BALANCING CONSUMER WELFARE AND PUBLIC INTEREST IN COMPETITION LAW

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ABSTRACT

When competition law is used to promote public interest, certain restrictive conduct may be immunized, while some pro-competitive behavior suppressed. This paper discusses the risks to market competition, institutions and consumer welfare of accommodating public interest concerns in competition enforcement. Promoting public interest may paradoxically lead to lower social welfare as market competition is weakened and incentives are distorted. A case is made to ring fence competition regime from public interest regime; to limit public interest considerations to the highest societal objectives that could only be pursued outside the market system; and to intervene in behalf of public interest in a transparent and systematic process.

KEYWORDS: *public interest, competition law, economic efficiency, mergers*

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I. INTRODUCTION

The core objective of competition law is to protect and preserve competition as a means of enhancing consumer welfare and ensuring efficient allocation of resources. When competition law is used to promote "public interest", certain restrictive conduct may be immunized or pro-competitive behavior suppressed, as social and political objectives are allowed to override market concerns.

In a recent review of selected merger regimes, the Organisation for Economic Co-operation and Development (hereinafter "OECD") observed that while public interest considerations are commonplace in competition laws, developed economies tend to interpret "public interest" narrowly or apply the exemption infrequently. In contrast and as may be expected, developing economies are more inclined to place economic equity above market efficiency, and thus invoke public interest consideration more often.[1]

Yet several recent cross-border mergers in developed economies have attracted attention because anticompetitive deals were allowed to go through, while deals with benign competition issues were proscribed in the name of public interest. In 2015, the German Federal Cartel Office banned the merger of two supermarket giants, EDEKA and Kaiser's Tengelmann, on ground that it could result in domination of regional markets.[2] However, the Economic Minister later overturned this decision due to concerns on employment, job security and workers' rights.[3] In similar vein, the 2008 takeover of HBOS, the United Kingdom's (hereinafter "U.K.") largest mortgage lender, by Lloyds TBS, was sanctioned by the U.K. government, despite negative assessment by its competition authority, as the merger was considered necessary to maintain the country's financial stability.[4] On the other hand, without any finding of competition concern, the United States (hereinafter "U.S.") government blocked the planned merger among semiconductor companies, Singapore-based Broadcom Limited, California-based Broadcom Corporation and Broadcom Cayman L.P., which it claimed is a threat to national security.[5] The U.K. government also blocked the 2011 merger of News Corporation and BSkyB to maintain plurality in media,

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[1] *Public Interest Considerations in Merger Control* 5 (Organisation for Econ. Cooperation & Dev. [OECD], Paper No. DAF/COMP/WP3(2016)3, 2016).

[2] *Bundeskartellamt Prohibits Takeover of Kaiser's Tengelmann by EDEKA*, BUNDESKARTELLAMT (Apr. 1, 2015), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/01_04_2015_Edeka_Untersagung.html.

[3] *Düsseldorf Higher Regional Court Confirms Prohibition of EDEKA/Kaiser's Tengelmann Merger*, BUNDESKARTELLAMT (Aug. 24, 2017), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2017/25_08_2017_OLG_EDEKA_KT.html.

[4] Federico Mor, *Contested Mergers and Takeovers* 7 (House of Commons Libr., Paper No. 5374, 2018).

[5] WHITE HOUSE, PRESIDENTIAL ORDER REGARDING THE PROPOSED TAKEOVER OF QUALCOMM INCORPORATED BY BROADCOM LIMITED (Mar. 12, 2018).

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despite the assessment of the European Commission that the transaction would not harm market competition.[6] Citing "national interest", the Australian Treasurer disregarded the clearance given by the Australian Competition and Consumer Commission (hereinafter "ACCC") to the acquisition of GrainCorp Ltd by the U.S.-based Archer-Daniels-Midland Co.[7]

Interventions to competition enforcement on public interest grounds are not new, but the current wave of protectionism around the globe has given rise to concern that public interest might be used to legitimize a protectionist policy. While these are just handful of cases, they involve antitrust regimes whom developing economies look up to for guidance in practice and priorities. Thus, these few cases could become the norm of facilitating anticompetitive outcomes or suppressing competition, purportedly to promote social and political objectives. The anticipated impact on markets and economic efficiency of such happening are dire and long term.

To be clear, public interest concerns, particularly those affecting national security, public health, environment and macroeconomic stability, are no less important than market concerns, and deserve to have priority over competition objectives under certain circumstances. Nonetheless, without clear and reasonable parameters for intervention, competition may be weakened and perverse market incentives engendered. Over the long term, the harm to the public caused by undermining competition could outweigh the short-term gains from achieving public interest objectives. Worse, the created market distortions may be too difficult to reverse in the future.

