note 239 at 8.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ Ibid.

³⁵⁸ Supra note 9.

³⁵⁹ Supra note 239 at 8.

³⁶⁰ Ibid.

³⁶¹ Ibid at 9.

production of feedstock propylene some of the lowest in the world, ultimately making Sasol a low-cost polypropylene and purified propylene producer.³⁶² Sasol attempted to justify this position by countering that they had repaid all state support they had received in monetary terms, however the Tribunal noted that the nature of the state support they had received was of a prolonged and considerable nature and as such it amounted to more than the monetary terms expressed, and its impact had created Sasol's enduring dominance in the markets which this case considered.³⁶³

It becomes apparent from the above canvassed cases that although the Act's prohibited conduct provisions do not specifically set out the incorporation of public interest, the Authorities are in practice including such considerations when assessing prohibited conduct, albeit in an indirect manner, particularly when a case involves formerly state owned entities facing abuse of dominance allegations.³⁶⁴ These cases illustrate the acute awareness that the Tribunal has with regards to the significant interplay between South Africa's policy objectives relating to industrial development and competition policy and law.³⁶⁵ The former being vital for economic development through provision of access to services or products not ordinarily provided by the market, the encouragement of activity in a particular region, protecting and promoting SMEs, and countering any decline in designated industries.³⁶⁶ These cases provide valuable lessons which will become increasingly apparent later in this paper.³⁶⁷

c. [A comparative look at other jurisdictions and their approach to the public interest:](#)

It has been noted by Smith and Swan (2014) during their assessment of various jurisdictions and their approach to provisions of a public interest nature, that many jurisdictions provide for and consider such factors, especially in Africa, however there is a substantial variation in the scope given to the public interest, with a great variety of differing formulations for this.³⁶⁸

³⁶² Supra note 239 at 9.

³⁶³ Ibid.

³⁶⁴ Ibid.

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ P Smith & A Swan 'Africa: Public Interest Factors in Competition Decisions' (2014) *Global Competition Review, The African and Middle Eastern Antitrust Review 2014*.

The United Kingdom's competition authorities historically (from 1948 to 1998) employed a public interest test which incorporated various factors, like protecting exports and employment – this allowed for “fairly unconstrained political discretion”, according to Scott (2009).³⁶⁹ The UK Competition Authorities were given discretion by the Fair Trade Act of that time, which Hay (1997) states gave them freedom on what they would consider when determining what was in the public interest, and in essence extended the scope of public interest considerations, making their function more than the mere promotion of competition.³⁷⁰ As stated by Scott (2009), national security protection was the sole stipulated public interest consideration in the UK, as of 2002.³⁷¹

The deleterious impact on the public interest that any prohibited conduct which hinders free competition plays is recognised by the Spanish Competition Act.³⁷² In this regard, economic principles of a traditional nature in competition law and the competitive outcomes expected are recognised by the Spanish competition authorities as representative of the public interest.³⁷³ Market or economic integration is prioritised in the European Union, according to the UNCTAD (2002) survey of various jurisdictions and their competition policy objectives.³⁷⁴

In the United States, it has been noted by Smith and Swan (2014), that their competition regime in some instances protects small businesses by conferring competition law immunity on them.³⁷⁵ The authors cite Posner (2001) in noting that the Clayton Act and the Sherman Act appear to make no provision for the public interest, whilst the Small Business Act “confers antitrust immunity on joint actions undertaken by small business firms in response to a request by the President pursuant to a voluntary agreement or program approved by the President to further the objectives of the Small Business Act, if found by the President to be in the public interest as contributing to the national defense.”³⁷⁶ It is not general practice in the US competition regime to review exploitative pricing, but

³⁶⁹ A Scott ‘The Evolution of Competition Law and Policy in the United Kingdom’ (2009) 9/2009 *London School of Economics Law, Society and Economy Working Papers*.

³⁷⁰ *Supra* note 239 at 9.

³⁷¹ *Ibid*.

³⁷² *Ibid*.

³⁷³ *Ibid*.

³⁷⁴ *Ibid*.

³⁷⁵ *Ibid* at 10.

