THE ECONOMICS OF PUBLIC INTEREST PROVISIONS IN SOUTH AFRICAN
COMPETITION POLICY

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Abstract

Public interest provisions in South African competition law have long evoked debate among South African economists and policymakers. Already in the development of the Competition Act in the late 1990s, the inclusion of these provisions generated a sometimes heated scholarly debate. Three recent high-profile merger cases in South Africa re-opened the public interest debate: Wal-Mart/Massmart, Kansai/Freeworld and Momentum/Metropolitan. Jurisdictions elsewhere have also grappled with the challenge of incorporating non-competition objectives (including state aid provisions in the EU) into competition policy. This paper reviews the public interest issues in the three merger cases, with the aim of studying their economic foundations. The paper identifies three issues related to the economics of public interest provisions. Firstly, the paper considers the problem of using public interest provisions as motivation for arbitrary (rather than systematic) interventions in competition cases. The paper relates the problem to broader economic policy uncertainty. Secondly, the paper considers the relationship between public interest objectives and the welfare standard in South African competition cases. Thirdly, the paper considers the analytical requirements for investigating public interest issues, including the need for dynamic rather than static analysis as well as the problem of ‘merger-specificity’, especially in relation to job losses.

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I. INTRODUCTION

If one accepts that the traditional purpose of competition law is to enhance and protect consumer welfare, how does one marry this objective with the "public interest" considerations also enshrined in South Africa's Competition Act⁴?

According to Hantke-Domas (2003) public interest in the legal context has more to do with the realisation of political and moral values and it is this concept of public interest that informs the decision-makers on how to decide disputes where there is a conflict⁵. The "values" articulated in the Competition Act are to be found not only in the broadly worded preamble and purpose sections of the legislation but also in specific sections within the statute.

For example, in the merger review section of the Competition Act it is clear that the relevant competition authority must consider whether the proposed transaction can or cannot be justified on certain public interest grounds which include, employment, the competitiveness of small business and firms controlled or owned by previously disadvantaged persons, national industries competitiveness in international markets and the impact of a merger on a particular industrial sector or region.

Hantke-Domas (2003) argues further that judicial interpretation of public interest in this context "constitutes a limitation of the legal scope of government's intervention in the economy, and provides the judiciary with a rhetorical base for resolving questions of political economy"⁶.

The Competition Act also enjoins the competition authorities to consider whether a proposed merger is "likely to substantially prevent or lessen competition" but also if it appears that it will do so, whether the merger is likely to result in "technological, efficiency or other pro-competitive gains" that could be greater than or offset the effects of any prevention or lessening of competition. In other words, the competition authorities are required to consider the traditional welfare effects of the transaction, which typically includes an analysis of allocative, productive and dynamic efficiencies.

⁴ Competition Act No. 89 of 1998
⁶ Ibid at 187
In the merger analysis milieu, the public interest and welfare considerations could arguably result in certain efficiency or equity trade-offs. A previous chairperson of the Competition Tribunal, David Lewis stated, however, that he was ‘quite comfortable with the requirement that we must balance competition and public interest considerations’. Further that although:

‘[I]t makes for complex decision making...real politiek, 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’.\(^7\)

Although Lewis advocated a process of reconciliation, early decision making by the Competition Tribunal appeared to indicate that where a public interest consideration was the bailiwick of another governmental agency, the role of the competition authorities should be secondary to those agencies and statutes. In 2002, for example, in relation the merger between Shell and black empowerment oil company Tepco, the Tribunal dismissed the recommendation of the Commission that, inter alia, the deal be conditional on Tepco remaining an independent company, jointly controlled by Thebe and Shell. The Commission had indicated that it had included the proposed condition because by removing Tepco as an independent participant in the petroleum industry would, from a public interest perspective, hinder the ‘ability of a firm controlled by historically advantaged individuals from becoming competitive’. The Tribunal referred in this case to the Employment Equity Act, the Skills Development Act and the Petroleum Charter as the more appropriate legislative instruments and cautioned the Commission on its role in pursuing its public interest mandate in an ‘over-zealous manner lest they damage precisely those interests that they seek to protect’.\(^8\)

In view of this position, the question arises as to whether the competition authorities are the right institutions to balance welfare and public interest considerations. The competition authorities are not elected officials with a mandate from the electorate to decide on public policy issues. According to Gal, making public interest decisions that might result in social, political or cultural consequences may therefore damage democratic values. Public policy should rather be determined by government. Further, a competition authority may not be the

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\(^7\) Lewis, D Presentation on “The Political Economy of Antitrust” at the Fordham Corporate Law Institute's 28\(^{th}\) Annual Conference on International Antitrust Law and Policy, October 25 and 26, 2001, at 4

\(^8\) Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd case no 66/LM/Oct01 para 58
right body to balance competing considerations as it may not possess the most effective and efficient means for achieving these objectives\textsuperscript{9}. For example, in circumstances where a merger impacts on a remote area with high unemployment levels, the competition authorities are unlikely to be well suited to effectively evaluate the indirect and direct economic effects of the merger on the region. Interestingly, in the case of bank mergers the Competition Act evidently recognises these deficiencies by empowering the Minister of Finance to issue a notice excluding the merger from the jurisdiction of the Act. In other words, the legislature has recognised that in certain circumstances it may be in the public interest for bank mergers not to be subject to the jurisdiction of the competition authorities or the intervention of any other regulatory agency for that matter.

An alternative perspective is of course that competition law and its institutions are simply another tool of government and it can use the public interest provisions to achieve certain governmental objectives. Three recent merger cases in South Africa appear to be illustrative of this view.

I. THE SEMINAL PUBLIC INTEREST CASES

In Minister of Economic Development et al and Wal-Mart Stores Inc. et al\textsuperscript{10} ("Wal-Mart/Massmart") the Competition Appeal Court (CAC) approved the merger between Massmart Holdings Limited and Wal-Mart Stores Inc. This approval was given notwithstanding attempts by various interveners, including, unions (being SACCAWU, NUMSA and FAWU), three ministers, namely the Minister of Trade and Industry, the Minister of Agriculture Forestry and Fisheries and the Minister of Economic Development (the "Ministers") and the South African Small Medium and Micro Enterprises Forum to have the merger prohibited.

The Ministers intervention arose from a concern regarding Wal-Mart's global procurement network and the extent to which its logistical capabilities might affect imports into South Africa. They submitted that the merger would result in a move in procurement away from local producers towards foreign low cost producers situated in Asia. This would in turn result in employment losses, closure of small and medium sized businesses and a stifling of the development of domestic industries.


\textsuperscript{10} Minister of Economic Development et al and Wal-Mart Stores Inc. et al case no 110/CAC Jul11
Although the CAC approved the merger, it held that significant public interest concerns arose from the merger. In particular, the CAC stated that:

‘[T]he 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’

The CAC further found that (1) the Competition Act contains a clear and distinct public interest consideration, which must be applied by the competition authorities, and (2) the application of this principle had not occurred in this matter. In this regard, the CAC stated that -

‘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 be taken 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’.