This paper discusses the risks to market competition, institutions and consumer welfare of accommodating public interest concerns in competition enforcement. Promoting public interest may lead to lower social welfare when competition is suppressed to satisfy noncompetition objectives, and the anticompetitive effects of such action are not counterbalanced. The first-best solution is therefore to shield competition law from being used to achieve public interest objectives. This way, competition law enforcement could focus on its core objective of advancing consumer welfare. But if it were unavoidable and expedient to carve a space for public interest in competition law, then the parameters for intervention should be defined and transparent. The aim here is to identify these parameters that will cause least harm on consumers.

To achieve this goal, the next section describes the evolution of thinking on competition law, and the emergence of common understanding on its goal and methods. Indeed public interest presents an alternative paradigm that

[6] *News Corporation/BSkyB Merger*, GOV. UK (June 30, 2011), https://www.gov.uk/government/news/news-corporation-bskyb-merger.

[7] Neil Hume, *Australia Blocks ADM Takeover of GrainCorp*, FIN. TIMES (Nov. 29, 2013), https://www.ft.com/content/39868472-587f-11e3-9da6-00144feabdc0.

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muddles the increasing convergence of competition laws across jurisdictions and increasing reliance on economic analysis for enforcement. Section III discusses the rationale for integrating public interest in competition law and weighs the danger it poses to market competition. Section IV examines how some jurisdictions have substantively and structurally addressed the pitfalls of public interest inclusion. The final section brings out some pointers for developing economies to avoid achieving the opposite outcome that public interest intervention seeks, *i.e.*, to uplift social welfare.

II. COMPETITION GOALS AND PUBLIC INTEREST

Before the publication of the seminal work of Justices Robert Bork and Richard Posner, the U.S. judiciary grappled with the problem of defining the standard for adjudicating antitrust cases. Views diverged on the goals of an antitrust system. Some expected the system to protect small producers against larger, more efficient competitors; others understood its mission as one of preventing the concentration of industries. Bork asserted that the legislative intent of the Sherman Act is to promote consumer welfare.[8] n *Antitrust Paradox*, he lamented the inconsistency and incoherence in then application of antitrust law that restrained, rather than protected, market competition.[9] Posner , on the other hand, insisted on basing antitrust decisions on economic theory and evidence. He believed that antitrust, grounded on sound economics, could be redeemed—in contrast to the distrust in the system pervasive at that time.[10] The writings of Bork and Posner changed the paradigm of antitrust in profound ways.

Foremost, their work rejected populist notions on the function of competition law. Antitrust enforcement is not an instrument to disperse economic power, much less redistribute wealth. The view that concentration of economic resources in the hands of big business is a threat to democracy and individual freedom of choice favored such decisions as the breakup of Standard Oil in 1911[11] and Bell System in 1982.[12] It could also be gleaned on the suggestion by the Ordoliberal School for the (German) competition law to provide a standard of conduct that requires "economically powerful firms (to) act *as if* they were subject to competition—i.e., *as if* they did not have monopoly power."[13]

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[8] *See generally* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966).
[9] *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).
[10] *See generally* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (2d ed. 2001).
[11] *See generally* Standard Oil v. U.S., 221 U.S. 1 (1911).
[12] *See generally* U.S. v. AT & T Inc., 552 F. Supp. 131 (1982).
[13] DAVID J. GERBER, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42(1) AM. J. COMP. L. 25, 52 (1994).

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Nor should antitrust enforcement shield small firms from competition against their more efficient rivals at the expense of consumers and market efficiency. The aim of competition law is to "protect competition, not competitors." Yet what the Chicago School considered as "uncritical sentimentality" in favor of small competitor could be read into the decisions on *Brown Shoe Co. v. United States (1962)*,[14] *Copperweld Corp. v. Independence Tube Corp. (1984)*[15] and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993)*,[16] among others.

Moreover, their writings clarified that competition law is not designed to compel dominant firms to reduce their prices so as to protect consumers. Rather, the welfare of consumers is promoted not by putting unreasonable restraints on market behavior such as price control, but by allowing competition to function effectively.