³⁷⁶ *Ibid*.

interestingly there are certain circumstances which make this permissible, Dolman (2005) notes: where the interest that the public has in consumer prices being lowered is clear and there is an absence of alternative remedies or an expectation of a new entry.³⁷⁷

Oxenham (2012) identifies several African jurisdictions where competition regulation includes public interest consideration in some form, namely: Namibia, Zambia, Malawi, Botswana, and Swaziland.³⁷⁸ Despite this, these jurisdictions do not tend to extend such provisions to exemptions or prohibited conduct; rather they are primarily preoccupied with merger activity assessment.³⁷⁹ South Africa shares a similar focus.³⁸⁰ Despite not making mention of specific factors, Botswana notably cites public interest as a potential basis for interim relief in relation to investigations of anti-competitive agreements or potential abuses of dominance.³⁸¹

In Zambia, there is an essentially unlimited scope of potential factors that can be considered, as noted by Smith and Swan (2014), which includes: international competitiveness, exports and employment along with “socioeconomic factors as may be appropriate; and any other factor that bears upon the public interest.”³⁸² Although there are no specific factors mentioned, public interest is cited by the authors as a potential basis for interim measures in investigations into abuse of dominance, prohibited agreements and merger control.³⁸³ According to Smith and Swan (2014), the Kenyan approach is that an exemption or other anti-competitive agreement can be justified by public interest factors which would include exports maintenance and promotion, stability being promoted, or “obtaining a benefit for the public”.³⁸⁴ Once again, Smith and Swan (2014) note that despite no specific factors being mentioned, public interest factors can provide a potential basis for

³⁷⁷ Supra note 239 at 10.

³⁷⁸ J Oxenham ‘Balancing public interest merger considerations before sub-Saharan African competition jurisdictions with the quest for multi-jurisdictional merger control certainty’ (2012) 9 *US-China Law Review* 211.

³⁷⁹ Supra note 239 at 10.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Ibid.

³⁸³ Ibid.

³⁸⁴ Ibid.

interim relief relating to restrictive agreement investigations and trade practices of a restrictive nature which involve trade associations.³⁸⁵

In Malawi, when potential abuses of dominance or agreements of an anti-competitive nature are evaluated (other than unilateral conduct and hard-core price fixing), public interest factors are considered.³⁸⁶ Smith and Swan (2014) further note that in Gambia, the role of public interest factors is limited, functioning as a list of potentially offsetting factors when an abuse, an anti-competitive agreement, or merger has come to light.³⁸⁷ The standard competition assessment would only exclude consideration pertaining to “enhancing the effectiveness of the Government’s programme for the development of the economy of the Gambia”.³⁸⁸

Public interest considerations are so pervasive that even the Chinese competition authorities appear to include these when prohibited conduct is assessed to the extent that it impacts priority sectors and/or case selection.³⁸⁹ Accordingly, it has been noted by Wang *et al* (2012) that several of the National Development and Reform Commission’s investigations into prohibited conduct, including the investigation of cartels, would appear to focus on substantial public interest products, namely foods, salt, telecoms, and popular medicine inputs.³⁹⁰

Public interest factors have also been considered when assessing restrictive trade practices in India, through the Indian Monopolies and Restrictive Trade Practices Commission (MRTPC).³⁹¹ Case law provides evidence in support of this:

Alkali Manufacturers Association of India vs American Natural Soda Ash Corporation, 1998 (see also the case of All India Float Glass Manufacturers Association vs PT Mulia Industries, Jakarta and others, 2000 CTJ 252 (MRTP)).³⁹² This case involved several American soda ash producers who were involved in combined importing of soda ash into the Indian market.³⁹³

³⁸⁵ Supra note 239 at 10.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Ibid.

³⁸⁹ Ibid at 11.

³⁹⁰ P Wang, Y Zhang & S Evrard ‘Chinese Enforcement Against Abuses of Dominance Ramps Up’ (2012) 1(3) *Competition Policy International Antitrust Column*.

³⁹¹ Supra note 239 at 11.

³⁹² Ibid.

³⁹³ Ibid.

