INTRODUCTION

“If I am not for myself, then who is for me?
And if I am not for others, then who am I?
And if not now, when?

Hillel, in one of his most famous quotes\(^1\), succinctly captures, although indirectly, the inherent friction that exists between competition, as a law and policy instrument that is largely driven by private interests which are based on economic efficiency as the ultimate objective, and the public interest, which is motivated by political and socio-economic considerations that can be deemed as being driven by ‘altruistic’ communal motives. Of course, both and public interest, although approaching this goal from different vantage points, ultimately seek to improve and maximise consumer welfare.

The South African Competition Act no 89 of 1998 (the “Act”), like many of its counterparts in the developing world, incorporates traditional competition law principles with public interest considerations. The concept of public interest is woven into and features prominently in various parts of the Act. For example, the preamble of the Act recognises the injustices of the South African political history and in this regard the Act states that its objectives include, \textit{inter alia}, 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. Further, the Act aims to promote and maintain competition in the Republic in order to, \textit{inter alia}, promote employment and advance the social and economic welfare of South Africans; to enable small and medium sized enterprises to participate in the economy; and to promote a wider ownership spread, particularly in relation to historically disadvantaged persons.

It is common cause that the South African competition authorities (the “Authorities”) are required to take into account public interest factors during the assessment of mergers and acquisitions. The consideration of the public interest is also incorporated into the assessment of exemption applications as one of the grounds for exempting otherwise anticompetitive conduct from the provisions of the Act. This is specifically confined to a situation where anticompetitive conduct promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive. However, the extent to which the authorities must take into account public interest factors during the assessment of prohibited conduct (restrictive vertical, horizontal and abuse of dominance practices), if at all, is less than clear.

Against this background, the predicament we find ourselves in is that the South African competition authorities have developed sizeable jurisprudence on the balance between public interest and orthodox economic tests only in relation to merger control. Given the Act’s silence on the incorporation of the public interest in assessing prohibited conduct, there is very limited jurisprudential guidance (and virtually no policy guidance) regarding the consideration of same in such proceedings.

This paper briefly evaluates the meaning of public interest and its interplay with competition policy and law (which is largely premised on traditional economic principles such as economic efficiency) and reviews the political and economic context which resulted in the incorporation of public interest factors in the South African legislation. The paper also briefly looks at the incorporation of public interest considerations in the competition legislation of a number of other jurisdictions. Further, the paper briefly provides examples of South African abuse of dominance cases where the public interest was (directly and indirectly) taken into account in evaluating prohibited conduct. The paper concludes by drawing lessons learnt to date and makes policy recommendations in respect of the consideration of the public interest in prohibited conduct proceedings.

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\(^1\) Hillel, Me, Myself and I: Ethics of the Fathers 1:14.
THE THEORY OF PUBLIC INTEREST AND ITS INTERFACE WITH COMPETITION LAW AND POLICY

Economic and legal literature reveals that the concept of public interest is ambiguous and its definition varies depending on the intended application. What is clear, however, is that the public interest is informed by political and socio-economic imperatives. Leslie (2012) states that the definitions of public interest abound and such may reflect one's political viewpoints and pure economic considerations such as access to affordable, quality goods and services, for example².

Posner (1974) describes public interest as one of the theories of economic regulation, which holds that regulation is supplied in response to the demand by the public for the correction of inefficient or inequitable market practices.³ The author traces the roots of the public interest theory to the assumptions that, first, economic markets are likely to operate inefficiently or inequitably if left unregulated and, second, government regulation is costless. As such, historically there was a general view that government intervention⁴ is merely a response by government to demands by the public for the rectification of inefficiencies and inequities in the operation of the free market. In this regard, Posner (1974) states that "Behind each scheme of regulation could be discerned a market imperfection, the existence of which supplied a complete justification for some regulation assumed to operate effectively and without cost."

Posner (1974), however, argues that economic literature has shown that there is no positive correlation between regulation and the presence of external economies or diseconomies of scale or with monopolistic market structures. Further, Posner (1974) avers that economic literature has proven the existence of government failure (government failure occurs when government intervention results in a more inefficient allocation of goods and resources than would otherwise be the case without that intervention).⁵ As such, the author concludes by refuting these assumptions, that form the foundation and basis for the theory of public interest, as untenable.