Posner's appeal to use economic principles based on a consumer welfare maximization framework is a departure from traditional enforcement of competition law, which was anchored on political, legalistic notion of "competition". Because of the Posnerian approach, certain behavior previously considered to have unlikely procompetitive effects, hence *per se* illegal, are no longer condemned outright and instead subjected to rule of reason review.[17] Most agreements and conduct are therefore evaluated on a case-by-case basis for plausible procompetitive justification, which led to repudiation of some earlier decisions based on *per se* violation.[18] In the 1960s, for example, the U.S. Court ruled *per se* illegal a territorial restriction imposed by a manufacturer on a distributor in the *U.S. v. Arnold, Schwinn & Co*.[19] A decade later, the Court took an opposite view in the *Continental T.V., Inc. v. GTE Sylvania Inc.*,[20] after recognizing the efficiencies in product distribution that may be realized from the agreement. If indeed the legislative intent of the Sherman Act were to promote consumer welfare, it would be irresponsible to blindly dismiss a business practice as unlawful on its face

[14] *See generally* Brown Shoe Co., Inc. v. U.S., 370 U.S. 294 (1962).
[15] *See generally* Copperweld v. Indep. Tube, 467 U.S. 752 (1984).
[16] *See generally* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[17] This is not to suggest that per se scrutiny has been completely abandoned and replaced by rule of reason. Hard core cartel behavior (i.e., price fixing, output restraints, market allocation and boycotts) is still regarded per se illegal in many jurisdictions. But the treatment of per se illegality has changed. In the past, U.S. Courts would not accept any procompetitive justification by the defendant, nor consider it necessary to establish that anticompetitive effects have actually occurred, if the conduct falls under per se illegal category, as in the *Socony-Vacuum* case. This is not the case in the *FTC v. Indiana Federation of Dentists* where a procompetitive justification was accepted and halted the application of per se illegality to an alleged cartel agreement. *See* EINER ELHAUGE & DAMIEN GERADIN, GLOBAL COMPETITION LAW AND ECONOMICS 74-76 (2d ed. 2011).
[18] Developments in economic theory and new empirical evidence could also lead to decision reversals.
[19] *See generally* U. S. v. Arnold, Schwinn & Co., 237 F. Supp. 323 (1965).
[20] *See generally* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

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without considering the market efficiency justification of such practice.[21] The adjudicating body must identify and balance all procompetitive and anticompetitive effects of a conduct at issue.

The economic approach to antitrust enforcement has been embraced not only by the U.S. and European Commission (hereinafter "EC"), but also by developing countries whose antitrust laws were very much influenced by these two regimes. The OECD describes the convergence among antitrust regimes as follows:

> There is general consensus that the basic objective of competition law is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources . . . in free market economies. While countries differ somewhat in defining efficient market outcomes, there is general agreement that the concept is manifested by lower consumer prices, higher quality products and better product choice.[22]

But the adoption of a common framework has not resulted in uniform implementation of competition principles. This is because most competition regimes are still conditioned by the zeitgeist of their own competition law, as well as by social and political realities in the domestic front. Two opposing philosophies are driving antitrust enforcement in different directions. One perspective presumes that unencumbered markets are vulnerable to abuse of dominance and collusion among competing producers; thus vigorous enforcement is necessary to preserve competition. Another perspective holds that market competition is robust and could prevail upon any private attempt to suppress it; therefore, rigid enforcement is counterproductive as it could undermine rivalry, hinder innovation and thus harm consumers in the long term. Most regimes would strive for the middle ground, i.e., neither intransigent nor too lenient. However, the effects of and intent behind market behavior are rarely apparent and often difficult to discern. This could result in a finding of infringement when in fact the conduct is a legitimate response to competitive pressure (type 1 error), or a failure to foil an anticompetitive conduct as it is mistaken for an innocuous pursuit of efficiency (type 2 error). Both types of error could ruin competition.

Indeed, striking the right balance in enforcement is arduous and mature jurisdictions are not exempted from the challenge. One observes notable disagreements between the U.S. and EC on such issues as refusal to deal and reverse patent payments, for example, as well as flip-flopping of decisions

[21] The consumer-welfare standard could also permit monopolization of an industry on the basis of allocative and productive efficiency.

[22] OECD, *Interim Report on Convergence of Competition Policies*, at 8-9, OECD Doc. OECD/GD(94)64 (June 1994).

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on various forms of vertical restraints. The divergence in views and inconsistencies in decision is probably inevitable as the understanding of economic behavior and market processes continue to evolve. Boudreaux explained:

> Almost all of the original bases for antitrust intervention have been shattered by sound economics. Price-cutting is no longer an obvious means of monopolizing; bigness is no longer believed to be inevitable, inevitably harmful, or perpetual; and the myriad contracting arrangements devised by actual market participants are increasingly understood to enhance competition despite having been ignored by authors of textbooks. **The advances that have occurred in economic theorizing are generally abstruse demonstrations of theoretical *possibilities*.** Only when these theories have been supported by solid empirical findings should they serve as the basis for policy . . . . (emphases added)[23]

Against this perplexed environment in the backdrop, the meshing of public interest and competition objectives adds further complication, uncertainty and unpredictability in competition enforcement.

