

Project #6

Prioritising gendered public interest considerations

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Abstract ¹

South African competition law has been a policy instrument with which the government has sought to open markets and create greater economic participation, particularly for ‘historically disadvantaged persons’ (“HDPs”). This is reflected not only in the public interest considerations (“PICs”) that have been incorporated in the competition law’s preamble, merger provisions, and (more recently) prohibited practices provisions; but also in the manner in which competition law has been progressively enforced more vigorously. The participation and engagement of stakeholders is a key element of competition law enforcement in South Africa, especially the stakeholders who have increasingly played a more active role in the application and enforcement of the PICs. In particular, this project aims to distil lessons from South Africa’s framework for inclusive competition law, which is intended to address the country’s past socio-economic and racial disparities. This provides an appropriate analogy to develop a framework for thinking about the inclusion of gender in competition law and enforcement as a possible PIC, in South Africa and abroad.

¹¹ All comments made are done so in our personal capacities.

INTRODUCTION

This paper grapples with the avenues for the incorporation of gender in competition policy, and seeks to answer questions about how to achieve a gender-aware competition policy. In particular, this project aims to distil lessons from South Africa's framework for inclusive competition law, which is intended to address the country's past socio-economic and racial disparities. It provides a reflective analysis of the role of public interest conditions ("PICs") in South Africa's competition policy and draws lessons - for South Africa and other comparable jurisdictions - on how the inclusion of gender into competition analysis, through the use of PICs, could be effected. In both examples of racial and gendered disparities, the theory of harm relates to *whom* economic rents are distributed. This is central to the links we seek to draw between the South African competition law's treatment of "race" and our proposed approach to "gender". In doing so, we seek first to engage with the prevailing views on how competition law should engage problems of inequality.

Embracing broader and inclusive goals of competition policy

"Dissents speak to a future age. It's not simply to say, 'My colleagues are wrong and I would do it this way.' But the greatest dissents do become court opinions and gradually over time their views become the dominant view. So that's the dissenter's hope: that they are writing not for today, but for tomorrow."

-Ruth Bader Ginsberg

The inclusion of "non-economic" goals in competition law incites debates of the interplay between competition policy and industrial policy, and the ideal level of market intervention by competition authorities.² Certain legal and economics scholars suggest that competition law should *only* make use of economic analysis as the sole standard for analysing consumer harm.³ Further, these scholars contend that this approach is desirable because a more interventionist approach that incorporates "non-economic" objectives may result in consumer harm.⁴ Proponents of this approach to competition law also argue that by excluding "non-economic" objectives, the intervention by competition authorities is reduced and that enables the markets to self-correct.⁵

As detailed in this paper, an approach to competition law policy that calls for an exclusion of all traits of "non-economic" objectives in competition policy is a flawed and outdated approach. This approach fails to recognise the country-specific, social, historical, economic and political context within which competition laws are enacted.⁶ Further, this 'purist' approach fails to recognise

² Sokol, D., 2015., 'Tensions between Antitrust and Industrial Policy'. *George Mason Law Review*, 22: 1247 – 1248. Online: <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1762&context=facultypub> (accessed on 17 June 2019). This view has also been supported by the International Competition Network, noting that merger review laws should not be used to pursue non-economic goals. See ICN, 'ICN Recommended Practices for Merger Analysis' (2002-2018), Online: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RPsforMergerAnalysis.pdf (accessed on 20 June 2019).

³ Ibid.

⁴ Ibid. See also: Foer, B., 2005. 'The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S'. Working Paper 05-09, *American Antitrust Institute*, p 24. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103510 (accessed on 7 June 2018).

⁵ Ibid.

⁶ As correctly recognised by Dabbah, competition law does not exist in a vacuum and it is largely influenced by the prevailing societal values; the historical background; the economic and political context of each country. See Dabbah, M., 2010. *International and Comparative Competition Law*, (CUP 2010) p 36-38.

competition law's fluidity, which is informed by evolving societal values.⁷ As Ezrachi correctly points out, "*While the idea of a stable, predictable, and economically-based [competition law] discipline is in all of our interests, these traits are not inherent to the law.*"⁸ To suggest that competition law should be free of "non-economic" objectives would essentially be an invalidation of the competition needs of many developing countries, whose societal values, economic and political context, not only supports, but also necessitates the inclusion of "non-economic" goals in their competition laws.⁹ As Fox notes, "*At its birth, antitrust was a discipline and tool for the outsider; for people without power. It has been seduced by beautiful, elegant, but unfitting economic assumptions.*"¹⁰

The interplay between the function of markets and societal disparities such as those embodied across racial and gender lines is present in every society. As such, this intersectionality cannot be overlooked by competition policy, as will be demonstrated through the South African experience. Competition policy does not function in a vacuum; in a country where its income and wealth inequality takes place along the lines of race and gender, South Africa's competition law sought to directly incorporate a racialised lens, acknowledging the context in which economic rents were historically disproportionately distributed. The purist approach to competition law fails to recognise the importance of inclusive competition law objectives. These are objectives based on the principles of justice and economic equity,¹¹ and are what we refer to in this paper as distributive efficiencies.

In view of the above the purist approach to competition law and policy is not sustainable for any society especially for developing countries, such as South Africa, with economic and market structures underpinned by historical exclusion.

Inequality, Inclusion and Distributive Efficiencies

In order to draw the links that we do, one also needs to understand what we mean by distributive efficiency. Neoclassical economics dictates that perfect competition exists in a paradigm of Pareto optimality. That is, scarce economic resources are allocated in such a way that any change in the allocation thereof will result in at least one agent being made worse off, and where productive¹² and allocative efficiency¹³ is obtained at the level where the price is optimised (or, at its lowest). Productive and allocative efficiencies, however, do not address the question of distribution - to *which* consumers benefit? – thus, it is possible to achieve Pareto optimality without distributive efficiency.

⁷ Ezrachi, A., 2017. 'Sponge.' *Journal of Antitrust Enforcement* 5.1: 49-75. Online: <https://academic.oup.com/antitrust/article-abstract/5/1/49/2525569> (accessed on 28 April 2021.)

⁸ *Ibid.*, p 49.

⁹ Adhikari, R. and Knight-John, M., 2004. 'What Type of Competition Policy and Law Should a Developing Country Have?', *South Asia Economic Journal*, 5(1). Online: <https://journals.sagepub.com/doi/abs/10.1177/139156140400500101> (accessed on 25 July 2019.) and Fox, E. 2017. 'Competition Policy: The Comparative advantage of Developing Countries', *Law and Economics Research Paper Series*, 69-70 and 79. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2916452 (accessed on 21 May 2019).

¹⁰ Fox, E., 2017. 'Outsider Antitrust: 'Making Markets Work for People' as a Post-Millennium Development Goal', *Competition Policy for the New Era: Insights from the BRICS Countries*. Edited by Bonakele, Tembinkosi, p. 22-37.

¹¹ *Ibid.*, p 42.

¹² Where the output of the economy must be produced at the lowest cost. This occurs when the marginal rate of transformation of the two products is equal and the marginal rate of substitution for both consumers is also equal.

¹³ Where resources are allocated to the production of the goods that the economy requires.

We believe that competition law must concern itself with questions of inequality, inclusion and distribution. As Mncube notes “[a]n increase in market power is associated with an increase in inequality. ... inequality [also] leads to poorer economic performance, including lower growth and more instability”.¹⁴ Distributive efficiency, as we seek to invoke the term, is concerned with an equitable distribution of resources.¹⁵ It has also been framed as inclusive growth, which is “about the equality of opportunity in terms of access to markets, resources and unbiased regulatory environment”.¹⁶ As enunciated by Roberts:

“An evaluation of competitive rivalry in dynamic terms is consistent with inclusive growth understood as both outcome and process. Inclusive growth implies participation and benefit-sharing. Participation without benefit sharing (for example through exploitative labour conditions or minerals extraction) means growth is unjust. Sharing benefits without meaningful participation is simply a welfare outcome rather than, in dynamic terms, an enabler of greater diversity of entrepreneurial activity and competition.”¹⁷

This departs from the purist views of the role of competition law, and we argue that competition law has a key role to play in setting the ‘rules of the game’,¹⁸ by foregrounding, in addition to consumer welfare considerations, distributive efficiencies.¹⁹

As will be further explicated below, the South African Competition Act 89 of 1998 (as amended) (the “Act”), incorporates these values and explains to whom distribution is intended, as Mncube stated: “Distribution is to consumers, workers, small firms, firms owned by historically disadvantaged persons and the poor.”²⁰ (Our emphasis)

Albeit in the context of distribution to the poor, South African competition authorities most recently reaffirmed their commitment to the distributive ideal with the onset of the Covid-19 pandemic. Jurisprudential election was made to read the contravention of price gouging into the excessive pricing provisions of the Act. The Competition Appeal Court (“CAC”) stated when doing so: “Doubtless a new equilibrium in the market had been achieved as a result of an increased demand and the changing conditions of supply. But this case turns essentially on the question of distribution as opposed to allocation.”²¹ (Our emphasis) And, as to where South African enforcement lies along that continuum the CAC expressed:

¹⁴ Mncube, L., 2016. ‘Balancing Inclusive Economic Growth and Competition’, Special Lecture: Department of Economics Stellenbosch University (31 August 2016).

¹⁵ Atkinson proposes, “Public policy should aim at a proper balance of power among stakeholders, and to this end should a) introduce an explicitly distributional dimension into competition policy”. (Atkinson, T., ND. ‘The 15 Proposals from Tony Atkinson’s ‘Inequality – What can be done?’, Online: <https://www.tony-atkinson.com/the-15-proposals-from-tony-atkinsons-inequality-what-can-be-done/> (accessed on 20 June 2021).

¹⁶ Mncube, 2016., p2.

¹⁷ Roberts, S., 2020. ‘Chapter 11: Assessing the record of competition law enforcement in opening up the economy’, *Opening the South African Economy: Barriers to Entry and Competition* Vilakazi, Goga and Roberts Eds. (HSRC Press, 2020) at p 180 (citations omitted).

¹⁸ Stiglitz, J., 2012. *The Price of Inequality*, Penguin Books: Great Britain, 2012, p 38.

¹⁹ Indeed, it is often noted that questions of total welfare are in themselves functions of inequality.