The CAC also ruled that the conditions imposed by the Competition Tribunal in relation to the establishment of a procurement fund to assist local suppliers, was not sufficiently interrogated. Accordingly, the CAC directed that a study be conducted by experts nominated by government, the merging parties and the unions to determine 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.’\textsuperscript{11}

\textsuperscript{11} Ibid para 109
With respect to the maintenance of employment, the Tribunal had ordered that the merged entity must when employment opportunities become available, give preference to the 503 employees retrenched in June 2010. However, the CAC ordered that these employees must be reinstated as it found that the retrenchment of these workers was sufficiently related to the merger. Other employment related conditions imposed by the CAC included a monitorium on retrenchments based on the merged entity's operational requirements for a period of two years; and the merged entity must honour existing labour agreements and current practice of bargaining with SACCAWU (the largest representative union).

In *Momentum/Metropolitan*¹², the Competition Tribunal, without prompting from government but at the insistence of labour, were willing to extensively address the regulation of labour on the basis of it being in the public interest to do so. In this case, the merging parties initially proposed to limit the number of merger related job losses to 1000 in the first three years following the implementation of the merger. The merging parties also offered to provide support, including 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.

Interestingly, the Competition Commission had accepted the merging parties' undertakings, and had recommended to the Competition Tribunal that the merger be approved subject to the implementation of these support measures. The union (NEHAWU), however, which represented significantly only 6% of Momentum's employees, argued that the merging parties had failed to properly justify the need for any job losses and had not substantiated how they had arrived at the 1000 retrenchments figure. The union requested that the Tribunal prohibit the merger or approve it without any job losses.

The Competition Tribunal approved the merger subject to the restriction that, with the exception of senior managers, no retrenchments should occur as a result of the merger for a period of two years from the effective date of the transaction. Moreover, it held that redundancy concerns cannot be addressed through "soft" initiatives such as re-skilling and redeployment as these conditions are, in its experience, largely ineffective.

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¹² Metropolitan Holdings Limited and Momentum Group Limited case no 41/LMJul10
In effect, the Tribunal elevated the status of employment as a public interest concern to such an extent that even a pro-competitive merger could be prohibited if the effect of the transaction on employment in the sector is not adequately addressed by the merging parties.

In *Kansai Paint Co. Ltd and Freeworld Coatings Ltd*\(^{13}\) the Commission approved the hostile takeover by Kansai, a coatings manufacturer, of Freeworld, a manufacturer and distributor of decorative and performance coatings, subject to a number of welfare and public interest conditions that included - (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. Kansai, however, was dissatisfied with the divestiture condition and filed a request for consideration alleging that the Commission's findings, on which the divestiture condition was based, were incorrect.

The Commission initially opposed the request for consideration and the Department of Trade and Industry (DTI) applied for and was granted intervention rights. Prior to DTI's formal intervention in proceedings, however, it had made a number of public interest and welfare submissions to the Commission regarding the transaction. In particular, it submitted that - the take-over constituted a direct threat to government's localisation initiative since Freeworld was the only local manufacturer of automotive coatings supplied to the domestic automotive industry. The DTI was also concerned that the deal may impact on employment levels should Kansai curtail or cease local manufacture of automotive coatings. Moreover, the DTI expressed a concern that the transaction would impact on innovation markets as Freeworld had developed uniquely South African automotive coatings products. Finally, the DTI was concerned about BEE as Freeworld was an ‘exemplar with respect to black economic empowerment’\(^{14}\).

The DTI also commented on their intervention being construed as contrary to the benefits foreign direct investment (FDI) and it was reported that the acting Director General of the DTI, Lionel October had stated that

\(^{13}\) *Kansai Paint Co.Ltd and Freeworld Coatings Ltd* case no 53/AM/Jul11

‘the DTI is doing everything possible to encourage inward investment, especially in relation to production sectors of the economy where higher levels of competition, local production and innovation are vital ingredients in the government's drive to address the structural weaknesses of the economy and to work closely with the private sector to reverse the decline of South Africa's industrial base, global competitiveness, exports and employment’\textsuperscript{15}

Although the DTI had participated actively in the initial review stages of the merger, it notified the Competition Tribunal shortly after the request for consideration that it would not proceed with its intervention as the Commission had undertaken to present its concerns to the Tribunal. Shortly thereafter the Commission and the merging parties entered into negotiations and the divestiture condition and the obligation to manufacture automotive coatings locally were withdrawn\textsuperscript{16}. However, these conditions were substituted with certain behavioural conditions relating to toll manufacturing fees and information flows.

II. ARBITRARY OR SYSTEMATIC INTERVENTION

‘Intervention and control of the economy by governments is as old as the existence of human beings’ and the "concept of public interest is as old as the political philosophy of government intervention"\textsuperscript{17}

It would appear that the legislature must have intended for government to participate in all merger proceedings as copies of all merger filing notices must be sent to the Minister of Economic Development, despite the fact that the Minister only has an automatic right to intervene in intermediate and large merger proceedings\textsuperscript{18}.

Since the establishment of our "modern" competition authority in 1998, government has however, not until very recently, actively used competition law as a tool to intervene and enforce its policy objectives.

In fact, prior to the aforementioned seminal cases, there were only two instances where government appeared to actively intervene. In The Tongaat-Hulett Group Limited and Transvaal Sugar Beperk et al\textsuperscript{19} merger, the Competition Tribunal prohibited the merger on the

\textsuperscript{15} Ibid
\textsuperscript{16} The removal of these conditions was approved by the Competition Tribunal.
\textsuperscript{17} Hante-Domas op cit note 6
\textsuperscript{18} Section 18 of the Competition Act. See also Commission Rule 33(2)(a)
\textsuperscript{19} The Tongaat-Hulett Group Limited and Transvaal Sugar Beperk et al case no 83/LM/Jul00
basis that it would prevent competition and forestall any attempt by the authorities to introduce greater competition in a regulated market. In its decision, the Tribunal was highly critical of the Department of Trade and Industry's (DTI) arguments describing them as being "confusing and half baked" as it appeared on the one hand to support the introduction of competition to enhance consumer welfare (and therefore opposed the merger) but on the other hand it refused to remove the regulation that eliminates competition.