Miller (1990), on the other hand, describes public interest as the sum of private interests and argues that both efficiency and equity can co-exist in economic thought as regards the public interest.⁶ In this regard, the author states that efficiency should be considered in its systemic and individualistic sense. Systemically, Miller (1990) argues that efficiency cannot be separated from socially provided foundations and connections, the social and economic underpinnings and framework of a society that gear it to work for its members. In this regard, Crompton (2002)⁷ argues that economic activity relating to health and safety, the environment, labour, food and drugs, transportation (particularly, airlines, rail, trucking etc), securities, insurance, healthcare and investment are regulated with reference to public interest considerations. Both authors essentially argue that socio-political and economic considerations, which often underpin the determination of the relevant public interest factors to be considered, cannot be separated from pure economic considerations.

Padberg and Westgren (1979) extend this economic view of the public interest by stating that product evolution, observed in the integrity in communication, sensitivity to collective as well as

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⁴ Whether through subsidies, trade union protection, public utility and common carrier regulation, public power and reclamation programmes, occupational licensing, minimum wage, tariffs, etc.
⁷ Asia-Pacific Economic Cooperation (“APEC”) and Organisation for Economic Co-operation and Development (“OECD”), Striking the right balance between competition and regulation: The key is learning from our mistakes, APEC-OECD Co-operative Initiative on Regulatory Reform: Third Workshop, Jeju Island, Korea, 16 – 17 October 2002.
individual values, waste, conservation, and product safety constitute the public interest. The authors argue that product evolution is an integral part of a society with highly developed scientific capability and therefore policy makers (as custodians of the public interest) should focus on improving its balance of social and individual effects given that unregulated product evolution appears sensitive only to individual values.8

Lewis (2012) characterises competition law as public interest law. Lewis states that competition law could arguably be viewed as public interest law using both political and/or economic arguments. This viewpoint is not new in economic literature. One of the earlier analyses of the origins of competition law was conducted by Bork (1966)9 in which the author argued that the Congressional Record shows that the legislative intent for the passing of the Sherman Act was premised on consumer protection. Essentially, Bork’s (1966) findings intimated and concurred with the oft held view that the origins of competition policy and law were primarily based on public interest i.e. to protect consumers. However, DiLorenzo (1985) and Boudreaux and DiLorenzo (1993) argue that the origins of competition policy and law are not only limited to public interest but also incorporate private interests.10 This view has also been espoused by the United States Supreme Court (“Supreme Court”) which stated 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.”11

Implicit in this recognition of the public importance of competition policy and law by the Supreme Court above is also what appears to be an acknowledgement that economic efficiency, arising from vigorous competition, is in the public interest. Posner (2001) also argues that economic efficiency is the sole goal of competition law. Leslie (2012) also appears to regard the competitive outcomes such as reducing prices of goods and services, increasing quality and innovation and the resulting improvements in consumer welfare as being in the public interest.

Posner (1969), in his study of the role of the Federal Trade Commission (“FTC”) in promoting the public interest, found that the FTC was significantly lacking. In his assessment, Posner (1969) employed a model of competition law pork barrel in which he emphasised that each member of the United States Congress (“Congress”) is obligated to protect and advance the interests of the citizens of the jurisdiction each represents. The model of competition law pork barrel is based on a standardised characterisation of how a geographically based representative democratic system operates in practice.13 As a result, because the power to control the FTC is unevenly distributed among members of Congress, there’s a real chance that some of the more powerful members of the Congressional subcommittees may exercise a great deal of power that may serve the interests of their jurisdictions, which interests may be unimportant from a national standpoint. Posner (1969) concluded that FTC investigations are seldom in the public interest and are instituted “at the behest of corporations, trade associations and trade unions whose motivation

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13 To describe this system, Faith et al (1982) state that “In effect, a geographically based system confronts the legislator with a high payoff from representing local interests in the national legislature by trading votes with other legislators to finance numerous local benefits at the expense of taxpayer-consumers in general and with a correspondingly low payoff from voting in terms of cost-benefit analysis, economic efficiency, or the "national interest."

is at best to shift the costs of their private litigation to the taxpayer and at worse to harass competitors.\(^1^4\).