²⁰ Mncube, 2016. p5 (our emphasis)

²¹ *Babelegi Workwear and Industrial Supplies CC v The Competition Commission of South Africa*

“Competition law in South Africa has a more ambitious animating framework than that which has dominated the US antitrust law and even that of the European Union. It is designed to ensure that markets work fairly and do not add to the economic disadvantage of millions of presently disadvantaged South Africans.”²²

We acknowledge that the inclusion of PICs in competition law gives rise to complex trade-offs in relation to balancing the significant lessening and prevention of competition assessment (“SLPC” assessment) and public interest assessments, and with regard to finding the most appropriate institutional model of enforcement. Nonetheless, South Africa is proof that the incorporation of inclusive PICs, especially equity-related PICs in competition law, has not rendered the law ineffective, nor has it undermined the legitimate regulation of competition. South Africa’s embrace of PICs supports Ezrachi’s conceptualisation of competition law as a sponge, ‘*inherently pre-disposed to a wide range of values and considerations*’.²³ We have canvassed the purist approach and it is clear that South Africa represents an inclusive approach on a continuum of enforcement intervention.

Competition law and gender inequality

As mentioned earlier, competition policy is concerned with market power; who owns it and how it is used. We propose that it must also be concerned with how such power is distributed and who gets to reap its benefits and at who else’s expense. We argue that the role of competition policy is to facilitate redistribution of economic rents to those traditionally excluded from the market. Gender remains one of the central modalities through which economic inequality takes effect in South Africa, and around the world, and as recognised globally, these gendered disparities have worsened with the onset of the COVID-19 pandemic.²⁴ Women in South Africa remain disproportionately over-represented in domestic and informal work; only 1 in 3 women make up managerial positions, and 47.6% of women are engaged in precarious work in the informal sector, while over 90% of domestic work is performed by women.²⁵ Women also perform up to 4 times as much unpaid care work.²⁶ The unemployment rate for women is 34% compared to men at 31.4%,²⁷ while the gender wage gap sits between 23-35%.²⁸ At the same time, the

CAC Case No: 186/CAC/JUN20 at para 45 (our emphasis). This statement should be understood in the context of the debate between economists about the merit to outlawing price gouging, a tension best exemplified by the debate between Matt Zwolinski and Jeremy Snyder.

22 Ibid., p68.

23 Ezrachi, 2017, p50.

24 United Nations Women, 2020. ‘Addressing the Economic Fallout of COVID-19: Pathways and Policy Options for a Gender-Responsive Recovery.’ *UN Women Policy Brief No.15*. Online: <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-addressing-the-economic-fallout-of-covid-19-en.pdf?la=en&vs=406> (Accessed: 3 July 2021).

25 Ibid.

26 Oxfam, 2020. ‘Reclaiming power: Women’s work and income inequality in South Africa’ Oxfam report. Online: <https://www.oxfam.org.za/wp-content/uploads/2020/11/oxfam-sa-inequality-in-south-africa-report-2020.pdf> (accessed: 3 December 2020).

27 Statistics South Africa, 2021. ‘Quarterly Labour Force Survey, Q1’. Available: <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2021.pdf> (accessed: 19 April 2021).

28 Mosomi, J., 2019. ‘Distributional changes in the gender wage gap in post-apartheid South Africa’. SA-TIED Working Paper. Online: https://sa-tied.wider.unu.edu/sites/default/files/pdf/SATIED_WP31_Mosomi_March_2019.pdf (accessed: 4 March 2021).

labour force participation rate for women stands at 50.2%, and 62.6% for men.²⁹ Black women, in particular, face the highest level of unemployment (at almost 40%) and economic disenfranchisement.³⁰

The existing literature points to how gender restrictions in markets can constitute as anti-competitive in themselves. Santacreu-Vasut and Pike provide a useful conceptual framework to reflect the bi-directional relationship between competition and gender; competition policy affects gender inequality when certain markets are not made available to women (reference is also made here to how certain markets that women predominantly engage in – such as in infrastructure – can be made pro-competitive and thus more accessible³¹); gender also affects competition in the market that is biased against women (such as barriers to enter certain markets based on gendered, discriminatory laws³²), that make markets less efficient. In this case, for example, gender biases may lead to the exclusion of efficient women-led businesses from entering the market.

In instances where women are featured in these plans, gender issues are generally featured as add-ons and women are not fully integrated into their conceptualisation and implementation. For example, in the recently published South African Economic and Reconstruction and Recovery Plan (ERRP), a post-COVID-19 economic recovery plan, the inclusion of gender is disparate. In the sections on competition policy and procurement of the ERRP, women are not included in its design and conceptualisation and while there is a focus on bringing women into ‘all levels of industrialization’ there are no targeted interventions to tackle gender inequality in the economy.³³ In light of this, we consider that it is imperative for every jurisdiction to define what is meant by a *gender-aware* competition (and industrial) policy, to avoid adopting policies and measures that passively feature women. However, it can be accepted that there is much more research to be done that identifies the intersections of gender and competition policy. On the one level, competition policy is seen as an important lever to improve women’s participation in the economy. Notwithstanding, there is a clear need for greater market access, and the preceding sections of this paper have argued for competition policy in playing a key role in regulating markets in favour of women.

On another level, we argue that a gender-aware competition policy should go beyond just making markets work for women, and should also grapple with its role in reducing inequality between women and men. As Kabeer notes: “*Market forces cannot on their own dissolve the ‘durable inequalities’ in rules, norms, assets and choices that perpetuate the historically established disadvantages of certain social groups. Rather, in the absence of offsetting forces, they tend to reproduce these deep-seated structural inequalities, rewarding the powerful and penalising the weak*”³⁴. The incorporation of gender in competition policy must speak to the

29 Statistics South Africa, 2021. Quarterly Labour Force Survey, Q1. Online: <http://www.statssa.gov.za/publications/P0211/P02111stQuarter2021.pdf>

30 Ibid.

31 Santacreu-Vasut, E. and Pike, C., 2019. ‘Competition Policy and Gender’, *Concurrences*. N° 4-2019. Online: <http://dx.doi.org/10.2139/ssrn.3487726> (accessed: 5 January 2021)

32 We invoke this term to incorporate an understanding of discrimination that is both direct and indirect, to borrow from South African constitutional law jurisprudence, in some instances the law may not have express reference to women in its differentiation but may nonetheless have adverse consequences for women.

33 South African Economic and Reconstruction Plan, 2020. Online: https://www.gov.za/sites/default/files/gcis_document/202010/south-african-economic-reconstruction-and-recovery-plan.pdf (accessed 28 August 2021).

34 Kabeer, N., 2017. ‘Women’s economic empowerment and inclusive growth; labour markets and enterprise development’. Online: <https://www.lse.ac.uk/gender/assets/documents/research/choice->

positionality with which women engage in, and outside, 'formal' markets. This means that every case considered by competition authorities must confront how competition policies interact with other economic policies, and how these may reproduce (market) power in certain circumstances. In addition, competition policy must contend with how market power reproduces gender inequality. As noted by Mncube, market power is one of the major sources of inequality; a monopolist's monopoly rents often come at the expense of consumers: as monopolies raise their prices, their profits increase, and are not redistributed to the consumer. The returns from the abuse of market power go disproportionately to the wealthy.³⁵

The South African treatment of competition law is both instructive and lacking. We posit that there are lessons to glean from its treatment of race - a concern of distributive efficiency - which lessons may be applicable to the enforcement of a system of competition law that prioritises gender. We also speak about some of South Africa's missed opportunities to have prioritised gender, as the country's Constitution requires.³⁶

The first part of the paper delves into South Africa's competition framework in relation to public interest, while the second part draws out key lessons from South African practice to inform the prioritisation of gender in competition law enforcement. We develop principles for competition agencies and legislators to consider adopting in order to be intentional in their prioritisation of gender in competition law enforcement. We show that incorporating PICs, concerned with distributive economic outcomes, can be an effective way to use competition law to advance gender equality in economies.

Part 1. The South African Legislative Framework For Inclusive Competition Law

The South African experiment is aspirational in the highest sense. The political moment of South Africa's first democratic election meant that in the early 1990s the country was deeply engaged in transitional justice praxis: pursuing trans-regime legitimation through the establishment of a truthful account of the past; the securing of justice and reparation for victims and, most importantly for our purposes, institutional transformation. From this basis, South African competition enforcement unashamedly pursues economic imperatives that are not only concerned with productive efficiencies but also with distributive efficiencies.

The Competition Act's Provisions

The Act's primary objective is to promote and maintain competition and it embraces the typical economic goals associated with competition policy, like most global competition laws. However, as alluded to above, the Act, in its preamble³⁷ and purpose,³⁸ seeks to *also* promote the following

[constraints-and-the-gender-dynamics-of-lab/Women%27s-economic-empowerment-and-inclusive-growth.pdf](#) (accessed: 8 January 2021).

³⁵ Mncube, 2016. p2.

³⁶ See for example sections 1(b) and 9 of the Constitution of the Republic of South Africa Act No. 200 of 1993.

³⁷ As stated in the preamble:

"The people of South Africa recognise: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans. That the economy must be open to greater ownership by a greater number of South Africans." (our emphasis)

³⁸ The Act has been enacted in order to:

equity-related PICs: (i) the promotion of employment and advancement of the social and economic welfare of South Africans; (ii) ensuring that small, medium enterprises (“SMEs”) have an equitable opportunity to participate in the economy; and (iii) the promotion of a greater spread of ownership, in particular, to increase the ownership stake of HDPs. In terms of the Act, a person (including juristic persons) is an HDP, if that person “*is one of a category of individuals who, before the [Interim Constitution], came into operation, were disadvantaged by unfair discrimination on the basis of race.*”³⁹ Currently the definition of an HDP is defined only with reference to race and does not incorporate gender.