III. COMPETITION LAW AS PUBLIC INTEREST LAW

The doctrine of "public interest" is often invoked in public policy, even as there is no universally accepted view on its scope and application. In welfare economics literature, however, the "Public Interest Theory" defends intervention in market processes when market failure exists due to monopoly, information asymmetry, externalities and public goods. [24] Elsewhere, the term is amorphous, embracing anything "in which the public as a whole has a stake . . . that justifies governmental regulation."[25]

Public interest considerations are written into competition law either as supplement to core economic goal of protecting and preserving competition, or as basis for overturning decisions that are based solely on the impact of market conduct on efficiency and competition.

Most laws do not define "public interest" and leave the onus to the authority in deciding whether a particular situation or factor is in public

[23] Donald J. Boudreaux, *The Second Edition of Judge Posner's Antitrust Law: A Tempered Appreciation*, 3, THE ANTITRUST SOURCE (Mar. 2002), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/03_02.authcheckdam.pdf.

[24] The Chicago School espouses a counter theory that claims regulation exists to protect the interest of specific groups, not of the public.

[25] The Black's Law Dictionary defines "affected with public interest" as "anything that is of concern to the community or general". *Affected with a Public Interest*, LAW DICTIONARY, https://thelawdictionary.org/affected-with-a-public-interest/ (last visited Sept. 7, 2018).

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interest. The ambiguity is presumably designed to maintain policy flexibility, but it could also be a veil to throw off infringers who would guise their behavior as aligned with public interest in order to elude prosecution.

For example, the Norwegian competition law makes reference to "cases involving questions of principle or interests of major significance to society" which may be approved by the King in Council despite contravening the prohibitions set forth in the law.[26] The newly amended German competition law stipulates that the Federal Minister for Economic Affairs and Energy may "authorize" a conduct that is prohibited by the competition authority if "the restraint of competition is outweighed by advantages to the economy as a whole . . . or if . . . justified by an overriding public interest."[27] Correspondingly, the Australian Competition and Consumer Commission may grant statutory immunity for a merger that delivers net benefit to society. A host of economic, social and environmental factors could be counted as "public benefit", which is broadly defined as "anything of value to the community generally or any contribution to the aims pursued by society including . . . the achievement of the economic goals of efficiency and progress."[28]

Where provisions concerning public interest are specific, they could include any number of economic and non-economic considerations. The European Union Merger Regulation permits member states to "take appropriate measures to protect legitimate interests", which include, but are not confined to, "public security, plurality of the media and prudential rules". The U.K. Enterprise Act 2002 has, for now, defined public interest cases in terms of these three considerations,[29] but it also allows for othercases, apart from those specified in the law, if such "in the opinion of the Secretary of State, ought to be so specified".[30] The Spanish Competition Act, on the other hand, stipulates "a non-exhaustive list of specific criteria",[31] which could serve as basis for intervention of the Council of Ministers to advance "general interest other than protecting competition."[32] That list includes: defense and national security, public health, protection of movement of goods and services within the national territory, environmental protection, promotion of technological research and development, and maintenance of

[26] Act on Competition Between Undertakings and Control with Concentrations § 13 (Nor.).
[27] Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints on Competition], Aug. 26, 1998, BGBL. I at 2546, § 42 (Ger.).
[28] *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357, 42,677 (Austl.), *quoted* the interpretation of the Australian Competition Tribunal *in* Allan Fels AO, *The Public Benefit Test in the Trade Practices Act 1974*, Australian Competition & Consumer Comm'n 5 (2001), https://www.accc.gov.au/system/files/Fels_NCC_Workshop%5B1%5D.pdf.
[29] Enterprise Act 2002, c. 2, § 58 (Eng.).
[30] *Id.* § 42(3).
[31] *Competition Act 15/2007 of 3rd July Explanatory Statement*, Comisión Nacional de los Mercados y la Competencia 1, 3 (2007), https://www.cnmc.es/file/64176/download.
[32] Competition Act art. 10.4 (B.O.E. 2007, 159) (Spain).