Faith et al (1982)\(^1^5\), building on the work of Posner (1969), assess the case-bringing activity of the FTC with the aim of determining whether there is any bias in the results of the competition law pork barrel process, in favour of firms that operate in the jurisdictions of members of Congressional committees that have important budgetary and oversight powers with respect to the FTC. In this regard, the authors examined the FTC’s case-bringing activity in the period 1961 to 1979, split into two relevant periods. The first period, 1961 to 1969 was based on the time period assessed by Posner (1969) which served as the basis for his findings. The second period, 1970 to 1979, represented a period in which it was claimed that the FTC underwent a series of reforms that improved its record for the promotion of the public interest\(^1^6\). Faith et al find in the affirmative that Congressional committee members who have important oversight and budgetary powers with respect to the FTC can deflect its decisions in favour of firms in their jurisdictions, thus supporting Posner’s (1969) findings. Further, the authors find that the pork barrel relationship between Congress and the FTC became stronger in the second ‘reform’ period, leading the authors to conclude that the FTC was not acting in the public interest even during this secondary period. We return to the implications of or the lessons that can be drawn from the above later on in the paper.

Smith and Swan (2014), citing the judgements of the European Court of Justice (“ECJ”), note that the ECJ has previously indicated that other public interest objectives might affect the consideration of a pure competition test\(^1^7\).

UNCTAD (2011) takes a slightly different approach and views competition policy, altogether, as part of a suite of economic development policies available to countries, particularly developing countries. Argument is made that prohibited conduct has an impact on the economic development and growth of economies given that such behaviour restricts competition and deteriorates consumer welfare through creating or enhancing barriers to entry, higher prices, all of which lead to efficiency and innovation concerns.\(^1^8\) Implicit in this view is a recognition that competition laws in these countries are likely to capture other developmental policy objectives which are generally viewed as of public interest in nature.\(^1^9\) UNCTAD (2008), however, cautions that economic efficiency concerns must be weighed against public interest concerns in the best way possible given 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.’\(^2^0\).

Given the varied views above in respect of public interest, the question that still remains is how public interest can be incorporated and measured within the context of competition law, particularly in respect of prohibited conduct. This is because the effects of prohibited conduct are generally felt over the long-term and the impact of such conduct on employment, for example, may not be easily divorced from changes in market circumstances such that they could be easily ascribed to the conduct assessed.

\(^1^7\) See, for example, Wouter, J C J Wouters, J W Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, Judgment 19 February 2002, Case C-309/99.
\(^1^9\) UNCTAD, The importance of coherence between competition policies and government policies, note by the UNCTAD secretariat presented at the Eleventh session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, on 19 – 21 July 2011.
\(^2^0\) Ibid
We turn to the South African experience in respect of public interest in competition law.

PUBLIC INTEREST IN THE SOUTH AFRICAN CONTEXT

South Africa’s political history and economic background had a significant bearing on the crafting of the current competition policy regime. The Act was drafted during a sensitive and impassioned time in South Africa. It was drafted shortly after the African National Congress (the “ANC”) was elected into government during South Africa’s first democratic elections. During this time, the ANC-led government was faced with the mammoth task of reshaping the South African economy into one that would be accepted by the international community. Further, there was the incalculable task of including the black majority into the formal economy after centuries of marginalization due to repressive laws. In confronting the above mentioned issues and in attempting to change the face of apartheid South Africa, many policy instruments were drafted with the aim of restoring a society deeply divided along racial and economic lines.

Competition policy and law had to work in unison with other industrial policy instruments to achieve the objectives outlined above. In this regard, it was necessary that the Act be crafted in a manner that allowed it to perform the traditional functions of promoting and maintaining competition while making provision for the special needs of a developing state. It was apparent that in dealing with the legacy of the economic distortions of the past, a unique approach to competition law and policy was necessary in South Africa. The plan was not only to adopt a law that followed international norms and practices, but also one that would curb the continued domination of the economy by a minority, within the white minority population group, and to promote greater efficiency in the private sector.

Other than the economic and political climate of the time, the then-current law was already ripe for overhaul and review. A study conducted revealed that the competition law of 1979 was deficient, lacking adequate powers and proper political context. It did not deal with vertical or conglomerate combinations or ownership concentration, and it lacked both pre-merger notification and meaningful post-merger power of control. Its prohibitions against anti-competitive conduct were also weak.