There are two themes of PICs that can be identified in the Act. The first theme relates to developmental concerns, namely the effect of the merger on “*a particular industrial sector or region*” and “*the ability of national industries to compete in international markets*”.⁴⁰ The second theme, which is the theme relevant to this paper, are the equity-related PICs; (i) “*employment*”; (ii) “*the ability of small and medium businesses, or firms controlled or owned by historically disadvantaged persons, to effectively enter into, participate in or expand within the market*”; and (iii) “*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*”.⁴¹

The Act promotes equity-related PICs throughout its substantive provisions: merger provisions, and, more recently through its market conduct and prohibited practices provisions. The Act also promotes the equity-related PICs through various provisions setting out legal processes and the participation rights relating to the enforcement of PICs. We also discuss the implications of the changes brought about by the 2018 Competition Amendment Act (“the 2018 Amendment”) which was introduced specifically to address high market concentration and the pattern of racially skewed ownership of the South African economy.⁴²

Merger Policy and equity-related PICs

The merger provisions of the Act require authorities to consider the effect that a merger will have on the public interest. As a starting point, all mergers that require notification to the competition authorities must be assessed to determine if they are likely to substantially prevent or lessen competition, taking into account any likely efficiency gains. Following a positive or a negative finding on the SLPC assessment, competition authorities are required to assess the effect of a merger on the public interest. As such, the competition authority may prohibit a merger if it is established that the merger raises substantial negative public interest effects, or impose conditions to remedy the substantial negative public interest effect of a merger, even if the merger has a positive competition effect, or has no effect on competition. Further, this also means that the competition authority could approve an anti-competitive merger (one found to

“provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic.” (our emphasis)

³⁹ The Act section 3(2).

⁴⁰ Section 12A(3)(a) and (d).

⁴¹ Section 12A(3)(b), (c), (e). Note that the Amendment Act updated this list to what appears here.

⁴² See for example Editorial on Fin24, 2017. ‘Patel: Structural features diminish effective competition, limit inclusivity of growth’. Online: <http://www.fin24.com/Economy/patel-structural-features-diminish-effectivecompetition-limit-inclusivity-of-growth-20170831> (accessed: 7 September 2017.) and Politicsweb, 2017. ‘Market over-concentration and un-transformation to be targeted Ebrahim Patel’. Online: <https://www.politicsweb.co.za/opinion/market-overconcentration-anduntransformation-to-b> (accessed: 15 October 2019).

fail the SLPC assessment) if there are substantial merger-specific positive public interest effects that justify the approval.⁴³

The enforcement of the merger provisions relating to public interest is supported by comprehensive Public Interest Guidelines (the “Guidelines”) issued by the South African Competition Commission (the “Commission”) in 2016.⁴⁴ While the Guidelines require update to incorporate the additional public interest and changes made to section 12A(3) by the 2018 Amendment,⁴⁵ the Guidelines remain useful and set out the steps of analysis to be undertaken by the Commission when assessing mergers under the public interest criterion in section 12A(3) of the Act. The Guidelines also set out the relevant factors which the Commission will consider; the information required from merger parties; as well as the conditions that may be imposed or recommended to remedy identified public interest concerns. We set out below the basic premises of the approach to the equity-related PICs.

The Commission analyses each public interest provision by following these steps:

1. determining the likely effect of the merger on each listed public interest ground;
2. determining whether such an effect, if any, is merger specific. A merger specific public interest effect is essentially an effect that is causally related to, or results/arises from, the merger;
3. determining whether such an effect, if any, is substantial; and
4. considering possible remedies to address any substantial negative public interest effect identified.⁴⁶

Market conduct, prohibited practices and equity-related PICs

Prior to the implementation of the 2018 Amendment, it was not clear the extent to which competition authorities are to take PICs into account during the assessment of prohibited practices. Buthelezi and Njisane argued that the jurisprudence in abuse of dominance cases revealed that PICs have featured prominently in the assessment of prohibited practices.⁴⁷ However, it is by recent amendment⁴⁸ that consideration of equity-related PICs has been specifically incorporated under the assessment under the Act’s abuse of dominance provisions. Notably, the 2018 Amendment introduced the contravention of buyer power under the abuse of dominance provisions in Ministerial designated sectors. In terms of the provisions a dominant firm is prohibited from imposing or indirectly requiring unfair pricing, or any other unfair trading condition, on a supplier that is an SME or an HDP; or, otherwise avoiding or refusing to purchase

⁴³ The Act section 12A(1), read with section 12A(1A).

⁴⁴ Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998, (published on 2 June 2016 under GG 40039 in GNR 309).

⁴⁵ It is noted that the Commission is yet to publish revised Guidelines on the interpretation and application of the additional public interest ground “*the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market*” which was inserted into the Act with the 2018 Amendment.

⁴⁶ Guidelines at [6.1]. In applying this approach, where an effect is found to be non-merger specific, the enquiry into that effect will stop at that stage. Likewise, where an effect is found to be merger specific but not substantial, the enquiry into that effect will stop at that stage.

⁴⁷ Buthelezi and Njisane 2016 “The Incorporation of PUBLIC Interest in the Assessment of Prohibited Conduct: A juggling Act?”, in Jenny, Katsoulacos (eds.) Competition Law Enforcement in the BRICS and in Developing Countries, International Law and Economics (Springer International Publishing, Switzerland, 2016).

⁴⁸ With effect from 13 February 2020.

from a supplier, that is an SME or an HDP.⁴⁹ The establishment of a *prima facie* case in this regard shifts the onus to the dominant firm to refute the unfairness of the business practice.⁵⁰ The Regulations setting out the factors and benchmarks for determining whether a price or trading condition is unfair have been gazetted by the Minister.⁵¹ Currently, the designated sectors to which the buyer power provisions apply are agro-processing, grocery wholesale & retail, eCommerce and online services.⁵² The Commission has published its buyer power guidelines, which aim to offer “*clarity to both dominant buyers and suppliers as to how the new legislation will be enforced by the Commission includ[ing] not only the unfair pricing and trading condition provisions, but also the avoidance provisions whereby it is a contravention to avoid buying from designated suppliers in order to avoid the application of fair treatment under the buyer power provisions.*”⁵³

Similar equity-related PICs have also been introduced under the price discrimination provisions of the Act. In instances where a dominant firm is a seller, it may not price discriminate if the discrimination is likely to have the effect of impeding the ability of SMEs or HDPs to participate effectively in a market.⁵⁴ A dominant seller is also prohibited from refusing to sell goods or services to SMEs or HDPs where it impedes the ability of SMEs or HDPs to effectively participate in a market.⁵⁵ A dominant seller is able to justify differential treatment on limited grounds (related to allowance for differences in cost, in good faith to meet a price or benefit offered by a competitor, or where differential treatment is in response to changing conditions affecting the market); however, it cannot make reference to the quantities supplied to different purchasers as a justification. Further, it is incumbent upon the dominant firm to demonstrate that the conduct did not impede the ability of SMEs and HDPs to participate effectively in a market.⁵⁶ The Minister’s Regulations on price discrimination make it clear that the HDPs to which the sections apply must “*purchase less than 20% of the relevant good or service supplied by the dominant seller over the same period of discrimination*”.⁵⁷

Regarding excessive prices, the structural characteristics of the market must be considered when determining the unreasonableness of the excessive price charged by a dominant firm, and “*past or current advantage that is not due to the respondent’s own commercial efficiency or investment, such as direct or indirect state support for a firm or firms in the market*” must be considered.⁵⁸

⁴⁹ The Act section 8(4)(a) and (b).

⁵⁰ The Act section 8(4).

⁵¹ Regulations on Buyer Power made by the Minister under Competition Act, 1998 (published on 13 February 2020 under GG. 43018 in GNR 168).

⁵² Ibid.

⁵³ Commission press release, Online: <http://www.compcom.co.za/wp-content/uploads/2020/05/Commission-releases-buyer-power-guidelines-that-give-boost-to-small-business-1.pdf> (accessed: 29 May 2021.)

⁵⁴ The Act section 9(1)(a)(ii).

⁵⁵ Section 9(1A). This section also prohibits a dominant firm avoiding dealing with a small and medium business, or a firm controlled or owned by HDPs in order to circumvent the operation of section 8(4)(a) of the Act.

⁵⁶ The Act section 9(2) and (3).

⁵⁷ Regulations on Price Discrimination made by the Minister under Competition Act, 1998 (published on 13 February 2020 under GG 43018 in GNR 169), Regulation 5.

⁵⁸ The Act section 8(3)(e).

Notably, the inclusion of a consideration of a firm's ability to participate in a market to the sections prohibiting abuse of dominance extends beyond the ability of firms to enter and expand (which was how the Act had been previously drafted⁵⁹). Where the term "*participate*" has now been defined in section 1 of the Competition Act to mean, the ability of or opportunity for a firm to sustain itself in the market.

Furthermore, the 2018 Amendment provides that the Commission, during a market inquiry, must decide whether any feature of the relevant markets impedes, restricts or distorts competition within that market; and in making this decision, regard must be had to the impact of the adverse effect on competition upon SMEs or HDPs.⁶⁰ The Act also now provides that the Commission must take reasonable steps to promote the participation of SMEs with a material interest in the inquiry and are, in the opinion of the Competition Commission, not adequately represented.⁶¹ The inclusion of PICs in the enforcement of the Act is also relevant for the mandate of the Competition Tribunal (the "Tribunal"). For example, when determining an appropriate penalty, the Tribunal must consider, among other factors, the market circumstances in which the contravention took place, including whether, and to what extent, the contravention had an impact on SMEs and firms owned or controlled by HDPs.⁶²

The Act also incorporates PICs in the assessment of exemption applications.⁶³

Much of what is explicated under the market conduct and prohibited practices sections remains to be tested by cases.

Participation Rights

Competition authorities have the final say on the application and interpretation of public interest issues under the Act. However, the Act makes room for the participation of multiple stakeholders that extend beyond just market participants. These broader stakeholder participation rights were drafted in, we believe, because of the appreciation that the public interest of the Act may encompass a balancing of competing rights and interests; and in order to avoid principal-agent problems, those best suited to represent their interests must be empowered to participate in enforcement.

The Act grants participation rights to certain persons (who may participate in person or through a representative) to put questions to witnesses and inspect documents or items presented at a Tribunal hearing.

In relation to mergers, the Act requires merger parties to provide a copy of the merger notification to any registered trade union or employee representatives that represents a substantial number of the merger parties' employees.⁶⁴ The Act provides that the Minister may participate in any merger proceedings before the competition authorities, in order to make representation on any public interest ground.⁶⁵ Notably, the nature of the Minister's participation in merger proceedings is circumscribed to provide that if the Minister's office seeks to intervene in merger proceedings,

⁵⁹ Background Note On Competition Amendment Bill, 2017 (published on 1 December 2017 under GG 41294 in GNR 1345) ("Background Note") p16.

⁶⁰ The Act section 43C(1) and (2).