The Indian Act restricts cartel activity, and the complainants levied allegations against the respondents that they were involved in precisely such activity.³⁹⁴ Specifically, it was alleged that there was a predatory nature to the respondent's pricing, although this allegation was not ultimately pursued.³⁹⁵ The MRTPC found in favour of the complainant, arguing that a part of the public interest would be Indian soda ash firms possibly closing, and the worker unemployment that would result, all occasioned by the alleged conduct.³⁹⁶ The MRTPC was alive to the salient public and consumer interest questions which this case raised, and consequently allowed individual importation by American soda ash producers, but operating as a cartel was prohibited.³⁹⁷

11. A promising step forward – the Competition Commission's Guidelines for the Assessment of Public Interest Provisions in Mergers:

There is general consensus that South African merger policy should include public interest considerations.³⁹⁸ Our democratically-elected government formed our competition legislation which endorses such inclusion: the underlying motivation being to address the legacy of apartheid by achieving imperatives relating to economic development, and finding remedies to socio-economic issues – statutes like our Competition Act form part of various policy instruments available to the state to ensure this.³⁹⁹ Competition policy needs to be sensitive to the socio-economic needs of our society broadly.⁴⁰⁰ However, the precise practical application of these public interest considerations to merger proceedings is contentious.⁴⁰¹ In order to fully harness the might of competition law in redressing developmental needs broadly, the government appears to prefer a prominent role for these considerations.⁴⁰²

³⁹⁴ Supra note 239 at 11.

³⁹⁵ Ibid.

³⁹⁶ Ibid.

³⁹⁷ Ibid.

³⁹⁸ Supra note 12 at 19.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

⁴⁰² Ibid.

This robust approach is more concerning to competition agencies and practitioners, who caution that competition policy cannot be the exclusive means used to address these developmental needs.⁴⁰³ It is critical to identify what the expectations of competition policy are, and that the boundaries of this policy be delineated clearly, to ensure that the scope of its intended use is not exceeded.⁴⁰⁴

It is also challenging to ascertain how public interest is measured, and precisely what constitutes public interest.⁴⁰⁵ The intended meaning of public interest is made clear by specifications in our Act, but guidelines for how it is measured are absent, which means that this must be determined in each individual case by the competition authorities.⁴⁰⁶ In applying public interest considerations in practice, the limits of these have been interpreted in varying ways, as the cases discussed have made apparent.⁴⁰⁷ In *Wal-Mart/Massmart*, the Tribunal acknowledged that it was only empowered to safeguard rights which pre-existed the merger and were threatened by this – the creation of rights which did not exist prior to the merger was not within its power.⁴⁰⁸ In order to avoid the conflation of competition policy's purposes with objectives where it would be more appropriate for different economic policies to pursue these, distinct boundaries for the practical application of the redistributive justice allowances that the Act makes are necessary.⁴⁰⁹

There has been controversy surrounding whether competition authorities are suited to deal with the public interest.⁴¹⁰ Popular opinion in South Africa has arguably been shifting in recent years towards support of the idea that there are more suitably-equipped agencies that ought to deal with these considerations.⁴¹¹ There was a decisive answer to this question submitted in *Metropolitan/Momentum*, which contended that in a merger, employment considerations are crucial, despite these considerations being secondary to other legislation (which was identified in *Shell/Tepco*): there are duties relating to

⁴⁰³ Supra note 12 at 19.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid at 20.

⁴⁰⁷ Ibid.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Ibid at 21.

⁴¹¹ Ibid.

employment that competition authorities are tasked with, that are distinct (for example) from those of the Employment Equity Act.⁴¹²

Determining whether there is fair process towards affected employees, and what a firm's operational requirements are, is the responsibility of Labour Tribunals – there is a different mandate faced by the competition authorities.⁴¹³ It is the task of the Competition Tribunal to determine whether the merger (which is responsible for creating these operational requirements) should in the first place have been permitted.⁴¹⁴ This is a distinct focus from that of the labour agencies, which are primarily concerned with establishing whether affected employees face fair process.⁴¹⁵

Merger-specificity becomes the underlying principle common to all of these considerations: the public interest should only be considered and grappled with by competition authorities insofar as this has a cognizable link to the specific merger in question.⁴¹⁶ A plethora of unintended consequences would arise if one attempted to divorce public interest from the competition analysis, or if such considerations were to be overzealously applied.⁴¹⁷ The only rational and objective approach that appears to be available is to consider all factors in a merger-specific sense.⁴¹⁸