Balancing equity interests against traditional competition law principles was most likely not an easy feat due to the many divergent interests and views that were involved such as those of big business and the trade unions representing organized labour. Each of these interest groups needed the assurance that their concerns would be sufficiently addressed in the impending legislation. Big business argued that there is an obvious tension between the objectives of traditional competition law principles and public interest considerations. It was argued that public interest considerations should be excluded from the Act on the grounds that they are politically loaded and arbitrary. On the other hand, those speaking for organized labour were alive to the

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22 Proposed Guidelines for Competition Policy - A framework for Competition, Competitiveness and Development, Department of Trade and Industry, Pretoria (1997), paras 1.2.3, 1.3.3.1, 1.4.2 and 1.4.3, pp 4-5. See also paras 2.2.7 and 2.4.4, pp 7-8.
23 Ibid, para 1.4.4, pp 5.
possibility of mergers and take-overs resulting in job losses in the name of efficiencies and the idea of legislation that could curb this was attractive28.

Despite arguments against an Act that would try to balance two seemingly irreconcilable interests, the Government (through the Department of Trade and Industry) was convinced that traditional competition law objectives and the needs of a developing state were not at war and with a proper aligning of policy, the two actually complement each other29. It was believed that competition policy could successfully control private enterprise in the public interest30. Such sentiments are illustrated by the following phrase extracted from the Proposed Guidelines:

‘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 injustices31.’

After much interaction between business, labour, the Government and others, today32, the Act incorporates features which reflect the unique challenges facing South Africa’s economic development. It permits and, in certain cases, requires consideration of equity issues such as empowerment, employment and the impact on small and medium enterprises33. Consequently, competition law performs a dual role in South Africa – in addition to stimulating competition and achieving market efficiency, it also aims to be an instrument of economic transformation and address the historical economic structure and encourage broad-based economic growth34.

So in the context of South Africa35, what exactly is meant by public interest factors and how did these factors finally find expression in the Act? One need only look to the preamble and other parts of the Act in which themes of equity and justice run like a common golden thread. For example, the preamble refers to the political background and motivations for the Act, including policies of equity, distribution and efficiency36. It also 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. Elsewhere in the preamble, it is stated that a competitive environment which balances the interests of all stakeholders and is focused on development will benefit all South Africans37.

Small and medium-sized enterprise development as well black economic empowerment received special attention in the Act because of the previous structure of the South African economy. The high levels of concentration that existed in many industries were considered to be barriers to entry especially for smaller enterprises38. Further, promoting a broader spread of ownership, especially among historically disadvantaged persons, reflected concerns about the skewed distribution of

28 Ibid, pp 37.
32 Lewis, D, (2012), Thieves at the dinner table: Enforcing the Competition Act: A Personal Account, Jacarana Media, Johannesburg, South Africa, pp 34.
33 Hartzenberg T, Competition Policy review, TRALAC at pg 9.
37 Ibid
income and wealth in South Africa. A more even spread of ownership was deemed to be important to ensure longer-term balanced and sustainable development.\(^{39}\)

As discussed above, the provisions dealing with merger control provide a closed list of public interest factors to be considered when evaluating proposed mergers.\(^{40}\) Other than the orthodox substantial lessening of competition test, the Competition Authorities must be mindful of the following:\(^{41}\)

- The effect that the merger will have on a particular industrial sector or region;
- Effect on employment;
- The ability of small businesses, or those controlled by historically disadvantaged persons, to become competitive; and
- The ability of local industries to compete internationally.\(^{42}\)

Although the authorities are recognised, and legislatively provided for, as independent institutions, the political involvement in the appointment of key members of the executive of the Commission and the Tribunal\(^{43}\) allows scope for a closer appreciation of the broader government policy imperatives in so far as it would be expected that there has to be ‘a meeting of the minds’ between government and the authorities at a policy level. This, in a way, can be likened to the competition law pork barrel model referred to above. Certainly from a merger perspective, the active involvement of government in the authorities’ proceedings is provided for and this further enhances the scope for the public interest to be incorporated in such proceedings.\(^{44}\) This, however, is not the case in respect of matters relating to prohibited conduct. As such, it thus makes sense that the authorities have sought other means through which they incorporate the public interest in their enforcement activity.

Continuous policy development in South Africa in subsequent years has seen the public interest continue to be a prominent actor. For example, public interest factors have found expression through the Competition Commission’s (“Commission”) approach to sector prioritization. A few years ago, a policy decision was adopted to prioritize certain sectors of the economy such as food and agro-processing in order to ensure maximum impact to the benefit of the consumer. According to this prioritization framework, the Commission directs resources towards particular cases and complaints based on three criteria: 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.\(^{45}\)

We now turn to one of the earlier cases in which the Competition Tribunal (“Tribunal”) incorporated public interest considerations, albeit indirectly, into its assessment of prohibited conduct.