In Shell/Tepco the Department of Minerals and Energy Affairs (DME) made submissions regarding conditions to be imposed on the merging parties. In particular, it requested that the seller, Thebe, be given a right of first refusal in relation to Shell SA's upstream refining activities should it consider disposing of all or part of its investments at this level of the supply chain. The purpose of this request being to enhance the stake of previously disadvantaged firms in the petroleum sector. The Competition Tribunal however, in its wisdom, realized that the imposition of such a condition would come at a price and no evidence was presented that Thebe would be willing to pay that price. The Competition Tribunal appeared to have the foresight to realize that an increase the consideration payable could derail the deal. This would in turn undermine the capital raising objectives of Thebe, a firm owned by historically disadvantaged individuals; possibly condemning it to the margins of economy. The arbitrary nature of the intervention by DME appeared to be paternalistic in that it was attempting to decide what was in the best interests of Thebe without proper consultation or consideration on the ultimate effects of its intervention.

Government's lack of intervention over the past 10 years has arguably also not been in the public interest especially where government participation is required such as in markets prone to failure. Mergers in the sugar industry for example, are cases where government participation is required as the industry is extremely regulated and competition is very limited. Government should probably have intervened or at the very least participated in the merger between Managa Sugar Packers (Pty) Ltd and Sunshine Sugar Specialities (Pty) Ltd/MSASA Sugar (Pty) Ltd.

20 Ibid para 75
21 Supra note 8
22 Managa Sugar Packers (Pty) Ltd and Sunshine Sugar Specialities (Pty) Ltd/MSASA Sugar (Pty) Ltd case no 116/LM/Dec05
According to Stigler (1971) regulation protects and benefits the public at large or an interest group of the public\(^{23}\). Arguably, labour has managed to procure, as a "politically effective group"\(^{24}\) not only the enactment of a public interest provision in the Competition Act to its benefit, i.e. the maintenance employment, but also the support of government and the competition authorities in the enforcement of this objective. However, labour's intervention and the authorities support thereof perhaps reflects a socio-political approach of serving the interests of the employed (the "politically effective group") as opposed to promoting sustainable job creation in the long-run by creating efficient markets.

Given that the maintenance of employment is a legislated public interest concern; all three of the seminal cases reflect systematic intervention by unions, and government in respect of the *Kansai/Freeworld* and *Wal-Mart/Massmart* transactions, to maintain employment levels. The resulting conditions are therefore similar and place a monitorium on operational retrenchments (and prohibit redeployment) for a defined period. Intervention in this manner arguably not only accords with existing definition of public interest as contemplated in the Competition Act but also with government's "New Growth Path" on balanced and sustainable economic growth through the maintenance of high levels of employment. Although the policy approach may be criticised for interfering in efficient market outcomes, the approach of the authorities and government is transparent and certain as it simply reflects the public interest criterion in the Competition Act.

However, upon closer analysis of *Kansai/Freeworld* and *Wal-Mart/Massmart* it is evident that a "new" public interest definition is hiding in the wings and government is attempting to manipulate the competition authorities to have it enforced. In *Wal-Mart/Massmart* for example, government argued for employment related conditions, however the merging parties submitted that there would be no direct impact on employment as a consequence of the merger and in fact employment would increase going forward. According to Lewis (2012), the real motivation for government's intervention on this basis was more to do with a foreign acquiring firm shifting its procurement off-shore and the impact of this strategy on employment levels within local manufacturing\(^{25}\). Put differently, the intervention was driven

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\(^{25}\) David Lewis *Thieves at the Dinner Table* (2012) 293
by an "industrialisation" policy in relation to foreign direct investment as opposed to the direct impact of the transaction on employment levels within the target and acquiring firms.

Government's arbitrary intervention on the basis of its "industrialisation" objectives is further illustrated in *Kansai/Freeworld* where government (DTI and EDD) entered into direct discussions with the merging parties and proposed conditions, *inter alia*, in relation to employment, BEE and investment in the local industry. In the latter instance, government apparently pushed for a condition that required investment in decorative coatings research and development and in respect of employment, although no direct impact on employment was envisaged, government apparently insisted on the monitorium. This mode of intervention whereby merging parties engage directly with government raises questions regarding transparency and accountability and arguably challenges the independence of the competition institutions.

This type of arbitrary intervention was extended in the *Wal-Mart/Massmart* transaction. When the deal was announced, the Minister of Economic Development established an expert panel to provide advice on the impact of the transaction. The panel apparently reported to the Minister that it was "probable that, owing to the size and international exposure of Wal-Mart, employment, the welfare of local manufacturers and small businesses would be seriously affected". According to Lewis (2012), the advice was opaque and from an administrative law perspective inappropriate. Furthermore, the DED evidently also contacted the merging parties prior to the filing of the transaction as well as various stakeholders in order to solicit their views on the transaction. The Minister of Economic Development therefore created an impression that - "if you want the merger to be approved speak to the Minister" and the Minister "can leverage and hold-up the process". There was thus no systematic approach to the issues raised and no transparency in the process. Government effectively proceeded with a parallel process to the competition authorities, which is arguably an inappropriate way to conduct policy. In addition, government's fixation with foreign companies owning domestic firms as well as the impact in local procurement reflects governments "industrialisation" policy which falls outside the scope of the public interest provisions in the Competition Act.

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26 Supra note 10 para 37
27 David Lewis ‘Public interest: The role of the Ministers’ Speech at workshop ‘Walmart – a successful resolution?’ University of the Witwatersrand 4 April 2012.
28 Ibid
In fact, the arbitrary manner in which government intervened, encouraged Business Unity South Africa to request government to finalise ‘the rules and regulations affecting all forms of investment and acquisitions" and in particular, to complete the "draft National Treasury document on cross-border investment rules"\(^{29}\).

In both Kansai/Freeworld and Wall-Mart/Massmart the arbitrariness of the intervention suggests that competition law is perhaps regarded by government as a substitute for industrial or trade policy. However, the difficulty with this approach is that it is industrial policy applied to a single merged firm, which is hardly good policy in itself. Although employment considerations are regularly considered in merger proceedings, other public interest "values" related to an "industrialisation" policy are often rather arbitrarily added and intervention of government on this basis creates a significant amount of uncertainty.

It is noteworthy that many jurisdictions around the world permit government interference in merger proceedings, however, it is often on the basis of a national security concern and only applied in cross-border mergers. The intervention is also limited and any new additional public interest grounds are often scrutinised by parliaments. For example, in the United Kingdom, the Enterprise Act (2002) allows for UK government acting through the Secretary of State to intervene in mergers that raise public interest\(^{30}\) concerns either specified in the Enterprise Act or that the Secretary of State specifies. Where the Secretary of State intervenes on the basis of a new public interest ground, the public interest consideration must be approved by parliament. Where such a case is raised, the UK competition authority (Office of Fair Trading) must provide a report to the Secretary of State who then is able to make a decision to refer to the matter to the Commission or approve the matter. The ability to intervene has been used only on seven occasions since the Enterprise Act came into effect.