⁶¹ The Act section 43G(2).

⁶² The Act section 59(3)(d).

⁶³ The Act section 10(3)(b)(ii).

⁶⁴ The Act section 13A(2)(a).

⁶⁵ The Act section 18(1)

it needs to file a concise statement setting out the PICs that it seeks to intervene in terms of, as well as a statement of the relief sought.⁶⁶ The Commission is required to share the Minister's submissions with the merger parties for their consideration and response. Further, the Act allows the Minister, trade unions and employee representatives to appeal merger decisions of the Commission and the Tribunal, to the CAC.⁶⁷

In toto, rights to participate in Tribunal hearings⁶⁸ relating to mergers, are afforded to the following persons: (i) any party to the merger; (ii) the Competition Commission; (iii) any person who was entitled to receive notice of the merger transaction, which currently includes the registered trade union and/or employee representative who indicated to the Commission an intention to participate; (iv) the Minister, if the Minister has indicated an intention to participate; and (v) any other person whom the Tribunal has the discretion to recognise as a participant.⁶⁹ In respect of complaint procedures before the Tribunal, participation rights are granted to the following persons: (i) the Commissioner, or any person appointed by the Commissioner; (ii) the complainant, if the complainant referred the complaint to the Competition Tribunal; or, if in the opinion of the presiding member the complainant's interest is not adequately represented by another participant, and then only to the extent required for the complainant's interest to be adequately represented; (iii) the respondent; and (iv) any other person who has a material interest in the hearing, unless, in the opinion of the presiding member, that interest is adequately represented by another participant, but only to the extent required for the complainant's interest to be adequately represented.⁷⁰

In addition, the market inquiry provisions also expressly allow participation and representations by external stakeholders such as SMEs, the Minister, regulatory authorities, trade unions and employee representatives of firms that are the subject of the market inquiry. Notably, section 43G of the Act requires the Commission to take reasonable steps to promote the participation of SMEs in market inquiries. We also note that, the recent amendments, provide for the Minister to be able to, after consultation with the Commission, require the Commission to conduct a market inquiry.

Some of what has been enunciated above remains to be tested through real-life application as the provisions of the 2018 Amendment have been incrementally brought into effect. However, the legislative structure outlined above provides how considerations of distributive efficiency can be incorporated into each element of competition policy.

Part 2. The five pillars of gender inclusive competition law enforcement

This chapter outlines five pillars for how competition authorities (and lawmakers) can begin seeking means to incorporate gender into competition law and enforcement. This is done with reference to how South African competition law and the enforcement decisions and advocacy measures of the South African competition authorities have advanced HDPs.

⁶⁶ Encapsulated in Rule 35 of the Competition Commission Rules (published on 1 February 2001 under GG 22025 in GRN 1), and in Rule 29 of the Competition Tribunal Rules (published on 1 February 2001 under GG 22025 in GRN 2).

⁶⁷ The Act section 17.

⁶⁸ Every large merger requires approval from the Tribunal prior to implementation, every intermediate merger requires approval from the Commission and the Commission may call for notification of small mergers. Appeal rights are granted to disgruntled parties for a reconsideration of any of the Commission's decisions in relation to intermediate and/or small mergers (Section 13 of the Act).

⁶⁹ The Act section 53(c) read with section 13A(2).

⁷⁰ The Act section 53(a).

In terms of methodology, we have selected key decisions, policy and advocacy measures by the South African competition authorities, in order to draw lessons and offer practical insights into how each of the five pillars enables the prioritisation of gender inclusive competition law enforcement.

1. Positionality

As noted earlier, an HDP under the Act, is defined as a person in one of the category of individuals who before the Constitution of the Republic of South Africa came into operation, “*were disadvantaged by unfair discrimination on the basis of race*” or a corporate entity (association/ juristic person) where a majority of its membership, members’ interest, issued share capital is owned and controlled (or is capable of control) by a majority of HDP individuals. There are multiple things to be said about this definition.

First, the definition of the recipient of the beneficiary group in this instance has not been essentialised; rather it is defined with reference to the system of discrimination that created the injunction for intervention and protection of this group. Implicit to an evaluation founded in this premise, is the acknowledgment that there is not something inherently deficient in the targeted group - rather part of the regulatory process is the uncovering of the economic, historical processes that perpetuate and maintain economic exclusion on a systemic level.

Second, the significance of this definition also means that, from the outset, the Act does not only seek to assist persons of colour in their capacities as consumers in the economic system, but also as owners and participants in the market. This is done by defining HDPs as both natural persons (HDP individuals) as well as juristic persons owned or controlled by HDP individuals (HDP entities). The Act’s framework serves to cater for the redistribution of economic rents to HDP individuals in their capacities as consumers, employees, SME entrepreneurs and business owners of larger enterprises during various phases in the enforcement process. By choosing to empower people of colour in these various capacities means more social processes are being destabilised. There are different multiplier effects at work when (i) saving a person of colour income that they would have otherwise spent on an overpriced good (consumer); (ii) creating income certainty by introducing a moratorium on employment or investments in skills acquisition (employee); and (iii) removing barriers to entry for entities owned and controlled by persons of colour (owners and customers in value chains). When dealing with HDP individuals in their capacities as customers and employees we are dealing with issues of income inequality, but once we begin increasing the potential of HDP individuals to participate in markets and extract rents from markets in their capacities as owners of businesses, we are dealing with issues of wealth inequality.

Third, the fact that reference is not made to discrimination on the basis of gender was a missed opportunity for South Africa. It has caused a gender-blindness in the way enforcers have approached their conception of beneficiaries.

In the Forestry impact study discussed below, we reflect on the missed opportunities of not advancing a gender-lens to an industry where women are key participants.

Case Study: Forestry impact study

In December 2020, the Commission published an *Impact of Vertical Integration on Competition* report and *The Participation of SMEs and HDPs in the Forestry Sector* (the “Forestry Impact Study”).⁷¹ The impact study was initiated under section 21A of the Competition Amendment Act,

⁷¹ Competition Commission, 2020. ‘The Impact of Vertical Integration on Competition and the Participation of SMEs and HDPs in the Forestry Sector’. Online: <http://www.compcom.co.za/wp->

which empowers the Commission to study the impact of any of its decisions, rulings or judgement of the Tribunal and the CAC.

The Forestry Impact Study identified competition concerns that largely impacted small and medium forestry enterprises and firms owned by HDPs (“Forestry SMEs/HDPs”). In particular, it investigated how anticompetitive practices can exacerbate the exclusion of HDPs from meaningfully participating in the South African economy, which in turn contributes to high levels of poverty and the disenfranchisement of rural communities.

Before considering the findings of the Commission and its competition law enforcement recommendations to address the competition and public interests concerns identified, it is useful to consider the landscape of the South African forestry industry and its importance for inclusive economic growth, especially for rural communities.

Commercial plantation forestry in South Africa refers to large, planted forests established particularly to supply raw material to satisfy mainly primary processors who purchase sawlogs, pulpwood, pole logs and mining timber.⁷² These plantations supply downstream operations such as pulp mills, sawmills, mining timber mills, pole treatment plants, wood chipping plants and other timber plants which process timber raw materials.⁷³ These materials are then processed further and used to produce key end-products such as wood, paper, cartons, cardboards, furniture, pallets, veneers, construction materials, power transmission poles, building and fencing poles and materials, and mining operation products such as support beams.⁷⁴

In order to contextualise the significance of the Forestry Impact Study, we have set out below a useful background to highlight the importance of the forestry industry for the overall South African economy, as well as for women in rural communities. Both the downstream and upstream levels of the forestry value chain consist of a few large vertically-integrated and privately (and predominately white) owned firms, with one state owned firm, the South African Forestry Companies Limited. About 82% of the plantations in South Africa are privately owned.⁷⁵ The South African forestry and forest products industry is a key sector for the country’s economic growth, as it is a multi-billion rand industry, forming 9.8% of the country’s agricultural GDP and 4.9% of South Africa’s manufacturing GDP. It also has an export value of over R38.4 billion”.

Further, as the forestry industry operations are largely based in rural areas, where rural communities rely heavily on the industry, both as consumers and as small-scale business owners, the industry is a key employment sector for rural communities.

Rural communities also utilise forestry products in their households. It is a source of energy (i.e. firewood) and building materials (for houses or for small scale operations such as farming). These consumers often live further away from cities and cannot afford access to transportation. As such, they rely heavily on rural community small-scale timber suppliers and small-scale timber plantations. Data shows that while the upstream forestry industry (i.e. timber plantation) is predominantly dominated by large privately owned big corporations, at least 27% of timber plantations are owned by medium-scale growers (14.8%) and small -scale timber growers

content/uploads/2020/12/COMPETITION-COMMISSION-PUBLISHES-FINAL-REPORT-ON-ITS-FORESTRY-SECTOR-IMPACT-STUDY.pdf (accessed 7 February 2021)

⁷² Forestry Impact Study, p 14.

⁷³ Ibid.

⁷⁴ Ibid, p 15.

⁷⁵ Based on 2017/2018 data on Page 21

(3.8%).⁷⁶ Notably, there are 25 000 individual timber growers who own small-scale timber plantations, which mostly comprise women and some community schemes, and these small-scale growers are predominantly located in rural communities.⁷⁷

Small-scale forestry businesses such as small-scale plantation and downstream timber-based production activities within rural areas are key contributors to rural household subsistence income, creating employment opportunities and in turn alleviating poverty.⁷⁸

Despite these Forestry SMEs/HDPs playing a key role in inclusive economic growth, their sustainability continues to be hindered by exclusionary practices of large and integrated forestry firms, as it will be demonstrated in the consideration of the Commission's findings below.

While exclusionary practices and hindrance of access to markets are core competition law concerns, these concerns are intrinsically linked to issues of inclusive economic growth. Especially the need to address the exclusion of black people from formal economic activities (which make up a large portion of the rural population) and economic empowerment of rural communities. As captured by du Toit, in the South African context:

“Rural and urban poverty have for more than a century been two sides of a single coin. They result, not from a growth deficit, but from a particular kind of growth: a skewed and exclusionary form of development driven by core features of the economic structure and the regulatory environment. In South Africa, this path of growth has created a deep divide between urban insiders and rural ‘outsiders’ — but this divide is not the result of a disconnection between rural and urban economies. Rather, flows from the direct but uneven, selective and adverse incorporation of South Africa’s rural black population into the core economy.”⁷⁹

It is within this background that the Commission Forestry Impact Study, in particular its competition law enforcement recommendations that seek to advance HDPs, need to be considered.