It is interesting to note that in South Africa, the consideration of the public interest in prohibited conduct matters, although indirect, has largely been within the scope of allegations of abuse of dominance involving previously state owned enterprises. For the sake of brevity, we focus on the Sasol Oil Proprietary Limited vs Nationwide Poles CC case. We briefly summarise the views of the Tribunal in respect of the remainder of the abuse of dominance cases that have indirectly dealt with the public interest.

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\(^{39}\) Hartzenberg, T, *Competition Policy review*, TRALAC Trade Law Centre, pp 12.

\(^{40}\) As previously indicated, the concept of public interest is partially carried through to the prohibited practices provisions of the Act as well in so far as it relates to the exemption of otherwise anticompetitive conduct.

\(^{41}\) Competition Act no 89 of 1998, section 12A (3) (a-d).

\(^{42}\) Ibid.

\(^{43}\) Competition Act no 89 of 1998, Chapter 4, Part A, sections 20, 22 and 23; and Part B, section 26.

\(^{44}\) Competition Act no 89 of 1998, Chapter 3, sections 18.


\(^{46}\) Sasol Oil Proprietary Limited vs Nationwide Poles CC, case no: 49/CAC/Apr05.
The case was brought by Nationwide Poles CC ("Nationwide") against Sasol Oil Limited ("Sasol"). Nationwide was a small producer of treated wooden poles in the Eastern Cape. Nationwide obtained wooden poles from sawmills and treated these poles with a preservative or a wax-additive called creosote. Nationwide’s major customers were vineyards in the adjacent Western Cape Province. Sasol, using the tar by-product from its synthetic fuel production process, produced a range of products; including creosote. The owner of Nationwide, Mr Foot, initially lodged a complaint of collusion and price discrimination with the Commission. The Commission found insufficient evidence of a contravention and issued a notice of non-referral, Mr Foot then approached the Tribunal directly and self-referred the matter.

Nationwide alleged that Sasol charged it a higher price than its most important competitor in the downstream production of treated wooden poles. It was not disputed that Sasol’s price schedule did allow for discounts based on historical volumes purchased. The larger creosote customers received the most preferred prices and this resulted in a 3 – 4% cost differential, which the respondent argued was not substantial. Nationwide alleged that Sasol’s pricing policy with respect to creosote amounted to prohibited price discrimination in contravention of Section 9 of the Act.

In evaluating the alleged conduct, the Tribunal found that Sasol was indeed dominant in the market for the provision of creosote. The Tribunal further held that Sasol, in setting the price of its creosote, behaved to an appreciable extent independently of its competitors, customers or suppliers.

In its assessment, the Tribunal noted that the price discrimination provisions of the Act had been intentionally afforded a separate place in the Act, apart from section 8 which generally deals with the abuse of dominance. The Tribunal put forward that the different treatment of price discrimination and its prohibition reflects 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. It was stated that in the absence of a level playing field or in the presence of price discrimination, small and medium sized enterprises may find it difficult to enter new markets and even more difficult to thrive, to compete effectively on the merits. The Tribunal found that the legislators concern with the development of small business is reflected through one of the stated purposes of the Act being to ensure the equitable treatment of small and medium-sized enterprises. The Tribunal also referred to the explanatory memorandum to the Act which set out the intention of the legislature as being, inter alia, to support small and medium sized enterprises through the instruments and principles of the Act.

Giving reference to the preamble and purposes of the Act into an assessment of price discrimination, the Tribunal argued that 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 given 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.

Sasol then lodged an appeal against the decision of the Tribunal. Sasol concentrated its argument on the manner in which the Tribunal sought to interpret section 9(1) of the Act. Sasol argued that the Tribunal had erred in finding that the appellant’s volume based discount pricing was likely to substantially prevent or lessen competition. Sasol argued that the Tribunal should have found that there was no such likelihood. Ultimately, the Competition Appeal Court ("CAC") found in favour of Sasol on the grounds that Nationwide had not presented sufficient evidence that Sasol’s conduct was likely to substantially prevent or lessen competition in the relevant market. The CAC averred
that while Nationwide had established harm to its business, it had failed to demonstrate market-wide impact or harm due to Sasol' behaviour.