Initially, the lack of active intervention may have occurred as a consequence of the pragmatic realisation that the competition authorities or other statutes and agencies may be the more appropriate means to achieve public interest objectives. The later arbitrariness of government's intervention may therefore be symptomatic of the disappointing performance of the sector regulatory process. Posner (1974) argued that regulatory agencies are created for bona fide public purposes, but are then mismanaged, with the result that those purposes are

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\(^{30}\) Prior to the recent world financial crisis only two public interest grounds are contemplated in the Enterprise Act, namely national security and media plurality.
not always achieved. Thus, government has turned to the competition authorities to give effect to its objectives. Alternatively, the arbitrary approach to intervention may simply be that government now sees competition law and its institutions as a tool to implement policy - the lack of transparency, arbitrariness and uncertainty though may be a failure by government to develop comprehensive competition and industrial policy.

III. PUBLIC INTEREST OBJECTIVES AND THE WELFARE STANDARD

In Wal-Mart/Massmart case the CAC held that:

"[T]here is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue of an embrace of the goals of a free market and effective competition together with uniquely South African elements.....the legislature imposed ambitious goals upon the competition authorities created in terms of the Act. Within the context of the present dispute, this ambition is further captured in S12 A which mandates an enquiry into substantial public interest grounds."

The question that arises therefore is whether there should be an adoption of a standard other than consumer welfare in competition law cases, "particularly in view of the complexity of the economic calculation of total welfare of a particular, particularly if total welfare extended beyond an exclusive calculation of consumer and producer surplus alone".

This section therefore considers the relationship between the public interest provisions and the welfare standard in the context of the "seminal" public interest competition cases. Clearly a trade off exists between the competition and efficiency consideration of a transaction and the conditions imposed based on the public interest provisions of the Competition Act. This section will proceed with a description of the relevant theory and then analyse the three cases highlighted above.

Those involved in competition law merger analysis should be cognizant that it is generally a partial equilibrium analysis where the ceteris paribus condition is applied because specific markets only are analysed. In economics, wellbeing is measured against the yardstick of the


32 Supra note 10 para 98
33 Ibid para 99
34 Holding all other influences constant.
competitive general equilibrium, and the associated efficiency outcome and resulting equilibrium. Only in a general equilibrium analysis is the competitive equilibrium Pareto efficient. An allocation of resources is Pareto efficient if it is impossible to make any consumer better off without harming someone else.

Economic efficiency refers to two separate, but related concepts: productive efficiency and allocative efficiency. Production efficiency involves the best use of resources at the least cost method of producing a given level of output. Allocative efficiency refers to the allocation of resources or goods to their highest valued use, this occurs in a competitive market where price is equal to marginal cost. This is a necessary condition for Pareto optimum allocation of resources, where goods are allocated so that any reallocation of resources might make someone else worse off but someone else would be better off. This idea implies that consumers pay producers what it costs to produce the good.

A deviation from the competitive market may result in these two efficiencies operating in opposing directions. For example, a merger could improve productive efficiencies through economies of scale, but reduce allocative efficiencies because of price increases away from marginal cost due to market power. Any merger analysis would therefore have to weigh-up the gains and losses in efficiency to establish whether or not the merger is in the public interest.

There is a distinction to make between efficiency and economic welfare. Economic welfare relates to changes in consumer and producer surplus. Consumer surplus is the difference between what the consumer is willing to pay and the actual price paid. This may be expanded to include quality, range and service which in theory are captured in the price of the good. Producer surplus is the gains producers receive from charge a price higher than the cost of producing an additional unit. Total welfare is the combined welfare of consumers and producers. In effect, it is the sum of the consumer and producer surplus.

The welfare standard determines the framework of reference used to determine liability when applying competition regulation. The consumer welfare standard is concerned with the consumer only. In the consumer welfare standard the distribution of wealth between producers and consumers is not treated neutrally. If there is a transfer of wealth from consumers to producers, this seen as harmful to consumers, even if there is an overall

increase in total surplus. The total welfare standard is concerned with society as a whole. In the total welfare standard the treatment of the distribution of wealth between producers and consumers is neutral.

Consumer welfare is by in large the main consideration of competition policy. However there is little consensus on the meaning of the term in competition policy. There are loosely two main approaches to the understanding of the term consumer welfare. First the term more accurately refers to consumer surplus, and that in advancing consumer surplus, authorities are protecting consumers and not promoting efficiency. And secondly, the term is often used erroneously to describe total or aggregate surplus.

It would be naïve to assume that by simply maximising consumer surplus one maximises consumer welfare. The pursuit of low prices is not always consistent with the goal of welfare maximisation. In sum, there exists a set of circumstances where the pursuit of consumer welfare as understood in the partial equilibrium analysis imposes costs on societies in other sectors not considered by competition authorities. This is a problem of second best which as a theorem states that:

‘[I]f there is introduced into a general equilibrium system a constraint which prevents the attainment of one of the Paretian conditions, the other Paretian conditions, although still attainable, are, in general, no longer desirable. In other words, given that one of the Paretian optimum conditions cannot be fulfilled, than an optimum situation can be achieved only by departing from all the other Paretian conditions.’

The distinction between consumer surplus and consumer welfare is important. Consumer surplus as defined is only one part of the consumer welfare story. In a partial equilibrium analysis, consumer surplus is consumer welfare. In a general equilibrium analysis, consumer surplus may not equate to consumer welfare. Price is not always a good measure of wellbeing, and therefore consumer surplus does not always proxy consumer welfare.

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38 Orbach op cit note 37
39 ibid
40 ibid
41 ibid
There is an underlying distribution of income associated with any given allocation of surplus between consumers and producers. The producer surplus is representative of the firm’s profits. These rents are distributed amongst various groups, for example they may be taxed, paid out to shareholders in dividends and reinvestments and sometimes wealthy families and individuals. Large shareholders are often pension funds. Resources can be reallocated through the market or by government intervention. For example, by pursuing low prices, the purchasing power of income increases and consumers can buy a wider range of goods and services. This has indirect distributional consequences. When government intervenes directly to reallocate resources, well intentioned efforts to improve income distribution can create its own inefficiencies.

The trade off "unpacked"

The public interest provisions of the Competition Act go beyond notions of efficiency and welfare by seeking a more equitable allocation of resources. However, any reallocation of resources will change the incentives of individuals and firms thereby distorting the efficiencies of a competitive outcome. Notions of equity are by construct value judgements. They allude to objectives which, at the heart are political in nature. The conditions imposed on a merger as a result of the public interest objectives have implications for efficiency, welfare and income distribution both in and beyond the related markets. It is well acknowledged that there is a trade-off between efficiency and equity. Any intervention by government has the potential to change incentives for firms. These interventions may well be improving equity, but they arguably distort choices and sacrifice efficiency.