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the objectives for sector regulation.[33] The South African competition law narrows down the basis for intervention in mergers to development-oriented goals, namely: employment; ability of small businesses or those owned by previously disadvantaged individuals to compete; international competitiveness of domestic firms; and impact on industrial sector or region.[34]

Public interest may also be reflected in explicit exemptions or alteration of competition standard afforded to certain entities or sector. In the U.S., for example, exemptions for certain transactions are granted to farmer and fisherman cooperatives,[35] sports leagues,[36] and professional review bodies,[37] among others. The Philippine Competition Commission may forbear from applying the statute to entities seeking exemption, provided that "forbearance is consistent with public interest."[38] The Thailand Competition Act, amended in 2017, exempts state-owned enterprises, public organizations, or other government agencies that conduct business related to maintaining national security or providing public utilities. Agricultural producers and rural economic organizations engaged in farm-related business activities are discharged from any liability under the China's Anti-monopoly Law.[39] In addition, Chinese law exempts producers selling in foreign market from entering into otherwise anticompetitive agreement if it is intended to safeguard their "legitimate interests in foreign trade".[40]

How public interest is actually integrated in competition enforcement is often intractable as there are different ways of managing public interest *vis-à-vis* competition concerns. One approach, which appears to be followed by South Africa and Chinese Taipei, is to weigh competition objectives against public interest considerations in *all* cases. The other approach is to balance competition and public interest considerations in exceptional cases, and to consider only competition-related factors in general cases. This would describe the U.K. government intervention to the jurisdiction of the competition authority in "exceptional" situations where national security, media plurality or stability of the financial system is at stake. Another approach is to consider public interest concerns only when the market

[33] *See id.*
[34] *See* Competition Act 89 of 1998 art. 12A(3) (S. Afr.).
[35] 49 U.S.C. § 10706 (1996).
[36] 15 U.S.C. §§ 1291 (1986), 1292-93 (1966), 1294-95 (1961).
[37] 42 U.S.C. §§ 11101 (1986), 11111 (1989), 11112, 11151(9)-(11) (1986).
[38] An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor, Rep. Act No. 10667, § 28(c) (2015) (Phil.).
[39] Zhonghua Renmin Gongheguo Fanlongduan Fa [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 56.
[40] *Id.* art. 15(c).

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conduct is found to substantially lessen competition. South Korea, for instance, considers "efficiency enhancing effects" (on employment and development of downstream and upstream sectors, among others) and failing firm defense only after the conduct at issue fails the competition test.

Competition regimes may stipulate preference for a particular approach, but in practice, it is difficult to ascertain how competition objectives are actually balanced with public interest. This stems from the fact that many factors, including those directly related to the competitive effect of a conduct, are not easy to quantify. As a result, assessments of market conduct are inevitably qualitative and laden with subjective judgment.

Considering the difficulty of verifying the true extent public interest has been brought to bear in competition case law, a debate has ensued on the appropriateness of its inclusion.[41] This discourse pits those who view antitrust through the lens of public interest law,[42] against those who consider competition law as a purely business law.

On one side of the debate, proponents of public interest inclusion consider competition law as part of a suite of economic development policies.[43] From this perspective, competition law should be allowed to pursue multiple objectives and fit the socioeconomic characteristics of a country.[44] Public interest concerns have to be weighed against economic efficiency. This is consistent with the "broad view of antitrust"—as opposed to the "narrow view" that sees competition law as driven by a single goal of maximizing consumer welfare. Legal scholars acknowledge the broad view taken by the U.S. antitrust regime until about the 1970s. The decisions at that time were not only meant to achieve economic efficiency, but also to uphold the social and political values that are associated with a competitive system, such as freedom to trade and decentralizing economic power.[45]

At the opposite side, skeptics are concerned that the coherence, consistency and predictability of competition enforcement are compromised by the inclusion of public interest. Bork's interpretation of a singular legislative intent of the Sherman Act speaks to this concern. Having only one guiding principle, which is to maximize consumer welfare, spares competition enforcers from making complex and non-neutral choices among several, possibly conflicting, policy goals. Furthermore, public interest considerations are generally broad and thus difficult to interpret and apply in

[41] OECD, *supra* note 1, at 6.
[42] *See generally* Christophe R. Leslie, *Antitrust Law as Public Interest Law*, 2 UC IRVINE L. REV. 885 (2012).
[43] *See generally* U.N. Conference on Trade & Dev. [UNCTAD], *The Importance of Coherence Between Competition and Government Policies*, U.N. Doc. TD/B/C.I/CLP/9 (July 2011).
[44] *See generally* Michal S. Gal & Eleanor M. Fox, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, (N.Y.U. L. & Econ., Working Paper No. 374, 2014).
[45] David F. Shores, *Antitrust Decisions and Legislative Intent*, 66(4) MO. L. REV. 725, 755 (2001).