In respect of the public interest approach adopted by the Tribunal, the CAC seemed to acknowledge that the protection of SME’s is indeed an integral part of the Act. In support of this the CAC quoted the remarks of the chair of the Korean Competition Advisory Board, Kyu-UcK Lee: ‘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’. However, the CAC found that there was no basis for the Tribunal to extend the objective of protecting SME’s, as it appears in the preamble and objectives of the Act, into the inclusion and construction of Section 9.

Other abuse of dominance cases that are instructive relate to State Owned Entreprises (“SOEs”) and previous SOEs such as Telkom, South African Airways, Sasol and ArcelorMittal (the old Iscor) which have all been found to have harmed consumers and competition in South Africa. This, notwithstanding that they are all (or were at some point) important to the industrial development plan of South Africa and, accordingly, granted state support.

The Tribunal, in the excessive pricing case involving ArcelorMittal, considered the role of state support on the competitive landscape in the steel market in South Africa and tied this (in conjunction with ArcelorMittal’s pricing conduct) to the impact on downstream manufacturing markets. In this regard, the Tribunal indicated that when a firm has been the recipient of state support, the state is "entitled to take an active interest" in the pricing behaviour of such firms, that "the risks for competition are substantially different" for such firms and that, where relevant, these firms have an obligation to price their products in a manner that supports the consumers of the intermediate products that they produce. In this regard, the Tribunal appeared to consider that it would be in the public interest that the pricing behaviour of recipients of state support be aligned to the national developmental imperatives. Further, the tribunal appeared to consider that state support raises barriers to entry and that the provision of state support contributed to making the steel market, in the ArcelorMittal case, incontestable.

Recently, the tribunal reaffirmed this approach in the excessive pricing case against Sasol Chemical Industries (“Sasol”). Notwithstanding the fact that Sasol has been privatised for many years, the tribunal considered and placed emphasis on the state support historically afforded to Sasol in its measurement of the reasonableness of the difference between the price charged and the economic value of purified propylene and polypropylene. In this regard, the nature of the state support received by Sasol included legislative and regulatory interventions which were aimed at ensuring the sustainability and profitability of Sasol. The tribunal found that Sasol’s dominance was attained and sustained as a consequence of such state support and not as a result of risk taking and innovation and that this conferred on Sasol a cost advantage that made it one of the lowest cost producers of feedstock propylene in the world, which ultimately made Sasol a low-cost producer of purified propylene and polypropylene. Notwithstanding Sasol’s argument that the state support, in monetary terms, had been repaid to the state, the tribunal was of the view that, due to the considerable and prolonged nature of the state support received, such state support could not only be expressed in monetary terms given that it has had the effect of creating Sasol’s dominance which has endured into the current markets considered in the case.

47 Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another, case no: 70/CAC/APR07.
The above illustrates that although not specifically set out in the provisions relating to prohibited conduct, the South African competition authorities are already incorporating public interest considerations, albeit indirectly, in their assessment of abuse of dominance matters.

In addition, it also highlights the interplay between competition policy and industrial development policy objectives in the development of the South African abuse of dominance jurisprudence. Specifically, the above raises the question of whether industrial development policy objectives can be incorporated into and achieved through competition policy. It is well accepted that industrial development, effected through various initiatives and strategies, plays a crucial part in the development of an economy. In this regard, the objectives for industrial development may include, *inter alia*, encouraging economic activity in a particular region, providing access to products or services that the market would not ordinarily provide or countering decline(s) in designated industries. In South Africa, the use of state support has been an important tool of the government industrial policy programme, specifically aimed at giving support to firms in designated industries. The impact of such state support, from a competition perspective, is that it selectively confers advantages (cost or otherwise) to certain firms or industries. It is thus arguable that this may result in the beneficiary firms or industries not being altogether disciplined by normal competitive forces.

Further, the above raises a key policy question insofar as it relates to whether competition authorities can and should directly engage in price regulation. In this regard, the observations of the Tribunal in respect of the expected pricing conduct by these firms seems to indicate that there is an expectation that such firms ought to price in a manner that is conscious of the country’s economic development imperatives. As such, the judgements by the Tribunal refer to the concept of ‘developmental pricing’, although no guidance is provided as to what such pricing entails. The foray into ‘price regulation’, albeit indirect, by the authorities in respect of these entities also raises the question of the role of such entities (i.e. whether these entities, even though now privatised, are still viewed as public utilities who are ordinarily subjected to regulation) in the South African economy. We do not deal with these questions in this paper but rather raise these as areas of further research.