In Wal-Mart/Massmart the competition authorities used a consumer welfare standard to assess the transaction. It was argued that the merger would bring consumer benefit in the form of lower prices and production efficiencies would be achieved through Wal-Mart’s ability to run a very efficient logistics operation. These production efficiencies would lower the costs, and these cost savings would be passed on to the consumer, resulting in lower prices and therefore achieving greater allocative efficiency. Evidence was led in Massmart/Wal-Mart to demonstrate that prior to Wal-Mart’s entry in other jurisdictions such as Chile and the United Kingdom aggregate prices were higher, and decreased following the

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entry into these jurisdictions. In the case of Chile, the economic expert for the merging parties emphasised that ‘in the six months before Wal-Mart acquired DNS in Chile, the prices were approximately 1% below the market as a whole. After the acquisition by Wal-Mart, the prices reduced to 5% below the market average’.

As price tends to marginal cost, there is a gain in consumer surplus. This gain in consumer surplus is partly at the expense of a loss in domestic producer surplus and partly because of an increase in the total surplus. The local producer surplus is eroded as domestic firms cannot compete with the lower import prices, some firms shut down as a consequence whilst others reduce their output. Total surplus however increases because consumers can now consume greater quantities at lower prices due to cheaper imports.

However, as pointed out in the Massmart Wal-Mart judgement, the entry of Wal-Mart into South Africa gives new access to local producers to supply to new markets, for efficient local firms this is an opportunity for growth. Wal-Mart’s representative Mr Bond confirmed this in his testimony:

“[O]ne would expect the best of the small South African suppliers to have opportunities to export via the Wal-Mart network of stores elsewhere in the world.” and “Suppliers have the opportunity to extend their reach considerably by being part of Wal-Mart’s global supplier family”.

Changes in the consumer and producer surplus also have implications for wealth distribution in the market. Wealth is transferred from local producers to domestic consumers in the form of lower prices and decreased profits. Consumers effectively gain as purchasing power increases as a result of lower prices. The relative price decreases and the opportunity cost of purchasing other goods declines. The redistribution is usually from producers to consumers in the form of lower profits for producers.

To understand how the public interest provisions relate to the chosen welfare standard of the South African competition authorities we need consider how they change efficiency and reallocate resources in the economy. We consider these condition under three broad headings; first conditions relating to employment, second conditions relating to the development of SMMEs and third conditions relating to innovation.

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44 Supra note 10 para 108
45 Supra note 10
Maintaining employment by limiting retrenchments and re-deployment

It may be useful to make the obvious distinction between, job protection and job creation. The former, has redistributive affects, i.e. there is a trade off or an opportunity cost of protecting a job and wealth is redistributed between the owners of capital and labour. The latter, theoretically, when you have an underutilised workforce there should be no opportunity costs to job creation, although it has income implications it is primarily an efficiency objective to using all available resources.

The conditions prohibiting retrenchments in the short term has two potential implications for efficiency and welfare. First, not allowing to the merging parties to allocate their labour in the most efficient manner raises costs for the firms. Although temporary, it increases the cost of production without any gains in output. This is a waste of resources and decreases the productive efficiency of the firm. If these costs are passed on to consumers, this raises prices, which reduces the allocative efficiency and consumer surplus benefits of the merger.

Secondly, the retrenchment or re-employment condition is essentially protecting jobs that will inevitably be lost anyway, the costs incurred in retaining redundant employees is akin to an indirect tax of sorts on the owners of the firm. As firm’s profits are distributed amongst a wide range of groups, including pension funds, households, individuals and tax transfers, the distributional effect of this distortion may be far reaching.

Thus the retrenchment or re-employment conditions are protecting jobs in the short run, redistributing wealth to labour at the expense of consumers and the various recipients of rents from the firm. Furthermore, the re-deployment condition also has an impact on productive efficiency.

Local procurement

The Kansai and the Wal-Mart case, both have conditions relating to local procurement. These issues were raised previously in the Edcon/Dawn case\textsuperscript{46} in 2005. In this merger local procurement issues were raised by the South African Clothing and Textile Workers Union (SACTWU), SACTWU petitioned for a condition which would control the number of imports by the merged entity. In the judgement, the Competition Tribunal made the following

\textsuperscript{46} Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd case no 21/LM/Mar05
observations relating to the benefits of increased competitiveness and lower prices on the consumer:

‘Firstly a condition of that sort goes to the very heart of anti-trust’s concern with the welfare of consumers. If Edcon favours international over domestic suppliers it is presumably because the company believes that it can procure higher quality and/or lower priced merchandise on the international market. As long as the retail market is competitive – and our view is that, residual anxieties surrounding what appears to be a creeping pattern of acquisitions aside, the clothing retail segment remains competitive – then a significant part of the benefits of these lower prices and superior quality commodities must be passed on to consumers, including working people. While we agree with SACTWU that this is cold comfort to those whose inability to find employment condemns them to very low levels of consumption, there is considerable evidence to suggest that the past 20 years have witnessed a significant growth in the purchasing power of previously disadvantaged consumers. Nor is this phenomenon only discernible in the form of the super rich – of greater significance is the rise of a mass middle and lower-middle class of consumers. This is clearly the outcome of a great many factors but there is no gainsaying the role played by lower interest rates and product prices over the period. 47

In the Edcon/Dawn transaction the Tribunal chose not to balance the job losses against the consumer gains, pointing out that increased openness and competitiveness of the South African economy had contributed toward an increase in the purchasing power of lower income consumers, increasing consumer welfare.

In the Kansai/Freeworld case, the competition authorities agreed to conditions around the development of local manufacturing. The details of these conditions, agreed between government and the transacting party’s were not part of the public record. However, an attempt to commit the firms to a particular allocation of resources, even if agreed upon, place constraints on the firms and it becomes difficult to arrange their production in the least costly method, to be productively efficient. Under different economic conditions, these arrangements may no longer be viable, forced constraints prevent the firm from responding appropriately.

47 Ibid para 30
The local procurement concern was dealt with differently in the Massmart Wal-Mart case. In this case the merging parties agreed to an R100 million development fund to develop local suppliers\(^{48}\). From an economic perspective this could be an effective tax. A tax inevitably increases costs for firms, how these costs is passed on depends on a number of factors amongst other things the elasticities of demand. In addition, depending on the success of the fund, there may be both positive and negative externalities for consumers and competing retailers.

How costs arising from the public interest conditions are passed on to consumers will depend on the elasticities of the goods that the firms supply. An additional cost, like a tax in the form of the development fund, is likely to increase price. If these costs are passed on, depending on the demand elasticity of the individual products, consumers may carry a disproportionately large burden of the tax. These products would be goods with low elasticities. Products which have an inelastic demand are often necessities; these are product often found in the shopping baskets of low income households. Should these costs be passed on, low income consumers will bear the heaviest burden of the additional costs. Low income households stand to gain from lower prices, but these gains may be offset by the disproportionate burden of an increase in costs could have on low income households.