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an objective, transparent and consistent manner. Their inclusion unavoidably creates uncertainty and unpredictability in competition law enforcement.[46]

Apart from undermining antitrust enforcement, accommodating public interest poses other risks. First, it politicizes an otherwise "objective" (economic-based) assessment of market conduct. Since social and political goals are "subjectively" measured up against competition objective, antitrust agencies become targets of lobbying by interest groups.[47] In the process, they may lose their focus, independence and credibility that have served them well in disciplining errant market behavior.

Second, some rules have to be bent to clear or block a conduct out of consideration of public interest. In the case of merger control, for instance, a competition authority would ordinarily refrain from blocking a proposed merger absent sufficient causal link between the merger and its alleged anticompetitive effects. When public interest consideration is involved however, it may be necessary to relax such standard, i.e., a merger could be blocked even if the public interest basis is not specific to the transaction at issue.

Third, public interest may be used to camouflage protectionist policies. Thus, giving way to public interest may cause a country to break its international commitment, which could harm market competition and consumer welfare in the long term. It happens when cross-border mergers are barred or subjected to unnecessary remedies even if they do not impair market competition. The public interest card could also be used to promote national champions, or as a pretext to rebuff competitive neutrality in order to provide advantage to government business over its private sector competitor.

Fourth, considering the wide variation in public interest clauses across jurisdictions, their inclusion in competition laws could cause further divergence in competition enforcement. This comes at the heels of increasing alignment of competition laws with the U.S. and EC regimes, and growing number of preferential trade agreements with competition provisions. Trade and competition policies have natural nexus, hence there is significant interest in harmonizing competition enforcement. Policy divergence, and the legal uncertainty and market unpredictability that it creates, adds to the cost of businesses operating across several borders, thereby impeding global trade and investments. Additionally, the market inefficiencies produced when competition objectives are subordinated to public interest objectives, do not remain in the domestic market, but eventually diffuse to the global economy.

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[46] OECD, *supra* note 22, at 8.

[47] Similar concern is discussed in *id*. Antonio Capobiano & Aranka Nagy, *Public Interest Clauses in Developing Countries*, 7(1) J. EUR. COMPETITION. L. & PRACTICE 46 (2016).

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IV. MINIMIZING PUBLIC INTEREST BACKLASH

Notwithstanding the risks and actual harm to enforcement and market competition, it is both impractical and conceptually indefensible to maintain a purely Borkian or narrow view of competition law. That all competition laws have exemption, or variation of standard, for certain sectors or activities suggests a common understanding among regimes on the need for occasional public interest intervention.[48] Exemptions are often added to rally support for the law itself and the reforms that it espouses. But for competition law, exemptions are also a recognition of prevalence of market failures. At the conceptual level, private economic agents could not be expected to voluntarily and collectively refrain from competing in order to advance some public goal. Further, they are unlikely to exchange appropriable, economic gains for non-appropriable, social benefits. Since private agents could not be expected to restrain competition when it is called for, there is a clear case for public intervention. The challenge however is to circumscribe the intervention so that it is neither whimsical nor excessive, and it does not cause more than necessary harm to competition and consumers.

Several jurisdictions have issued protocols for public interest intervention to ensure transparency, coherence and procedural fairness. Of these, the guidelines of South Africa, Australia and U.K. are instructive. These regimes strive to reserve intervention to select circumstances that reflect their respective country's social and political priorities; to apply controls in non-discriminatory manner; to avoid restricting competition more than necessary to achieve the public interest objective; and to undertake an open, transparent and highly consultative process before deciding to suppress competition in order to pursue a public interest goal. There are however some differences in scope and procedures of intervention among these regimes.

In 2015, the South African Competition Commission issued guidelines on the public interest enquiry in merger review.[49] The issuance was

[48] The International Competition Network [hereinafter ICN), in its 2008 merger recommendations, recognizes as much. Underscoring that: (i) "the purpose of competition law merger analysis is to identify and prevent or remedy only those mergers that are likely to harm competition significantly"; and (ii) "agencies should only intervene to prohibit or remedy a merger when it is necessary to prevent anticompetitive effects that may be caused by that merger", the ICN recommends to make transparent if public interest considerations are included in merger assessment. Int'l Competition Network, *ICN Recommended Practices for Merger Analysis*, at 1-2 (2017), http://www.internationalcompetitionnetwork.org/uploads/library/doc1107.pdf. Specifically, the ICN counsels: "If a jurisdiction's merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent." ICN, *ICN Recommended Practices for Merger Notification and Review Procedures*, at 26 (2017), http://www.internationalcompetitionnetwork.org/uploads/library/doc1108.pdf.