A promising step forward occurred earlier this year when the Commission published public interest guidelines for how to approach this issue when investigating mergers, as well as indicating what information the Commission would prefer be provided by parties in their merger notifications.⁴¹⁹ A five-step broad analysis was outlined by the Commission that it will conduct in relation to all proposed transactions which involve the public interest:

“Firstly, the Commission will determine the likely effect of the transaction on the public interest, followed by a determination as to whether or not that alleged effect is merger

⁴¹² Supra note 12 at 21.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid at 22.

⁴¹⁸ Ibid.

⁴¹⁹ Justin Balkin & Kirsty van den Bergh 'South Africa: The Commission's View On Public Interest' *Mondaq* 10 June 2015, available at <http://www.mondaq.com/southafrica/x/403750/Antitrust+Competition/ANNUAL+LEXISNEXISENSafrica+MINE+HEALTH+AND+SAFETY+SEMINAR+VARIOUS+TOPICAL+ISSUES+WERE+DISCUSSED>, accessed on 22 October 2015.

specific. Then, the authorities will assess whether this effect is substantial and, if so, whether the merging parties can justify the likely effect on the public interest. Lastly, any possible remedies to address the negative public interest effect will be evaluated.”⁴²⁰

If there is an insufficient causal nexus between the harm to public interest anticipated and the transaction being considered – i.e. the effect of the transaction is found to not be merger-specific – the Commission’s inquiry will go no further.⁴²¹ A finding that an effect is merger-specific but insubstantial will also result in the public interest assessment being stopped at this point.⁴²²

It ultimately comes down to the Commission balancing its public interest inquiry results against its competition impact assessment.⁴²³ Saliently, approval of a transaction is possible if its benefit to the public interest is greater than its anti-competitive impact and *vice versa*.⁴²⁴

This approach is generally applicable when assessing each public interest ground, however the Competition Commission also provided more specific detail of the different considerations that are relevant for each particular public interest ground – there are specialised approaches for each of these.⁴²⁵

a. The effect on a particular industrial sector or region:

The Commission may consider, when attempting to determine what effect on an industrial sector or region is likely, whether the firm being acquired is South African-owned; whether there would be far-reaching consequences which result from terminating local production; and whether goods produced locally would be substituted with imports as a result of the merger.⁴²⁶ When assessing the issue of substantiality, the crucial considerations are how strategically important to the sector the product in question is, or the importance of the sector to the economy as a whole; the magnitude of the consequences flowing from the

⁴²⁰ Supra note 419.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Ibid.

⁴²⁵ Lee Mendelsohn ‘Competition Commission Publishes Draft Public Interest Guidelines for Public Comment’ *ENSafrica* 27 January 2015, available at <https://www.ensafrica.com/news/Competition-Commission-Publishes-Draft-Public-Interest-Guidelines-for-Public-Co?Id=1680&STitle=competition%20newsflash>, accessed on 13 March 2016.

⁴²⁶ Ibid.

merger for the specific sector and the economy more broadly – there is a greater likelihood that an effect will be substantial if the ramifications extend further than the primary market or sector); and whether there are any public policy goals which are impeded by the merger.⁴²⁷

When an effect on any industrial sector or region is found to be substantial, the Commission is open to considering justifications based on any public interest argument.⁴²⁸ With regards to remedies, the Commission offers several possible examples which could be appropriate, however it emphasises that imposing these must occur on a case-by-case basis.⁴²⁹ Some examples which could be appropriate are:

“requiring investment into the local supply chain; maintaining or expanding local production facilities; and requiring the continued supply to local producers or sourcing from local suppliers.”⁴³⁰

b. The effect on employment:

When attempting to determine what effect on employment is likely, the Commission will primarily focus on employment *within the parties that are merging* – i.e. not on the effect on employment in the economy as a whole.⁴³¹ All retrenchments being contemplated by the merging parties will have to be declared to the Commission – it does not matter whether these parties consider the retrenchments to be merger-specific or not.⁴³² The effect on the general level of employment in the industrial sector or region which is likely, and if the merger will have an impact on the creation of jobs and duplications more broadly, will then be the secondary focus of the Commission.⁴³³

The proximity of the retrenchments to the merger is salient for determining whether retrenchments are merger-specific.⁴³⁴ All retrenchments which occur from when merger discussions are initiated, to the date the merger is filed, and within a one-year period after

⁴²⁷ Supra note 425.