However, if the development fund successfully improves the competitiveness of local suppliers it could result in lower domestic prices, local producer surplus gains and an increase in the total surplus. We would expect an increase in productive efficiency resulting from the local supplier development fund, which would result in a reduction in domestic prices. This may benefit not only Massmart Wal-Mart customers, but also the customers of competing retailers, if the cost savings are passed on to these consumers. As domestic prices fall allocative efficiency is improved and this improvement impacts consumer welfare across the sector.

Wal-Mart provided evidence to show that a similar programme in Chile had improved the domestic producer surplus\(^{49}\). The potential for the development fund to improve the local producer surplus and consequently the total surplus also has implications for household income. At faster growth rate more local firms potentially will experience greater profits improving income as these profits are dispersed and more jobs are potentially created which

\(^{48}\) The appropriate size of the fund is still being investigated.

\(^{49}\) Supra note 10 para159
further improves income. The increase in income has a demand side effect; as households can buy more it increases demand so that consumer surplus and total surplus is further improved.

The benefits of the development fund accrue to all retailers in the sector and all consumers. However, Massmart Wal-Mart bears the entire cost of the fund and receives only part of the benefit. There is a problem of free riding.

The firm’s competitors are not subject to the same condition, but they benefit from the condition; there is a freeriding problem. The problems facing local suppliers have many causes and cannot be resolved by a single firm, if left to the market they are likely to be under-provided. The solution to improving the competitiveness is one than requires a much bigger and coordinated effort across government. This was acknowledged in 2005 in the Edcon/Dawn matter, where the Competition Tribunal recognised, with a similar issue, that such a condition which would advantage Edcon’s competitors without any cost to them was not correct:

“[E]xpressed otherwise this issue is not merger specific. SACTWU’s concerns about cheaper imports cannot be cured by the imposition of a merger condition on a single firm. It is a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments.”

Research and development

Conditions imposed in the Kansai/Freeworld case which sought to oblige the firms to invest in research and development in decorative coatings. Research and development encourages dynamic efficiencies. Improvements in dynamic efficiencies, increases quantities and potentially lowers costs and prices, improving the competitiveness of local producers. This could mean an increase in producer surplus, consumer surplus and total surplus. The extent, to which it does so, depends on the firm’s willingness to comply.

Attempts by government to intervene using the public interest provision have the potential to cause some inefficiency and distort consumer welfare. The inefficiencies created by the public interest conditions have the potential to crowd out the efficiency gains of the merger. A competition policy focused on efficiency gains has the advantage of being more objective than one that elevates equity objectives. An efficiency objective avoids the uncertainty

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50 Supra note 46 para 31.
created by value judgements regarding the distribution of economic benefits. If we are to use the public interest provisions, then we need to do more to understand their implications. In future, efficiency gains would have to be offset against the costs associated with the potential for government intervening in mergers. Any costs associated with the conditions imposed would have to be factored into the proposed merger. It may be that mergers would become non-viable. The value that mergers contribute to society is debatable and outside the scope of this paper. Equity objectives are important in a society which has such great income inequality; we must choose a means of addressing the equitable allocation of resources that will produce the least amount of inefficiency.

IV. ANALYTICAL IMPLICATIONS OF PUBLIC INTEREST PROVISIONS

The preceding discussion has highlighted how public interest provisions may alter the welfare standard of South African competition policy. If public interest objectives carry particular implications for the welfare standard in competition policy, they must necessarily also have analytical implications, i.e. implications for economic analysis. This section explores the analytical requirements of accommodating public interest objectives in merger control.

When the court has to consider public interest provisions it faces two challenges in sequence: firstly, determining the merits of the public interest concerns, and, secondly, weighing these against the net competitive effects of the merger. The latter has certainly attracted more direct attention, possibly due to the CAC highlighting the need for guidance on how to approach this balancing act in the Wal-Mart/Massmart case. But the former, assessing the merits of public interest issues in a particular merger case, is as important and poses a number of challenges for economic analysts. In any event, the balancing of competitive and public interest effects cannot proceed without a proper evaluation of the public interest issues.

Opposing parties in competition proceedings often disagree on the economics of a particular merger case. These disagreements are not merely arbitrary, but derive from rational differences in how opposing parties weigh type I and type II risks (false positives and false negatives) related to economic evidence and its interpretation. This is recognised in market definition in South Africa and in vertical mergers / vertical restraints internationally by

\[51\text{ Cseres op cit note 35} \]
\[52\text{ Willem Boshoff ‘Conceptual and empirical advances in antitrust market definition’ (PhD dissertation. Stellenbosch University, 2011)} \]
Cooper et al\textsuperscript{53}. As public interest issues affect the outcome of a merger case, their assessment will necessarily be subject to the same types of disagreement.

Suppose a court weighs the evidence on public interest concerns. A rational weighing of economic evidence can be unpacked into three components: (1) the loss function (as discussed, the relative risks assigned to false positives and false negatives), (2) the weight of previous cases or theory and (3) the weight of case evidence. As far as (2) is concerned, it is unlikely that previous cases will offer much guidance in terms of how to approach a particular public interest concern. In the Wal-Mart/Massmart case there was uncertainty as to the actual effects of Wal-Mart’s entry in other markets on competing suppliers or consumers in those markets. Therefore, previous cases did not provide strong evidence in favour or against the public interest claims. This leaves much of the analysis dependent on (3), the case evidence itself.

The weighing of the case evidence requires evaluating whether the evidence supports a particular causal story about how the merger is linked (or not linked) to a particular public interest objective. Such an evaluation requires clarity of concepts. In particular, as we argue in the following sub-section, only partial equilibrium analysis can provide such conceptual clarity – in the form of specific markets.

\textit{Market specificity}

Economic analysis in competition policy is based on partial equilibrium analysis: economists focus on the effects of a merger in a particular market rather than trying to trace out all of the possible implications of the merger for the economy. This is because economists are reasonably good at modelling and understanding specific markets and how mergers and other forms of behaviour might affect market outcomes. In fact, industrial organisation scholars specialise in explaining firm conduct within well-defined settings and are far more cautious about making predictions about industry-wide effects, let alone the effects on the economy as a whole. Therefore, if economic analysis is to play a role in evaluating claims about public interest objectives in a merger, it will have to be on a partial equilibrium basis. This requires the definition of specific markets.

In order to conduct a rigorous analysis of public interest objectives, the relevant markets will have to be identified. Even if their boundaries are not defined as rigorously as in those of the product and geographic market in the competition assessment, the buyers, sellers and the traded product or service (or labour) markets related to a particular public interest issue will have to be described. This will increase the need to be specific when objecting on the basis of a public interest issue.

Relevant in this context would be markets that have a direct relation to one of the public interest concerns and that would be significantly affected by a proposed merger. Again, in this context, ‘significantly affected’ is determined by a partial equilibrium approach. We argue that a value chain approach will be useful here, given that the value chain specifies clear linkages between the relevant competition market and other markets upstream and downstream. It therefore facilitates building a causal story that links the merger with particular public interest effects. The use of the value chain approach also has the benefit of vertical concepts being well-established in other areas of competition policy. Table 1 describes the type of markets that would be related to each public interest provision under this approach.