In the Forestry Impact Study, the Commission considers the impact of merger decisions since the inception of the Commission and the Tribunal in the forestry industry. The mergers considered in the impact study were largely approved, despite the mergers giving rise to vertical integration in the forestry sector, as well as timber supply access concerns for small businesses (integrated and non-integrated). It is at the back of deepening concerns and complaints from market participants relating to abuse of dominance in the forestry sector, that the Commission has decided to undertake this impact study. In particular, the Commission focuses on the ability

⁷⁶ See Forestry South Africa's blog 'Introducing the Timber Plantation Owners', based on 2018/2019 data. Online: <https://www.forestrysouthafrica.co.za/wp-content/uploads/2019/12/004-Ownership.pdf> (accessed: 2 May 2021).

⁷⁷ Ibid.

⁷⁸ OECD, 2008. 'Natural Resources and Pro-Poor Growth: The Economics and Politics', Chapter 7: Forestry for Pro-Poor Growth. Online: <https://www.oecd-ilibrary.org/docserver/9789264060258-9-en.pdf?expires=1619939445&id=id&accname=guest&checksum=E39CCBEA7ED1C39B32262E385A60E898> (accessed: 2 May 2021). and International Union of Forest Research Organizations, Forests, Trees and the Eradication of Poverty: Potential and Limitations, 2020. Vol. 39, 2020. Online: <https://www.iufro.org/fileadmin/material/publications/iufro-series/ws39/ws39.pdf> (accessed: 2 May 2020).

⁷⁹ du Toit, A., 2017. 'Explaining the Persistence of Rural Poverty in South Africa, United Nations Economic Commission for Africa', Expert Group Meeting on Eradicating Rural Poverty to Implement the 2030 Agenda for Sustainable Development, Addis Ababa, 27 February - 1 March 2017. Online: <https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/03/Du-Toit-2019-rural-poverty-in-SA-UNEG-2019-02-27.pdf> (accessed: 2 May 2021).

of SMEs and new HDP entrants to access logs from large vertically integrated suppliers in order to sustain their commercial viability in downstream markets.

The Commission notes that while it has adopted a number of advocacy measures to address the access concerns, there are still supply access barriers for SMEs and new HDP entrants.⁸⁰ The Commission particularly identified that long-term supply contracts are not extending to SMEs.⁸¹

Concerns identified from the Forestry Impact Study

The Commission notes that owing to the decline in the availability of forestation areas, stringent environmental approvals and land claims, the volatility of supply and demand for timber, and economic downturn, the viability of first in the timber supply chain is dependent on (i) ensuring that timber plantations are located close to processing mills (to reduce costs) and (ii) access to secure and consistent supply of good quality timber products.⁸²

As such, the continued commercial viability of firms in the timber and timber product value chain requires firms to be vertically integrated or to enter into long-term supply contracts. This allows firms to invest in their operations (given their appreciable insights into long-term market forecasting), plan and optimise their production activities and, in some instances, engage in cost-saving strategies such as product swapping.⁸³

While the few large players in the market have benefited from vertical integrated operations and long-term supply contracts, SMEs and HDPs have not had the same benefit. In particular, SMEs and HDPs have had to rely on supply from the open spot timber market.⁸⁴ Given the unpredictable nature of the supply and demand in the timber sector, SMEs and HDPs are competitively disadvantaged. This is further exacerbated by increased costs and restriction of output due to the prioritisation of supply to vertically integrated rivals and those with more secure and steady supply contracts.⁸⁵

The effect of all these dynamics and their impact on SMEs and HDPs, is that concentration levels are maintained, and that the market position of the large vertically integrated private firms is self-reinforced.⁸⁶

Key competition law enforcement recommendations

In light of the diminishing opportunities for log supply to SMEs and HDPs, and the role of plantation acquisitions in reinforcing vertical integration, the Commission has recommended the use of the merger control regime to address these concerns, in particular that remedial action in merger control should ensure long-term supply agreements with SMEs and HDPs where a merger threatens their security of supply.⁸⁷ The Commission further notes that competition law may also be used to create opportunities that facilitate greater security of supply for SMEs and HDPs, such as allowing SMEs and HDPs to cooperate to be able to secure long-term log supply

⁸⁰ Ibid., p 5

⁸¹ Ibid.

⁸² Ibid., p 80

⁸³ Ibid., p 63 - 68, and p 80 - 81

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

agreements through collective purchasing or commercialisation.⁸⁸ This type of cooperation could be exempt under section 10 of the Competition Act, which provides that an exemption can be granted if it is found to contribute to the promotion of the competitiveness of SME and HDP firms.⁸⁹

Outside of competition law enforcement, the Commission has also made several recommendations relating to industrial policy and advocacy engagements with the large vertically integrated plantations. For example, the Commission recommends the use of state-owned entities and the South African government, to support the development and viability of SMEs and HDPs in the sector.

In relation to development finance, the Commission recommends that state developmental finance institutions such as the South African Industrial Development Corporation be directed to grant small finance packages for the upgrade of milling operations of SMEs and HDPs, as well as financing SME and HDP plantation acquisitions.

The recommendations of the Commission in relation to the exclusionary and market access concerns noted above will certainly, if implemented effectively, advance the interests of HDPs in both the upstream and downstream forestry market. However, the lack of inclusion of gender in the Competition Act's PICs, has inadvertently resulted in the role of women in the forestry industry being overlooked. This is likely to have significant implications as a majority of the small-scale forestry SMEs/HDPs in rural communities are owned by women as reflected above.⁹⁰ In rural African communities, women are typically left to assume varied roles in the agricultural and forestry sector, as men typically out-migrate from rural areas to seek better economic opportunities in urban areas, which contributes to the high number of women-headed rural households.⁹¹ Findings of studies that have examined the role of women in the forestry industry in Africa and in other developing countries are particularly concerning. For example, while the forestry sector stands to offer significant economic empowerment opportunities for women, especially those in rural communities, studies show that their participation is generally low in the high value generating segments of the forestry industry.⁹² The key barriers to enhancing women's participation in high-value generating segments of the forestry industry include lack of access to market information and finance, as well as the persistent male domination of high-value forestry commercial sectors which create an inaccessible and unfavourable environment for women.⁹³

In this way, the Commission's Forestry Impact Study missed a key opportunity to consider the exclusionary practices and market access concerns in the South African forestry industry from a gendered perspective. While the recommendations could improve the position of women in

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ See Forestry South Africa's blog 'Introducing the Timber Plantation Owners', based on 2018/2019 data. Online: <https://www.forestrysouthafrica.co.za/wp-content/uploads/2019/12/004-Ownership.pdf> (accessed: 2 May 2021).

⁹¹ International Union of Forest Research Organizations, *Forests, Trees and the Eradication of Poverty: Potential and Limitations*, Vol. 39, 2020, page 71 - 72. Available: <https://www.iufro.org/fileadmin/material/publications/iufro-series/ws39/ws39.pdf> (accessed: 2 May 2020) and Kiptot, E. and Franzel, S., 2012. 'Gender and agroforestry in Africa: a review of women's participation', *Agroforestry Systems*, 84: 36- 58. Available: <https://link.springer.com/article/10.1007/s10457-011-9419-y> (accessed: 2 May 2020).

⁹² Kiptot, E. and Franzel, S., 2012. 'Gender and agroforestry in Africa: a review of women's participation', *Agroforest SystEM*, 84: 36-58. Available: <https://link.springer.com/article/10.1007/s10457-011-9419-y> (accessed: 2 May 2020).

⁹³ Ibid.

the industry as owners of equity, only a small portion of the rents to be derived from the Commission's recommendations are likely to benefit women.

As pointed in by Kiptot and Franzel, measures seeking to improve the economic position of women in the agroforestry sector need to be deliberately gender-sensitive, such measures should include (i) access to technological interventions to enable women to use technology in cultivating, storing and developing new products; (ii) policy intervention that facilitate improved access to markets, financial credit and market information; and (iii) institutional intervention such as strengthening groups that can benefit women by linking them to markets and the industry.⁹⁴ It is clear from the above that the measures required to be adopted to advance women's participation in the South African agroforestry industry extend beyond the scope of the Competition Act. As with all economic policies, competition policy, and its effects, are not gender-neutral. However, the Competition Act plays a crucial role in opening up access to markets, and had the Commission taken a gender sensitive approach to its Forestry Impact Study, it would have been able to assess the impact of the competition issues identified on SMEs owned by women, which will be particularly unique. Further, the Commission would have taken the opportunity to consider recommendations that deliberately seek to advance women in the forestry industry.

2. Purposeful framing of public interest considerations

The fact that the public interest values are embedded in the Act's preamble and purpose has enabled their norms to permeate competition enforcement and practice. South African competition enforcement is also proof that it is possible to take a balanced approach to applying PICs that is evidence-based and does not lose sight of the traditional elements of competition assessment. However, this has not always been smooth, as Capobianco and Nagy note, the inclusion of PICs in merger control provisions raises a number of important questions, such as (i) how the PICs should be defined; (ii) how to measure the weight of the PICs in merger assessment cases; and (iii) how to fit the PICs into the traditional *ex-ante* assessment of merger cases.⁹⁵

The jurisprudence of the CAC in the Massmart case, is illustrative of the tensions the framing of the legal provisions can create. As noted by Fox and First about the Massmart decision:

*"The Wal-Mart/Massmart case demonstrates the difficulties of incorporating public interest factors into merger enforcement, but it also shows that competition law can accommodate interests beyond a narrowly conceived version of consumer welfare and need not leave those interests to be considered elsewhere. South Africa's competition law decision makers tried to keep their public interest concerns focused on the factors enumerated in the Competition Act. They insisted on concrete evidence of the public interest harms so that they could weigh these harms against consumer welfare benefits. They brought into a judicial process what might otherwise have been solely an exercise in political bargaining, giving representation to other government ministries and to labor interests, and requiring them to present their arguments— and even their bargaining—in a more transparent way than would otherwise have occurred."*⁹⁶

⁹⁴ Kiptot, E. and Franzel, S. 2011. 'Gender and Agroforestry in Africa: Are Women Participating?', *World Agroforestry Centre*, Occasional Paper No. 13, 2011, 36 - 39. Available: <http://apps.worldagroforestry.org/downloads/Publications/PDFS/OP16988.pdf> (accessed: 2 May 2021).