[49] COMPETITION COMM'N S. AFR., GUIDELINES ON THE ASSESSMENT OF PUBLIC INTEREST PROVISIONS IN MERGER REGULATION UNDER THE COMPETITION ACT NO. 89 OF 1998 (AS AMENDED) (2015), http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Public-Interest-Guidelines-public-version-210115.pdf.

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prompted by controversies that arose following the remedies applied to three big cross-border mergers,[50] which critics claimed could put off foreign investors. The Commission clarified that a public interest enquiry will be pursued only if the proposed merger has substantial impact on: (i) a particular industrial sector or region; (ii) employment; (iii) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; or (iv) the ability of national industries to compete in international markets.[51] This limitation signals the Commission's intent to remain selective in its intervention.

A proposed merger is assessed at three levels that may be carried out in separate but interrelated enquiries. Thus a merger is probed on: (i) whether it is likely to substantially prevent or lessen competition; (ii) whether there are technological or efficiency gains that would outweigh the negative effects on competition; and (iii) whether there are any public interest considerations that would merit allowing an anticompetitive merger to continue, or prohibiting a merger without competition concerns.[52] With respect to public interest enquiry, a five-step procedure involves: (i) determination of the likely effects of the merger on public interest; (ii) determination of whether such effects are directly a result of the merger; (iii) determination of whether such effects are substantial; (iv) balancing the public benefits and public detriments; and (v) designing remedies to address the public detriments.[53] The last stage is crucial in ensuring that the unintended harm caused by accommodating public interest objectives is adequately countervailed.

Such methodical approach is intended to achieve some degree of consistency, coherence and predictability in outcome although it is not designed to remove the discretion of the competition authority to conduct the enquiry in a manner best suited in a given circumstance.

Public interest intervention in the Australian competition regime is based on a core principle enunciated in the National Competition Policy,[54] allowing the government to retain or introduce restrictions on competition if the benefits to the community exceed the costs. The "public interest test" is elaborated in the Competition Principles Agreement[55] where a non-

[50] *Id.* at 17, 20; *Kansai's Acquisition of Freeworld Approved with Conditions* (Apr. 19, 2011), http://www.compcom.co.za/wp-content/uploads/2014/09/Press-release-Acquisition-of-Freeworld-by-Kansai.pdf. Namely, *Wal-Mart/Massmart*, *Kansai/Freeworld* and *Momentum/Metropolitan*.
[51] COMPETITION COMM'N S. AFR., *supra* note 49, ¶ 5.7.
[52] *Id.* ¶ 5.3.
[53] *Id.* ¶¶ 6.1.1-5.
[54] *See* PARLIAMENT OF COMMONWEALTH OF AUSTL., NATIONAL COMPETITION POLICY: OVERVIEW AND ASSESSMENT (1994), https://www.aph.gov.au/binaries/library/pubs/rp/1994-95/95rp01.pdf.
[55] *See* COUNCIL OF AUSTRALIAN GOVERNMENTS, COMPETITION PRINCIPLES AGREEMENT: 11 APRIL 1995 (AS AMENDED TO 13 APRIL 2007) (2007), https://www.coag.gov.au/about-coag/agreements/competition-principles-agreement.

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exhaustive set of factors that could justify an intervention is enumerated. The following are among those factors:

> [G]overnment legislation and policies relating to ecologically sustainable development; social welfare and equity considerations, including community service obligations; government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity; economic and regional development, including employment and investment growth; the interests of consumers generally or of a class of consumers; the competitiveness of Australian businesses; and the efficient allocation of resources.[56]

It is left to the agency[57] authorizing an anticompetitive arrangement to demonstrate that on balance, some benefits accrue to the public. This seems a straightforward and logical standard on its face. But implementers note some challenges. First, the onus of proving the net benefits is placed on the government. Ordinarily, *i.e.*, in other jurisdictions, governments do not have to prove the "correctness" of their own policies. But in the case of permitting a restrictive practice to continue, the burden should be placed on the party espousing its continuation, which in this case is the government. The second difficulty relates to the first. Many of the policies that would justify retaining restrictions on competition for public benefit were instituted with the interest of specific groups as a primary consideration. As such, the community-wide impact of most of these policies are not easy to establish.