As is shown, these markets narrow the open definitions of public interest issues in the Act to clearly defined spaces that can be analysed using conventional tools of economics. Furthermore, this market specificity facilitates merger-specific analysis.

The definition of specific markets linked to specific public interest claims effectively recognises that the various public interest provisions in South African competition law differ significantly in terms of their focus. Linking a public interest concern to a specific market also reflects the consideration of welfare standards earlier in this paper: if public interest provisions have welfare implications, it is necessary to be explicit about exactly which markets are being affected.

*Table 1: Public interest provisions and their relevant markets*

<table>
<thead>
<tr>
<th>Public interest provision</th>
<th>Relevant market?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Impact on particular industrial sector</td>
<td>Upstream and downstream <em>product</em> markets in merging parties’ value chain(s), including the relevant competition market</td>
</tr>
<tr>
<td>Impact on particular industrial region</td>
<td>Upstream and downstream <em>geographic</em> markets in merging parties’ value chain(s), including the relevant</td>
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</table>

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<table>
<thead>
<tr>
<th>Impact on employment</th>
<th>competition market</th>
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<tbody>
<tr>
<td>Impact on ability of small businesses to become competitive</td>
<td>The labour input <em>product and geographic</em> market</td>
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</tbody>
</table>
| Impact on ability of firms controlled or owned by historically disadvantaged persons to become competitive | Narrow definition: relevant competition market  
Broader definition: upstream and downstream product markets in merging parties’ value chain(s), including the relevant competition market |
| Impact on ability of national industries to compete in international markets          | Narrow definition: relevant competition market  
Broader definition: upstream and downstream product markets in merging parties’ value chain(s), including the relevant competition market |

But beyond the general issue of a need for rigour, the balancing also requires market identification. The first step is to recognise that, in economics, welfare is calculated as surplus – whether it is consumer surplus or producer surplus – and surplus derives from the differences between demand and supply at different quantity and price levels. This implies that to reach a common set of values requires the identification of all of the affected markets. I say identification as I don’t believe it would be possible (given the time constraints and already stretched resources) to be as exact in defining these boundaries (although the problem of trading off analysis based on a carefully defined markets against public interest issues based on loosely defined markets can be problematic).

The CAC’s cry for help in how to rigorously weigh competitive and public interest issues supports market specificity: rigour will require a systematic analysis on *both* sides. One would not be able to defend a weighing of competition and non-competition effects if only one side involves systematic analysis. As mentioned earlier, competition analysis involves a market-specific methodology that investigates the effects of a merger within a defined market on the economic surplus in that market: “The antitrust methodology indeed offers a limited set of policy tools that do not accommodate welfare maximization or even welfare analysis. Conceptually, it may be desirable to have a different methodology, but this will entail a massive statutory reform and training of antitrust professionals.”  

54 Orbach op cit note 37 p159
and methodology. That is, a methodology that is all about understanding perceived surplus effects in particular markets\textsuperscript{55}.

\textit{Hierarchy of public interest provisions}

Economists are cautious about arguments involving equity. In fact, as early as the 1980s, Elzinga notes that while economists may disagree about the efficiency implications of a merger, it is much more likely that they will agree on this than on matters of equity\textsuperscript{56}. This is why modern competition analysis is based on efficiency considerations within well-defined markets.

The distinction between equity and efficiency can be useful starting point when studying the economics of public interest objectives. Often, one might be lead to believe that public interest provisions are concerned with equity issues as opposed to the strict efficiency focus of competition analysis. It is therefore a good idea to classify the various provisions according to whether the aim is efficiency or equity.

\textit{Table 2: Public interest provisions and their focus}

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
\textbf{Public interest provision} & \textbf{Focus} \\
\hline
Impact on particular industrial sector & Efficiency \\
Impact on particular industrial region & Efficiency \\
Impact on employment & Efficiency \\
Impact on ability of small businesses to become competitive & Equity \\
Impact on ability of firms controlled or owned by historically disadvantaged persons to become competitive & Equity \\
Impact on ability of national industries to compete in international markets & Efficiency \\
\hline
\end{tabular}
\end{table}

Public interest provisions are not necessarily concerned with equity. As shown in the table, the industrial promotion and employment objectives can be interpreted as dealing with the efficiency of upstream or downstream markets (including labour markets). The provisions are not strictly concerned with the earnings of employees or particular businesses within industrial sectors or regions. Even if such equity concerns could also be raised, economic theory would suggest retaining focus on efficiency. This is because efficiency and equity are

\begin{flushright}
\textsuperscript{55} Orbach op cit note 37 p140  \\
\textsuperscript{56} Elzinga op cit note 43
\end{flushright}
not mutually exclusive. In fact, in some cases improving efficiency also enhances equity. This claim contradicts the aim of policymakers, who included equity objectives presumably on the assumption that efficiency improvements in these markets will not necessarily yield equitable outcomes. Even so, economic theory would suggest that even some of these equity considerations can be addressed by focusing on the efficiency of the relevant market.

The view of public interest objectives as essentially concerned with efficiency suggests that the analysis will proceed in much the same way as in conventional competition analysis – the analysis will be concerned with surplus within a particular market (albeit a different market from the conventional competition market). Note however that efficiency in this context often refers to producer surplus rather than total surplus. For example, the employment provision implies a focus on the ‘producer’ (or seller) surplus in a labour market, while the small business provision, for example, could imply a focus on producer surplus in a downstream input market. As discussed in the section on the welfare standard, the logical implication is that consumer surplus – i.e. the surplus or welfare of buyers – in these settings is less important. Presumably, given that the competition court or Tribunal has the ability to judge whether consumers are harmed in a specific market, these authorities would also be able to judge whether producers are harmed in a specific upstream or downstream market.

Dynamic and static analysis

While the analysis is, in principle, no different from conventional competition analysis, it is also far more complicated. Even in well-defined markets, it is very challenging to predict the dynamic effects of mergers, and it is unlikely to be easier in these other markets. Competition authorities sometimes ignore difficult dynamic issues, and the question is whether a similar approach should be adopted.

Competition authorities need to decide on an overall approach to the dynamic/static issue in public interest provisions. This is challenging. Consider, for example, the argument that some mergers, while not anti-competitive on balance, may not be conducive to what policymakers consider to be in the long-run interest of the economy – for example, they might affect the long-run evolution of a whole industry (one of the public interest provisions). In these cases, it would seem that a more comprehensive analysis is required (very similar to the kind Baker describes). However, in contrast, the public interest provision concerned with employment protection often involves a fairly static approach – focusing on the number of jobs immediately lost due to the merger.
The challenge of balancing

The CAC’s judgment in the Wal-Mart/Massmart case argues for some form of ‘balancing’ of public interest and competition objectives.