Furthermore, the incorporation of public interest considerations in the assessment of prohibited conduct may present challenges in relation to compliance by firms and the monitoring of same by competition authorities. The incorporation of public interest in the assessment of prohibited conduct may conflate rational behaviour by firms, in response to changes in market circumstances, and harm to the public interest, e.g. negative effect on employment, that could be arise as a result of the conduct assessed. This is likely to make compliance difficult for firms. Further, as stated earlier, the effects of any exclusionary or exploitative conduct are generally felt in the long-run, it may prove challenging for competition authorities to accurately monitor compliance by firms and separate harm to competition and rational firm behaviour.

There are other ways in which the public interest has been incorporated in the enforcement activities of the competition authorities. As discussed above, the work of the Commission has shown that the public interest can also be served through the prioritization of those sectors of the economy that may have a greater socio-economic impact. This has partly been seen in the Commission’s selection of priority sectors, which are largely based on the industrial policy imperatives of government. These industries may largely be labour-intensive and may thus promote employment or be sector that may have a large social impact. Four sectors were identified: food and agro-processing; construction and infrastructure products; intermediate industrial products; and banking. Further, the Commission determined to focus its enforcement efforts towards prosecuting cartel activity in the identified priority sectors. In this way, the Commission has implicitly introduced public interest considerations into its non-merger enforcement activities. A review of the prioritization policies of other competition authorities by UNCTAD shows that the South African authority is not unique in this respect.
This approach does, however, bring with it complications in so far as it requires that the competition authorities must balance broader policy objectives when assessing the matters brought before it, thus inadvertently extending its mandate to attending to several ills in the South African economy through competition policy. In many occasions, the said ills could perhaps be best dealt with through direct sector regulation or industrial-policy measures.

In the next section, we consider the public interest provisions of more established jurisdictions such as the United Kingdom. We also consider the public interest provisions of other comparable jurisdictions such as Zambia and Namibia.

**PUBLIC INTEREST IN OTHER JURISDICTIONS**

Smith and Swan (2014), in their assessment of the public interest provisions in various jurisdictions, note that while public interest factors are considered and provided for in many jurisdictions, particularly in Africa, there are a variety of different formulations, and the scope given to the ‘public interest’ varies substantially. A brief summation of their findings, interspersed with our findings, is set out below.

Historically, the United Kingdom (“UK”) competition authorities had a ‘public interest’ test from 1948 to 1998 which included a number of varying factors such as the protection of employment and exports, which, according to Scott (2009) allowed ‘fairly unconstrained political discretion’. Hay (1997) states that the then Fair Trade Act gave discretion to the UK competition authorities to decide on what they would take into consideration in determining the public interest, which essentially broadened the scope of such considerations beyond the promotion of competition. Scott (2009) states that as of 2002, the only stipulated public interest consideration in the UK related to the protection of national security.

In Spain, Spanish competition act recognizes that any prohibited conduct that is to the detriment of free competition is regarded as being against the public interest. In this instance, the Spanish competition authorities view traditional economic principles in competition law and the expected competitive outcomes as representing the public interest. UNCTAD (2002) provides a survey of the objectives of competition policy in various jurisdictions and notes that in the European Union priority is given to economic or market integration.

Smith and Swan (2014) note that the United States competition regime has conferred competition law immunity on small businesses in some instances. Citing Posner (2001), the authors note that there appears to be no public interest provisions in the Sherman Act or the Clayton Act, with the exception that the Small Business Act, which ‘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.’ It is also interesting to note that although the United States competition regime does not generally review exploitative pricing, it is only permissible under those circumstances, according to


Dolmans (2005), where there is a clear public interest in lowering consumer prices and there is no other remedy or an expectation of new entry.55

According to Oxenham (2012), Botswana, Malawi, Namibia, Swaziland and Zambia are some of the jurisdictions in Africa that include some form of public interest consideration as part of their competition regulation.56 However, the provisions in respect of public interest in these jurisdictions are mainly associated with the assessment of merger activity and do not extend to prohibited conduct or exemptions. This is akin to the position in South Africa. It is noteworthy, however, that in Botswana, while public interest is also cited as a potential basis for interim relief in the context of investigations into potential abuses of dominance or anti-competitive agreements, no specific factors are mentioned.57