Unlike Australia, the U.K. stipulates a very limited set of factors that would merit public interest intervention: national security, media plurality and financial stability. In addition, interventions are applied only in mergers, not in other antitrust infringements. As a result, there have been only 12 cases of interventions in a span of 16 years,[58] 7 of which were triggered by national security concern.

What truly distinguishes U.K.'s public interest regime is a clear delineation of jurisdictions of the Competition and Market Authority (hereinafter "CMA") and the Secretary of State. The intention is to keep merger control free from political interference. Thus, the Secretary of State could only intervene in mergers under public interest cases, *i.e.*, those that

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[56] *Id.* ¶ 1.c.; GARY BANKS, COMPETITION AND PUBLIC INTEREST 1 (2001), http://www.pc.gov.au/news-media/speeches/cs20010712/cs20010712.pdf.

[57] This refers to the Australian Competition and Consumer Commission (ACCC) in case of collusive agreement, and to the Australian Competition Tribunal for mergers. No authorization is granted in cases involving misuse of market power.

[58] The period alluded to is from 2002, when the Enterprise Act was enacted, until Mar. 2018.

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meet the jurisdiction thresholds[59] and also raise public interest concerns, as well as in special interest cases, *i.e.*, those that do not meet the jurisdiction threshold but involve government contractors holding defense-related information, or mergers in newspaper and broadcasting sectors. When a public or special interest case arises, the Secretary of State renders the final decision on whether to clear, block or conditionally approve a merger based on public interest grounds. In any case, the Secretary of State is bound to accept the findings of the CMA on the competition merits of the merger.

V. CONCLUSION

Whether by design or forced by economic and political circumstances, competition law enforcement in developing economies is expected to contribute to several policy objectives: preventing abuses of economic power, promoting small businesses, equitable growth, industrial development, and technological advancement, among others. Accommodating these non-competition policy objectives has risks, but so is ignoring them. On one hand, protecting small businesses to decentralize economic power and achieve equity may unduly restrain competitive behavior. On the other hand, singular pursuit of market efficiency could also fail to prevent abuses of dominant position, penalize inefficiencies and encourage innovation. The former describes Bork's antitrust paradox, while the latter illustrates Fox's efficiency paradox[60]. This paper deals with yet a third kind of paradox. When competition law is used to promote public interest goals, it may actually harm public welfare by tolerating anticompetitive practices or blocking procompetitive behavior.

Could the public interest paradox be avoided? The key is to circumscribe the concept of public interest to the highest social and political goals of a country, which could not be achieved by promoting market efficiency. The U.K. goals—national security, media plurality and financial stability—fit well into this description. In contrast, industrial development and employment generation are arguably promoted when the market attains efficiency through competition; therefore, they should not be basis for subverting competition enforcement. A narrow, but well-defined, list of

[59] Unless a merger transaction is voluntarily notified for clearance, the Competition and Markets Authority [hereinafter CMA] limits its merger review to those that meet one of two jurisdiction thresholds: (i) the target's U.K. turnover exceeds £70 million; and (ii) the parties' activities overlap and they have a combined U.K. share of supply or purchases of at least 25%. *See* CMA, *Mergers: Guidance on the CMA's Jurisdiction and Procedure* 1, 15-16 (2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2__Mergers__Guidance.pdf.

[60] *See generally* Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77, 77-88 (Robert Pitofsky ed., 2008).

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public interest goals must be communicated to all stakeholders, including an explanation on the relevance of each of these goals to the current and foreseeable future status of the country. Moreover, since these goals are tied to the status of the country, they are not permanent and would have to be reviewed and possibly modified, from time to time, to reflect new priorities.

Learning from Australia and U.K., the procedures for public interest intervention must be transparent, systematic and time-bound. The concerned agencies must engage the stakeholders in open consultations at various stages of intervention. A highly consultative process will force the authority to examine carefully if the public interest goal could be achieved through means other than permitting an anticompetitive practice or suppressing competition; to consider remedies that do not restrict competition more than necessary; and to be consistent and fair in its decisions.

Yet the most important lesson that could be emulated from other jurisdictions is to ring fence the competition regime from the public interest regime. This entails reflecting public interest goals as exemptions or variation of standard that will be applied to specific sectors and activities in exceptional circumstances. The competition law itself should be clear about its objective, i.e., promoting efficiency to maximize the benefits that consumers derive from competition. On the practical level, the competition authority should not have dual role of enforcing competition and intervening in the public interest. In the first place, competition authorities may not be the right institutions to balance multiple and competing considerations and to make decisions where public welfare is at stake. Competition authorities have been served well by their independence and nonpartisan mandate. This could change when they are compelled to step into the more complex sphere of public policymaking.

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