‘[W]hat weight is to be given to the factors set out in s 12 A (3) in order to determine whether these should trump a finding based on more traditional considerations of consumer welfare as captured in s 12 A (2)?’ and “An engagement with an exercise of proportionality is then required to determine how to balance the competing arguments. While this exercise may, by its nature and for the reasons set out above, never be precise, it is what the Act appears to require in respect of mergers” and later “[A] proportionality exercise requires evidence which would enable the exercise, justify the calculation which flows there from and permit a balance to be struck between the competing issues of consumer welfare, employment and small business.”

Underlying the idea of asking direction from economics for the balancing exercise rests on the idea that we should be able to translate everything into one or other total welfare metric. So, it seems that idea of asking for direction is leaning towards the need for combining the total welfare effects in the various affected markets (which is also supportive of our emphasis on market specificity). Ultimately, if one could translate all the effects into changes in consumer or producer surplus in a market, then one could combine them to arrive at same aggregate decision. Lewis also interprets the CAC’s position as suggesting that there should be some form of quantification and argues that economists should help here as there is no guide on how to weigh such evidence.

In traditional competition analysis, the balancing is between pro-competitive and anti-competitive evidence. Both types of evidence relate to the same market. This is not the case when net pro-competitive (or anti-competitive) evidence is weighed against public interest concerns. This creates a problem when courts rely on an eclectic approach to economic evidence. If we had only quantitative calculations from a comprehensive econometric model, we wouldn’t care to do this weighing. It is exactly because we don’t have these models and have to rely on an eclectic approach that this creates a problem: in the traditional analysis the market is the common thing, which makes weighing up evidence easier. An exercise to

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57 Supra note 10 para 99
58 Supra note 10 para 100
59 Supra note 27
calculate surplus or welfare would be prohibitively expensive for many markets, as it is simply too difficult to model demand and supply accurately enough in order to facilitate quantitative welfare calculations.

It is important to note this fundamental challenge, which will disappoint perhaps some who would have liked economists to provide quantitative answers from complex models. The challenge is similar to that faced by economic models in general competition analysis. These models are not used in the majority of competition cases, at least in the EU and US, and in most cases in South Africa.

*Resource-intensity of competition investigations*

One could argue that the inclusion of extensive public interest provisions in competition policy in effect increases the scope of the review of the competition policy regime. This, in turn, requires a particular change in culture where competition enforcers are often wary of “ongoing supervision” of firms, much more interaction with industry is required. Furthermore (perhaps more important than the impact on culture) it has an implication for how analysis is performed. Public interest provisions essentially force generalist competition authorities to engage much more deeply with a range of economic issues in a particular industry, which places a heavy burden on the extent of the analysis required for a prospective merger).

This resource-intensity may yet force the competition authorities to prioritise. The literature suggests that public interest provisions should receive less attention in those markets subject to sector-specific regulations. Where sector-specific regulators are present, public interest provisions may already be accounted for, as their ambit includes much more than just addressing potential competition problems in the relevant sector (Baker 2010). Therefore, it might make sense to defer to them (see our earlier discussion in the introduction on the Tribunal’s approach in the *Shell/Tepco* matter). But in many other industries sector-specific regulators are not present. Here government will have to provide upfront guidance on which sectors should receive special attention, which is related to our discussion earlier concerning the need for systematic as opposed to arbitrary public interest interventions by government.

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60 Jonathan B Baker ‘Sector-Specific Competition Enforcement at the FCC’ (September 21, 2010) Available at SSRN: http://ssrn.com/abstract=1675990 at 4

61 Op cit note 60
V. CONCLUSIONS

The paper studies three “seminal” merger cases involving public interest provisions in South Africa: Wal-Mart/Massmart, Momentum/Metropolitan and Kansai/Freeworld. These cases have attracted international attention, their challenges resonating with similar challenges faced by other jurisdictions, including the EU. Based on this assessment, the paper then develops three themes in order to study the economic foundations of public interest provisions. Firstly, the paper proceeds to an analysis of how systematic public interest provisions have been in each of the three merger case. Government interventions in competition cases appear to have been arbitrary, and the paper ascribes this to uncertainty in government policymaking and failures of sector regulating bodies.

Secondly, the paper considers the implications of public interest objectives for the welfare standard of competition policy. Based on recent developments elsewhere, the paper unpacks the welfare standard concept, contrasting it with concepts of surplus. The paper then explores how the public interest provisions relate to the chosen welfare standard by analysing how these provisions change efficiency and re-allocate resources in the economy. In particular, the paper considers conditions relating to employment, conditions related to local procurement and conditions relating to innovation.

Thirdly, the paper considers the implications of public interest objectives for economic analysis in merger cases. If economics is to play any role in the analysis of public interest concerns, it will have to follow a partial equilibrium approach. Partial equilibrium analysis is preferred in merger analysis, because economists can provide reasonable predictions about the effects of a merger in a particular market. In contrast, the overall effects of a merger beyond a particular market are difficult to model.

If partial equilibrium analysis is to be the basis for the economics of public interest concerns, analysts will have to be specific about the markets relevant to particular public interest claims. For example, where a merger is said to affect the ability of a particular sector to compete, analysts will have to define the relevant product markets involved. Of course, one could claim hundreds such markets. But, in the spirit of partial equilibrium analysis, we argue that a value chain approach should be adopted which would limit attention to upstream and downstream markets related to the conventional competition market. This market specificity will also assist with the balancing of competitive and public interest effects, as it would enforce more rigorous analysis of public interest claims.
Furthermore, the paper argues that public interest issues, contrary to what one would expect, are often concerned with efficiency rather than equity. Those provisions that do have strong equity goals – which include small business and promotion of businesses owned by historically disadvantaged individuals – should receive less attention: economics provide tools for the analysis of efficiency. However, the paper also notes that efficiency and equity are often mutually reinforcing. The paper then proceeds to note that in most cases the focus will be on producer (or seller) surplus in these markets, which would require an analysis similar to the conventional competition analysis (but with an explicit focus on the seller).

While the analysis of many of the public interest issues is, in principle, no different from that of conventional competition issues, it is also far more complicated. This is because the various provisions conflict in terms of whether they require static or dynamic analysis. Economics is much better able to provide static predictions than dynamic ones, which also suggests why courts have often avoided considering too many dynamic questions. While many have called for competition policy to become more concerned with dynamic analysis, institutional limits and the limits of academic research suggest that adopting a dynamic standard would create legal uncertainty.

The choice between static and dynamic analysis essentially splits public interest provisions in South African competition policy into two parts: protection of jobs (static) and other public interest provisions (dynamic or static). A focus on dynamism may well undermine the use of the ‘job protection’ defence.