⁹⁵ Capobianco, A. and Nagy, A., 2016. 'Public Interest Clauses in Developing Countries', *Journal of European Competition Law & Practice*, p 49. Online: <https://academic.oup.com/jeclap/article-abstract/7/1/46/2357787> (accessed: 10 June 2021).

⁹⁶ First, H. and Fox, E., 2015. 'Philadelphia National Bank, Globalisation, and the Public Interest', *Antitrust Law Journal*, p 307. Online:

Case Study: Walmart/Massmart

In the Walmart/Massmart merger decisions (the First and Second Walmart/Massmart CAC Decisions),⁹⁷ the CAC illustrated that the framework of the Act allows competition authorities to consider PICs in a manner that does not deviate from the SLPC assessment objectives of the Act.

First principle: The section 12A(3) public interest grounds have a limited scope

This principle that the CAC focused on in the Second Walmart/Massmart CAC Decision, stating that the introduction of PICs in merger assessment raises a debate regarding the relationship between industrial policy and competition law.⁹⁸ The CAC made it clear that the PICs in the Act, are not broad considerations which invite an assessment of mergers based on any industrial policy issues highlighted by a merger.⁹⁹ Importantly, the limited scope of the PICs seeks to set a clear distinction between industrial policy considerations that are caught by the Act and those that are not, and therefore, require a broader and comprehensive industrial policy framework.¹⁰⁰

Second principle: The application of public interest provisions requires a careful assessment of conflicting considerations

The inclusion of PICs in merger assessment requires competition authorities to strive to strike the right balance between sometimes conflicting considerations.¹⁰¹

In the First Walmart/Massmart CAC Decision, the CAC held that:

“On a holistic reading of the Act, it is possible to contend, for example, that if it appears that a merger is not likely to substantially prevent or lessen competition, the relevant competition authority must, notwithstanding this finding, proceed to engage with the factors which make up the public interest enquiry. On one level, this appears to be an approach which is congruent with the wording of the section. Public interest grounds then stand to be examined separately in order to come to the final conclusion as to whether to permit the merger.”¹⁰² (our emphasis)

The CAC noted that a conflict often arises where a merger results in economic efficiencies at the expense of PICs.¹⁰³ This issue came up, as the Minister and the South African Commercial, Catering and Allied Workers Union (the “SACCAWU”), who both intervened in the merger, were concerned that Walmart’s global supply chain would lead to a flood of cheap Asian imports;

https://lsr.nellco.org/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1409&context=nyu_lewp (accessed: 10 June 2021).

⁹⁷ *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc and Another* 10/CAC/Jul11, 111/CAC/Jun11 (9 March 2012) (“First Walmart/Massmart CAC Decision”) and *Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc* 110/CAC/Jun11, 111/CAC/Jul11 (9 October 2012) (“Second Walmart/Massmart CAC Decision”).

⁹⁸ Second Walmart/Massmart CAC Decision [12].

⁹⁹ *Ibid.*, p 13-14.

¹⁰⁰ *Ibid.*

¹⁰¹ Boshoff, W., Dingley, D. and Dingley, J., 2014. ‘The Economics Of Public Interest Provisions In South African Competition Policy’, South African Competition Commission Conference, p2 -3. Online: <http://www.compcom.co.za/wp-content/uploads/2014/09/The-economics-of-public-interest-provisions-in-South-African-competition-policy.pdf> (accessed: 20 May 2021).

¹⁰² First Walmart/Massmart CAC Decision at [113].

¹⁰³ *Ibid* at [99].

putting pressure on local manufacturing and resulting in job losses.¹⁰⁴ The intervenors argued that post-merger, Massmart would have access to Walmart's global procurement capabilities, enabling it to substitute its procurement from local suppliers to imports.¹⁰⁵ They further argued that with reduced domestic procurement, Massmart's SMEs would be unable to compete with imports, and as a result, these suppliers would be forced to shut down and there would be significant job losses.¹⁰⁶ While for the merger parties, Walmart's global procurement capabilities would result in significant merger efficiencies and lower prices for consumers. The CAC importantly noted that in cases where competition authorities are required to balance such conflicting considerations, the authorities must consider what weight should be attributed to the PICs.¹⁰⁷

In this regard, the CAC noted that competition authorities are required to determine whether the public interest concerns raised should override the competition assessment of the merger, resulting in a prohibition decision.¹⁰⁸ In its guidance on how competition authorities ought to navigate this complexity, the CAC held that this assessment requires competition authorities to engage in a proportionality exercise.¹⁰⁹ The CAC also importantly acknowledged that this exercise may not be perfect or easy; however, it is what the Act requires.¹¹⁰ In conducting the proportionality exercise, the CAC referred to the wording of section 12A of the Act, which requires the public interest ground being relied upon to be "substantial".¹¹¹ In this regard, the CAC held that unless the public interest concern is shown to be substantial, competition authorities cannot prohibit a merger solely on the basis of PICs.¹¹²

In view of the above, the CAC made it clear that the application of the public interest criterion in merger assessment must be conducted. Further, it is clear that the merger assessment needs to be guided by the principles of proportionality and substantiality, and the evidence provided by the intervenors and the merger parties plays an important role in evaluating the "substantial" nature of the concern.

Third principle: The determination of appropriate remedies for public interest concerns also requires careful consideration

In the First Walmart/Massmart CAC Decision, the CAC considered the undertaking offered by the merger parties to create an investment fund of R100 million, to be spent over a period of three years aimed at developing local suppliers in response to the concerns that, post-merger, the merged entity may divert procurement from local suppliers to imports. This undertaking was accepted by the Tribunal in its initial consideration of the Walmart/Massmart merger.¹¹³

¹⁰⁴ Mail & Guardian, 2011. 'Massmart chief 'surprised' by SA govt intervention' (14 June 2011). Online: <https://mg.co.za/article/2011-06-14-massmart-chief-surprised-by-sa-govt-intervention> (accessed: 10 March 2021).

¹⁰⁵ First Walmart/Massmart CAC Decision.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid. at [99].

¹⁰⁸ Ibid.

¹⁰⁹ Ibid. at [100].

¹¹⁰ Ibid.

¹¹¹ Ibid at [113]-[114].

¹¹² Ibid.

¹¹³ *Walmart Stores Inc v Massmart Holdings Ltd*, case number: 73/LM/Dec10 at [72]-[120]

The CAC was critical of the Tribunal's approach in considering this remedy, as it held that the Tribunal failed to determine whether the amount was excessive or too little, and what effect it would have in dealing with the concerns it sought to address.¹¹⁴

The CAC noted the complexities of determining the appropriate remedy in relation to the procurement concern raised by the intervenors, and held it that it would be impossible in the case before it to make a determination on the appropriateness of the remedy without first understanding the global value chain and the challenges posed by globalisation to the South African economy; in particular, on SMEs in the context of the Walmart/Massmart merger.¹¹⁵ As such, in the First Walmart/Massmart CAC Decision, the CAC ordered that a study be commissioned to consider the impact of the merger on the SMEs and what changes needed to be made to the fund condition to ensure that it would be appropriate to address the identified public interest concerns.¹¹⁶

In the Second Walmart/Massmart CAC Decision, the CAC then considered the commissioned study and held that, in determining what is an appropriate remedy, the debate turns on a reduction of the risk or harm arising from the merger so as to achieve a maximisation of welfare.¹¹⁷ The CAC also reiterated that the purpose of the remedy should be to minimise the risk that flows directly from the merger, and not to replace the government's prerogative of formulating and developing comprehensive economic policies.¹¹⁸

As noted earlier, the determination of the appropriate remedy is heavily guided by the evidence presented by the intervenors raising concerns, which is then assessed against the evidence of the merger parties. In this regard, the CAC held that being asked to simply say that the fund should be increased from R100 million to R500 million, in order to remedy the public interest concern raised by the intervenors, would be asking "*the court to shoot into the evidential dark*".¹¹⁹ Thus, the CAC considered submissions from the intervenors and the merger parties on how to structure the investment fund in a manner that maximises the objectives of the affected public interest ground.¹²⁰ The CAC made it clear that the determination of the appropriate merger remedy for public interest concerns needs to be guided by the scope and limitations of section 12A(3) of the Act, and that the determination requires a careful balancing of the SLPC and the implicated PICs of a merger.¹²¹

Since the above discussed Walmart/Massmart decisions, the 2018 Amendment has included an amendment to the section 12A public interest test in order to clarify any ambiguities regarding the balancing of the proportionality exercises performed in relation to the SLPC and PIC assessments. The new text of section 12A of the Act remedies these ambiguities and is consistent with the findings in the CAC.¹²²

¹¹⁴ First Walmart/Massmart CAC Decision at [148].

¹¹⁵ Ibid at [158].

¹¹⁶ Ibid at [167].

¹¹⁷ Second Walmart/Massmart CAC Decision at [16].

¹¹⁸ Ibid at [20].

¹¹⁹ First Walmart/Massmart CAC Decision at [166].

¹²⁰ Second Walmart/Massmart CAC Decision at [42].

¹²¹ Ibid.

¹²² It reads: "(1A) *Despite its determination in subsection (1), the Competition Commission or Competition Tribunal must also determine whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3).*" (our emphasis)

The above three principles enunciated by the CAC in the Walmart/Massmart decisions remains the foundation for the application of the public interest assessment and provides guidance on how PICs are to be assessed in conjunction with the competition assessment.

We argue that all mergers, which in any event require an assessment of the effect of the merger upon the public interest, should include the production of information relating to the impact of the merger on gendered outcomes. Where there may be multiple potentially conflicting outcomes - (i) between the SLPC and the PIC assessments; and/or (ii) among different PICs themselves - the principle stated in the Second Walmart/Massmart CAC Decision should be followed: “... *in the context of the limited scope of s 12 A (3), the Court considers that the focus should be on the most vulnerable enterprises, particularly those referred to specifically in s 12 A(3).*”¹²³

When understanding vulnerability it becomes important to take reference to evidence.¹²⁴ Drawing Crenshaw’s seminal work on intersectionality,¹²⁵ one should be cautious when dealing with those that experience multiple layers of disadvantage: these people should be prioritised; for such reasons, it may be important for rent allocation mechanisms to sometimes explicitly state that you aim to benefit black women, for instance.