⁴²⁸ Ibid.

⁴²⁹ Ibid.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Ibid.

⁴³³ Ibid.

⁴³⁴ Ibid.

the merger is approved, will be assumed to be merger specific – the onus will be on the parties to prove that retrenchments which occur within this time period are not merger-specific.⁴³⁵ The Commission also offers relevant considerations when determining merger-specificity: “whether the proposed retrenchments are linked to the intentions, incentives or management style of the acquiring group and whether, but for the merger, the retrenchments would have in any event occurred.”⁴³⁶

When attempting to determine whether the effect on employment is substantial, the Commission states that it will consider: “the number of affected employees; the affected employees’ skill levels; their likelihood of finding alternative employment; the nature of the sector (for example, its unemployment rate and trends of retrenchment); and the nature of the acquiring firm’s business (for example, whether it employs seasonal or permanent staff)”.⁴³⁷ In general, the effect will be more substantial if retrenchments involve more unskilled and semi-skilled employees without short-term prospects of re-employment.⁴³⁸

With regards to justification, all three of the following requirements would need to be met by parties:

“i) demonstrate the rationality of the process followed at arriving at the number of retrenchments and the rationality of the link between the number of jobs lost and the reasons therefor; ii) justify the job losses with an equally weighty and countervailing public interest argument under the Act (such as the need to save a failing firm; the need to ensure the efficiency and competitiveness of the firm by lowering its costs; or the necessity of the retrenchments to bring about lower costs and thus lower knock-on prices for consumers); and iii) demonstrate that they have provided full and complete information to the Commission and employees, to enable them to consult fully on all issues.”⁴³⁹

The Commission provides examples of remedies which could be appropriate in the context of employment concerns, which include: imposing a restriction on the number of jobs that can be lost; staggering these job losses over a certain time period; instituting a moratorium

⁴³⁵ Supra note 425.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

on job losses for a time period; making the parties fund reskilling for employees that are affected.⁴⁴⁰

c. [The ability of small businesses \(SMEs\), or firms controlled or owned by historically disadvantaged persons \(HDIs\), to become competitive:](#)

The Commission will look at the merger being proposed and determine whether it results in the following effects on SMEs and HDIs: “raising or creating barriers to entry; preventing access to key inputs; denying access to suppliers; and denying access to funding for business development and growth.”⁴⁴¹

When determining whether the impact of the merger on SMEs and HDIs, in terms of their ability to become competitive, is substantial, the Commission states that it will consider:

“whether the affected SMEs or HDIs are impeded from competing in the market; whether they constrain larger players, such that their impediment restricts dynamic competition and growth; whether the restriction in growth and competition limits growth and expansion of SMEs and HDIs and their participation in adjacent sectors; and whether the effect has an impact on other public interest grounds.”⁴⁴²

The Commission also provides possible remedies which could be used to address any negative impact on SME’s and HDI’s ability to become competitive:

“establishing a supplier development fund for technical and financial support; requiring the merging parties to provide favourable discounts and prices; and obligating parties to continue access and supply.”⁴⁴³

d. [The ability of national industries to compete in international markets:](#)

According to the Commission’s Draft Guidelines, this ground will only be applicable when an anti-competitive merger or a merger which results in other negative public interest concerns is sought to be sanctioned by a party.⁴⁴⁴ The party who relies on this ground will bear the

⁴⁴⁰ Supra note 425.

⁴⁴¹ Ibid.