In Zambia, Smith and Swan (2014) note that the scope of potential factors for consideration is essentially unlimited, including not only employment, exports, and international competitiveness, but also ‘socioeconomic factors as may be appropriate; and any other factor that bears upon the public interest.’ In this regard, the authors note that ‘the public interest’ is also cited as a potential basis for interim measures in merger control, prohibited agreements and abuse of dominance investigations, although no specific factors are mentioned.58 Similarly, in Kenya, public interest factors, including maintaining or promoting exports, ‘promoting stability’, or even ‘obtaining a benefit for the public’, can be used to justify an exemption for otherwise anti-competitive agreements, according to Smith and Swan (2014). Further, Smith and Swan (2014) note that while public interest factors can also be cited as a potential basis for interim relief in the context of investigations into restrictive agreements and restrictive trade practices involving trade associations, no specific factors are mentioned59.

Smith and Swan (2014) note that in Malawi, public interest factors are considered in respect of the evaluation of potential abuses of dominance or anti-competitive agreements, except for certain hard-core price fixing and unilateral conduct.60 In Gambia, the authors note that public interest factors only have a limited role as a list of potentially offsetting factors in the event that an anti-competitive agreement, abuse, or merger has been found. The only factor that would not fall within a standard competition assessment is ‘enhancing the effectiveness of the Government’s programme for the development of the economy of the Gambia’61.

It appears that the Chinese competition authorities also consider public interest in the assessment of prohibited conduct in so far as it impacts on case selection and/or priority sectors. In this regard, Wang et al (2012) note that many of the prohibited conduct investigations by the National Development and Reform Commission, including cartel investigations, appear to focus on products in which there is a substantial public interest, such as salt, foods, telecoms, and inputs for popular medicines.62

The above confirm our earlier observations as regards the varied nature and form that public interest takes as influenced by the socio-economic and political considerations in each jurisdiction. Second, it would appear that in most jurisdictions, as in South Africa, the consideration of public

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57 Botswana Competition Act (2009), section 46.
58 Competition and Consumer Protection Act (No. 24 of 2010), section 62 (B).
60 Malawi Competition and Fair Trading Act, section 44. The authors note that outright prohibitions are captured under sections 33(3), 41(1) and 43(1).
61 Competition Act, 2007, section 35(3), and specifically section 35(4)(d) and section 52(3)(b).
interest is largely associated with the evaluation of merger activity and not explicitly related to the assessment of prohibited conduct.

**LESSONS LEARNT**

It is clear that the concept of public interest takes on varied formulations depending on the socio-economic and political imperatives of an economy. As a result, there tends to be a natural friction between the consideration of public interest and the economic, efficiency-driven principles that underlie competition policy and law. Practically, in most jurisdictions, including in south Africa, public interest factors are typically incorporated in the merger control provisions, although these factors can occasionally be taken into account when evaluating exemptions and/or prohibited conduct.

It can be argued that in developing economies, there is a role for public interest factors in the application of competition policy (both from a merger and enforcement perspective). However, given the varied and broad nature of public interest considerations, Smith and Swan (2014) caution that there need to be sufficient safeguards against the abuse of these provisions and that public interest should be considered only exceptionally, and should be seen within the context of the primary competitive assessment.

The South African experience has shown that the competition authorities are already incorporating the public interest, albeit indirectly, in their assessment of prohibited conduct. This has largely been in the context of the competitive impact of the government’s use state support (as part of its industrial development programme) in certain strategic industries. In this regard, the judgements by the Tribunal refer to the concept of ‘developmental pricing’ and appear to indicate that there is an expectation that firms that are recipients of state support ought to price in a manner that is conscious of the country’s economic development imperatives. This raises the question of whether industrial development policy objectives can be incorporated into and achieved through competition policy. Further, the foray into ‘price regulation’, albeit indirect, by the authorities in respect of these entities also raises the question of the role of such entities (i.e. whether these entities, even though now privatised, are still viewed as public utilities who are ordinarily subjected to regulation) in the South African economy. Furthermore, the incorporation of public interest considerations in the assessment of prohibited conduct may present challenges in relation to compliance by firms and the monitoring of same by competition authorities.

The South African experience also shows that the incorporation of the public interest can also be served through case selection and the prioritization of those sectors of the economy that may have a greater socio-economic impact.
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