3. Progressionists’ participation: key public interest stakeholders

*“The politics is already baked into economics. To rebalance power in favour of those typically excluded from political action we must go at least a little out of our way to include them in the process – and to incorporate their concerns into the substance of antitrust.”*¹²⁶ While there is an inherent risk of political capture and inefficient administrability with a competition law that includes PICs, the South African approach demonstrates that with a balanced regulatory framework these risks can be minimised if not mitigated. As Meagher notes

*“If dealing with diverse public interest issues becomes unwieldy, authorities and legislators can develop bright line rules to aid with enforcement and compliance with the law. This does not mean we should adopt a less ‘economic’ or less ‘scientific’ approach, but it does involve recognising that antitrust is a tool of both economic and social policy, therefore neoclassical economics and its desocialisation of markets and economic actors is bound to fall short.”*¹²⁷

Meagher restates what the CAC outlined in Second Walmart/Massmart Decision that the delineation of and adherence to a scope of participation by stakeholders is key to their efficient participation. The CAC clarified that it is with regard to the purpose of the PIC being relied upon that the determination of the scope and limits of stakeholder participation is made.

After Walmart/Massmart, more diverse remedies are observed and where public interest conditions are imposed the Minister and major South African trade unions had played a role in proceedings before the competition authorities. The PICs of South African competition law have been a success mostly owing to the active participation by external stakeholders in the enforcement process. By actively lobbying for the realisation of the public interest objectives of the Act, the Minister and various industry trade unions have played a crucial role in the advancement of the ability of HDPs to participate in the South African economy and key value

¹²³ Second Walmart/Massmart CAC Decision at [22].

¹²⁴ First Walmart/Massmart CAC Decision at [100] and [113].

¹²⁵ Crenshaw, K. 1989. ‘Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory, and antiracist politics’. Routledge, 2018 and Crenshaw, K., 2010. ‘Twenty years of critical race theory: Looking back to move forward.’, Connecticut Law Review, 43 (2010): 1253.

¹²⁶ Meagher, M., 2020. *Competition is killing us*, Penguin Business, p140.

¹²⁷ Ibid., p 140.

sectors of the economy. Again, we reiterate that while the merger provisions of the Act allow key stakeholders to participate in merger proceedings before the authorities in order to aid the enforcement and application of public interest, the decision-making power to determine the true effect of a merger on markets as well as the public interest, vests solely with the competition authorities. We acknowledge that there are complexities that have arisen from these engagements with the Minister’s office and trade unions (i.e. lack of transparency, certainty and predictability of these engagements); however, we believe that without the vigorous participation of government and workers the many equity-related PICs imposed on mergers would not have come to pass. The crafting of remedies, in the form of merger conditions - and, potentially also, in terms of relief granted in complaint procedures - is as progressive as the participation rights allow stakeholders to be.

While there are many notified mergers that do not have conditions imposed upon them, in those in which conditions are imposed the following trends are seen:

Table 1: Mix of merger conditions imposed in Year 2004 - 2019¹²⁸

All conditions	419	
Type of condition		% Split
Public interest - employment	201	37.2
Public interest - SME and BEE ¹²⁹	73	13.5
Behavioural - cross shareholding	46	8.5
Self-monitoring - cross shareholding	46	8.5
Behavioural - supply conditions	40	7.4
Structural - divestiture	29	5.4
Public interest - industrial sector or region	29	5.4
Public interest - investment	20	3.7
Behavioural - pricing conditions	19	3.5
Self-monitoring - supply	16	3.0
Self-monitoring - additional acquisitions	16	3.0
Behavioural - tying/bundling/discounts	5	0.9
Self-monitoring - tying/bundling/discounts	1	0.2
Total	541	100%

Source: M&A Division Conditions Monitoring Report

¹²⁸ Hodge, J. and Mkwanzazi, S., 2019. 'We Need To Talk About Conditions: The challenge of conditions for merger control in South Africa.' Conference Paper presented at the 13th Annual Competition Law Economics and Policy Conference 2019, (“**Hodge and Mkwanzazi**”) p 4.

¹²⁹ BEE means Black Economic Empowerment.

Equity-related PIC remedies

As highlighted earlier, the PICs fall into two themes: developmental concerns and equity-related PICs. The 2018 Amendment has updated the equity-related PICs by including the spread of ownership consideration¹³⁰ and widening the consideration related to SMEs and HDPs. Where the Act previously referred to the ability of SMEs and HDPs to “*become competitive*”, it now speaks of the ability of SMEs and HDPs to “*effectively enter into, participate in or expand within the market*”. We briefly discuss the shape that remedies have come to take in order to provide for these objectives, with the aim to distil apposite lessons for gender.

Employment

The Act does not apply to economic activity that amounts to collective bargaining and collective agreements.¹³¹ The effect of the collective bargaining exclusion means that competition protections against no-poaching agreements, wage-fixing agreements, and information exchange on human resources data among competitors, for example;¹³² are not possible. Thus the conditions imposed to remedy employment concerns have mainly taken the form of moratoriums on any retrenchments or limitations on retrenchments by employee level, for a specific period of time or indefinitely.¹³³ This makes sense when the retrenchment of workers is a quick means to reduce costs and can be particularly attractive for new management after a merger. Regulators are trying to ensure that the approved mergers produce “*deeper and more far-reaching efficiencies than simply the opportunistic transfer of welfare from workers*”.¹³⁴ There have also been conditions imposed to support those that do get retrenched on account of duplications created by the merger: obligations to look first to them when future positions become available in the merged entity;¹³⁵ or conditions that the merged entity should provide a fund for the upskilling of those employees.

This tension between labour law regulation and competition law regulation is not without its complications.¹³⁶ In some cases the conditions imposed by the Tribunal include union recognition clauses: clauses that a given union will receive recognition at the merged entity or for a certain period.

The ability of small businesses, or firms controlled or owned by historically disadvantaged persons to effectively enter into, participate in or expand within the market

Supplier renegotiation is also a means by which new management may seek to achieve easy cost savings.¹³⁷ In other cases an acquirer may arrive with its own supplier base - these

¹³⁰ “The promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market”

¹³¹ The Act section 3(1).

¹³² See for example, Gu`rkaynak, G., Gu`ner, A., and O`zkanlı, C., ‘Competition Law Issues in the Human Resources Field’, *Journal of European Competition Law & Practice*, 2013, Vol. 4, No. 3; see also Moudgil, R and Bandey, S ‘Competition Law and Employment’, *Competition Commission of India Journal on Competition Law and Policy*, Vol.1 December 2020.

¹³³See for example, *Retailability (Pty) Ltd And Parts Of The Edgars Business Conducted By Edcon Ltd In South Africa, As A Going Concern, Consisting Of Certain Assets And Liabilities*, Case number: LM100Aug20 Conditions (“**Retailability**”) at clause 2.1

¹³⁴ Hodge and Mkwanzai., p8.

¹³⁵ *Retailability.*, at clause 2.2.

¹³⁶ See for example, *Staples J Holland M and Rossouw J, ‘Taking Public Interest Too Far: Walmart Stores Inc v Massmart Holdings Ltd.’* *South African Mercantile Law Journal*, 2013

¹³⁷ Hodge and Mkwanzai, p8.

strategies may result in the potential displacement of SMEs or HDPs during the process.¹³⁸ Therefore, under this PIC, conditions include commitments to continue or extend sourcing from SME or HDP suppliers or commitments to create a fund to support the development of local, SME or HDP suppliers.¹³⁹ Walmart/Massmart saw the imposition of the first supplier condition involving a financial commitment of R250 million.

The promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in firms in the market

Since coming into operation, this subsection has been put to use. One of the ways in which effect has been given to “increase the spread of ownership by workers” has been through the creation of workers’ trusts or employee share ownership programme (“ESOPs”). In *Simba*¹⁴⁰ the Tribunal grappled during the hearing with the principles of the rent distribution of the commitment related to the creation of an ESOP. In assessing the appropriateness of the proposed remedy, the Tribunal interrogated who would benefit, at what cost and the rights attaching to their ownership in order to assess whether this will amount to a “greater spread” of ownership.¹⁴¹

As part of South Africa’s transitional justice goals, affirmative action policies have been implemented through multiple legislative instruments- among them is the B-BBEE Act¹⁴² the framework for broad based black economic empowerment (“B-BBEE”, sometimes colloquially referred to by its prior incarnation “BEE” i.e. black economic empowerment).¹⁴³ The levels of B-BBEE have been applied as the proxy measurement for increases on the level of ownership by HDPs. The application of these principles culminated in the first merger prohibition based on negative PIC effects.

On 1 June 2021, the Commission prohibited the acquisition of Burger King South Africa and Grand Foods by ECP Africa (and its associated funds) on the basis that the transaction would lead to a significant reduction in the shareholding of HDPs in the target firms. Pre-merger the target firms are ultimately controlled by an empowered entity that is over 65% owned by HDPs; with the acquirers having no HDP owners. Despite a finding that the transaction raised no concerns under the SLPC assessment, the Commission prohibited the transaction.¹⁴⁴ The intermediate merger has gone on review to the Tribunal on an uncontested basis; given that the

¹³⁸ Id.

¹³⁹ See for example, *Off The Shelf Investments 56 (Rf) (Pty) Ltd ("Ots") And Chevron South Africa (Pty) Ltd*, case number: LM232Nov17

¹⁴⁰ *Simba (Pty) Ltd And Pioneer Food Group Ltd*, case number: LM108Sep19

¹⁴¹ *Simba* at paras 43-72.

¹⁴² No. 53 of 2003.

¹⁴³ The B-BBEE Act No. 53 of 2003 provides a legislative framework empowering the Minister of Trade and Industry to issue Codes of Good Practice and publish Transformation Charters, and establish a B-BBEE Advisory Council - all with the objective of advancing economic transformation and enhancing the economic participation of black people in the South African economy. (DTIC website <http://www.thedtic.gov.za/financial-and-non-financial-support/b-bbee/broad-based-black-economic-empowerment/>)

¹⁴⁴ Competition Commission, 2021. ‘Commission Prohibits Acquisition between ECP Africa Fund, Burger King South Africa and Grand Foods’. Online: <https://www.compcom.co.za/wp-content/uploads/2021/06/COMMISSION-PROHIBITS-ACQUISITION-BETWEEN-ECP-AFRICA-FUND-BURGER-KING-SOUTH-AFRICA-AND-GRAND-FOODS-.pdf> (accessed: 5 June 2021).

merging parties, Commission and DTIC approached the Tribunal with conditions that had been revised and were agreed to.¹⁴⁵

Where are women in these outcomes?