⁴⁴² Ibid.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

onus of advancing arguments to support it.⁴⁴⁵ The Commission will be open to considering arguments relating to:

“the efficiency benefits for the economy; whether such benefits arise from the merger or could not be achieved in its absence; and whether such benefits outweigh any anti-competitive effects or negative public interest concerns brought about by the merger.”⁴⁴⁶

12. Conclusion:

Whilst these guidelines represent a useful, concrete and coherent aid for ascertaining how the Commission will address the public interest in merger investigations, bringing some harmony to the often unclear and inconsistent approaches that have been taken in the past, these guidelines will not be binding: competition authorities will still enjoy unfettered discretion to consider public interest issues as they deem appropriate.⁴⁴⁷ They only serve to reflect the view of the Commission.⁴⁴⁸ These guidelines still need to be tested before the Competition Tribunal and the Competition Appeal Court to see if they find support in these bodies, and to determine how they will operate in practice.⁴⁴⁹ However, parties should be cognisant of these guidelines as they will more than likely determine how the Commission will approach these issues when investigating merger notifications submitted to it.⁴⁵⁰

It becomes evident that the political and socio-economic imperatives of a particular country determine what formulation of public interest is adopted.⁴⁵¹ There is also a common tendency for friction to occur between the underlying competition law and policy, economic and efficiency-centred principles and public interest factor consideration.⁴⁵² In practice it is typical for jurisdictions (and South Africa is no exception) to explicitly incorporate public interest factors solely in provisions pertaining to merger control.⁴⁵³

In South Africa, however, in certain circumstances, when prohibited conduct or exemptions are evaluated (especially when state owned entities are facing abuse of dominance

⁴⁴⁵ Supra note 425.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

⁴⁴⁸ Supra note 419.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Supra note 239 at 11.

⁴⁵³ Ibid.

allegations), public interest considerations can occasionally be taken into account.⁴⁵⁴ There is precedent illustrative of this, which has been discussed above.⁴⁵⁵ Authorities may have unintentionally strayed into assuming a price regulation role, with the *Sasol* and *Mittal* judgments being indicative of this.⁴⁵⁶ It becomes necessary to question whether Authorities should directly engage in the regulation of prices, when tasked with adjudicating anti-competitive behaviour allegations.⁴⁵⁷ The approach that the Tribunal has taken in the above canvassed cases is revealing.⁴⁵⁸ Formerly state owned entities (such as Telkom, Sasol, and Mittal) appear to be expected to set their prices in a manner which is cognizant of the economic developmental imperatives of our country, but there is scant further guidance as to the interpretation of this.⁴⁵⁹ By the Authorities, even indirectly, encroaching into the regulation of prices with regards to these entities, the role that these play subsequent to their privatisation is up in the air.⁴⁶⁰ It could be argued that despite having been privatised, these entities are still considered to be public utilities, meaning that they would typically be subject to regulation.⁴⁶¹

There may be space for prohibited conduct assessment to include public interest factors.⁴⁶² Our South African Act was constructed in such a way so as to ensure that strict adherence to the legislation of developed jurisdictions is not followed – and this is appropriate considering our specific needs.⁴⁶³ The peculiarities of the developmental context we were confronted with needed to be accounted for by our Act, which also needed to be fit for the purpose of rising to the challenges that this context presented.⁴⁶⁴ There is a delicate balancing act which must occur during the enforcement of our Act, and this presents its challenges.⁴⁶⁵ When concerns pertaining to pure economic efficiency are balanced against the competing objectives of the public interest, problems relating to firms' compliance and

⁴⁵⁴ Supra note 239 at 11.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid.

⁴⁶⁵ Ibid.

Authorities monitoring this may present themselves.⁴⁶⁶ There is a risk in conducting this sensitive balancing act which necessarily occurs in the process of adjudication, that the Authorities may exceed their mandate when seeking to address issues that other fora would be better able to remedy.⁴⁶⁷ It is suggested that due to the broad and varied nature of these public interest considerations, a cautious approach involving sufficient safeguards to counter any abuse of such provisions be adopted: the competitive assessment is primary, and the public interest should be an exceptional consideration.⁴⁶⁸ “It may be difficult to coordinate between the government’s objective of promoting public interest and competition authority’s objective of promoting efficient markets”, according to the UNCTAD (2008), and thus we should strive to weigh public interest concerns against those of economic efficiency in the best manner possible.⁴⁶⁹

⁴⁶⁶ Supra note 239 at 12.

⁴⁶⁷ Ibid.

⁴⁶⁸ Ibid.

⁴⁶⁹ Ibid.

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