The way in which these equity-related PICs serve to protect designated groups – HDPs and workers – is to ensure that cost reduction strategies that may be engaged after a merger do not come at the expense of vulnerable groups. Efficiencies should enhance total welfare without amounting to a transfer of welfare from groups that the Act aims to protect.¹⁴⁶ Similarly, these same rent protection mechanisms - moratoriums on retrenchments, skills funds, supply arrangements, value chain investments, and firm ownership opportunities – can all be engaged to protect women as a designated group.

The Tribunal is seeing more conditions with explicit reference to women. In the Barloworld Motor Retail Business sale,¹⁴⁷ the condition was imposed that for a period of two years the merged entity would continue to participate in the Barloworld Supplier Development Programme. This programme affirms that black owned and women owned qualifying small enterprises are afforded the maximum opportunity to participate in providing products and services to Barloworld. In *Thabong Coal*¹⁴⁸ the divestiture of certain mining rights was imposed as a condition to the merger. Guiding the selection of the purchaser, preference would be given to a purchaser with “*BEE female participation*”. In the *Simba* case discussed above, the merging parties provided in the hearing that “*in categorising qualifying employees under the trust, prioritisation would be given to [HPDs] and women*”.¹⁴⁹ This undertaking, though mentioned during the hearing and captured in the merger reasons, was not captured in the conditions.

Another interesting example, though not explicitly mentioning women appears to be an example of a double dividend.¹⁵⁰ During the *Dotsure And Hollard Holdings*¹⁵¹ merger hearing, it was evident that the target business' employees were still concerned about the increased travelling involved with a possible move to a different office being occasioned by the merger. After the Tribunal panel canvassed this topic with the merging parties, the merging parties committed to consider providing travel assistance or permitting work from home for these transferring employees on a case-by-case basis for a maximum of 24 months. In this case, the work from home strategy was set to solve the PIC related to employment; it could also be said to feasibly have had a gendered outcome – that positively contributed to the reduction of gender inequality in that workplace.

The exclusion related to collective bargaining is a missed opportunity; especially in light of recent scholarship on how competition could be employed to think through the eradication of the gender

¹⁴⁵ Burger King sale possibly back on the cards after revised conditions see <https://www.news24.com/fin24/companies/retail/burger-king-sale-possibly-back-on-the-cards-after-revised-conditions-20210818>

¹⁴⁶ Hodge and Mkwanazi , p8.

¹⁴⁷ NMI Durban South Motors (Pty) Ltd And The Barloworld Motor Retail Business of Barloworld South Africa (Pty) Ltd, case number: LM202Feb21.

¹⁴⁸ Thabong Coal (Pty) Ltd And South32 SA Coal Holdings (Pty) Ltd, case number: LM144Jan20.

¹⁴⁹ *Simba* at para 64.

¹⁵⁰ Santacreu-Vasut and Pike talk about how taking into account gender can result in a “double dividend” in that, “by promoting competition in certain markets, competition authorities may reduce market distortions in a particular market (first dividend) and contribute to reduce gender inequality (second dividend)”. Estefania Santacreu-Vasut and Chris Pike p 33.

¹⁵¹ Case number: LM156Nov20

wage gap.¹⁵² In South Africa, another piece of affirmative action legislation, the Employment Equity Act¹⁵³ requires companies with more than 50 employees to report equality statistics to the Department of Labour each year. This report includes an Income Differential Statement¹⁵⁴ - a document that could potentially be called for by the Commission with the notification of mergers in order to assess this factor; but again, we point out that questions of employment contract terms, fall completely outside the remit of South African competition enforcement.

Legislation that aims to have its public interest sections used should cater for the stakeholders best placed to lobby for those public interest aims. In South Africa, it is important that those stakeholders representing the economic interests of women have been identified and are invited to participate and make representations during the enforcement process.

4. Prioritisation of public interest in competition law enforcement (and advocacy)

The practice of sectoral prioritisation by competition authorities can be a means by which to infuse public interest into enforcement. The Act's PICs inform the priorities of the Commission.¹⁵⁵ The first five to eight years of the Commission's work was dominated by merger regulation.¹⁵⁶ The Commission signalled its intent to improve its enforcement capacity in its 2006-2007 annual report, with a specific focus on detecting and prosecuting cartels.¹⁵⁷ Since 2006, the Commission increased its enforcement activity and its formulated strategic plan acknowledged that the Commission should take a more proactive stance to deal with sectors that have high levels of concentration and anti-competitive market structures and practices.¹⁵⁸

In order to identify sectors for prioritisation, the Framework for Prioritising Sectors and Cases dictated that, alongside criteria based on competition concerns (i.e., the degree of concentration and the most harmful competition abuses), prioritisation included criteria based on alignment of the sector to government economic policy by considering its importance to development-related public interest concerns (i.e., economic policy, importance for South Africa's competitiveness and the effective working of the economy, extent to which sectors provide essential inputs to

¹⁵² Santacreu-Vasut, S and Pike, C 29 November 2018 "Competition Policy And Gender" Paper presented at the Global Forum on Competition hosted by the Directorate For Financial And Enterprise Affairs Competition Committee DAF/COMP/GF(2018)4 published 6 November 2018.

¹⁵³ No. 55 of 1998.

¹⁵⁴ Bosch, A. (2020). The gender pay gap: a guide for the already converted. University of Stellenbosch Business School, South Africa.

¹⁵⁵ See South African Competition Commission Website (<<http://www.compcom.co.za/our-strategic-goals/>>)

¹⁵⁶ Burke, M., 2014. 'Does prioritisation contribute to effective regulatory governance in developing countries? Insights from the Competition Commission South Africa', paper submitted to the 2nd Annual Competition and Economic Regulation Conference, Southern Africa Avani Victoria Falls Resort, Livingstone, Zambia hosted by CCRED (11 & 12 March 2016) citing Fox, E.M., & Gal, M.S., Drafting Competition Law for Developing Jurisdictions: Learning from Experience. New York University Law and Economics Working Papers. Paper 374 at 7 citing Competition Commission South Africa & Competition Tribunal South Africa, 2009; Makhaya, Mkwanzani & Roberts, 2012; Makhaya & Roberts, 2013.

¹⁵⁷ Ibid.

¹⁵⁸ Analysis by Tapia and Roberts (2015) show that the Commission receives between 100 and 200 complaints annually, but only conducts about twenty in-depth investigations as the overwhelming majority of complaints do not raise substantive competition issues.

other economic sectors); and equity-related public interest issues: the extent to which the sector is able to contribute to empowerment, new entry and growth of SMEs.¹⁵⁹

According to Burke, the Commission “sought to use the full range of available policy instruments to bear on priority sectors, including investigations, advocacy and market inquiries. In the prioritisation of sectors, it was proposed that different interventions are targeted at specific sectors”.¹⁶⁰ Burke asserts that this sector prioritisation strategy facilitated and enabled the skilling of effective personnel, that could be pulled from any department within the Commission, in order to staff the project teams that would manage the conduct of market inquiries.¹⁶¹ Formal powers to conduct a market inquiry were granted to the Commission in 2013.¹⁶²

The Strategic Plan 2015-2020,¹⁶³ details the Commission’s 15 year strategy and states as its mission to undertake “[c]ompetition [r]egulation for a [g]rowing and [i]nclusive [e]conomy” a process which “will entail balancing the efficiency objectives with the public interest objectives of the Competition Act.”¹⁶⁴ Further, the prioritisation of public interest objectives in the Commission’s mandate is clearly articulated in the Commission’s strategic goals, which states that the Commission seeks to use its regulatory instruments in realisation of inclusive economic growth, which is to be achieved “by creating an enabling environment for [SMEs], promoting job creation and preventing job losses, preventing further market concentration and supporting competition in industries which have the potential to drive economic growth in South Africa”.¹⁶⁵ These sentiments were also shared by (then Deputy) President Cyril Ramaphosa at the South African competition authorities’ conference in 2017, as he indicated that the role of competition policy in the present South African context should really be to facilitate economic transformation that is radical and inclusive. He further noted that the effectiveness of South African competition policy must be measured by the extent to which it contributes to the undoing of the racial and gender dimension of the economic concentration of power.¹⁶⁶

The 2017 Competition Amendment Bill was published together with a Background Note and Explanatory Memorandum, and the Background Note explicitly states:

“At the same time as tackling economic concentration, it is imperative to address the persistently racially-skewed profile of ownership of the economy. Instruments and mechanisms addressing economic transformation must ensure inclusive and meaningful change. They must be neither cursory nor superficial, and they must avoid undesirable practices like fronting.”

¹⁵⁹ Burke, p 11 citing (Competition Commission South Africa, 2007a).

¹⁶⁰ Ibid., p 12.

¹⁶¹ Ibid., p 13.

¹⁶² Ibid., p 16 with reference to section 6 of the Competition Amendment Act 1 of 2009, which came into effect from 1 April 2013.

¹⁶³ South African Competition Commission, ‘Strategic Plan 2015-2020’, submitted to the Ministry of Economic Development on 30 January 2015. Online: http://www.compcom.co.za/wp-content/uploads/2019/10/Strategic-Plan-2015-2020_Signed.pdf (accessed on 5 April 2021).

¹⁶⁴ Ibid., p18.

¹⁶⁵ Ibid., p19.

¹⁶⁶ The South African Competition Commission, ‘11th Annual Competition Law Economics and Policy Conference’ (September 2017), Online <http://www.compcom.co.za/wp-content/uploads/2017/03/5142-COMPCOM-SEPTEMBER-FINAL.pdf> (accessed on 28 June 2019).

*Continued and accelerated transformation of the ownership profile of the economy is necessary not only to redress historic discrimination and exclusion, but also as part of a sound policy for economic development”.*¹⁶⁷

We consider below the Commission’s Grocery Retail Market Inquiry (the “GRMI”), a case study that reflects the Commission’s prioritisation of PICs in market inquiries demonstrated by the consideration given to the market structures that gave rise to exclusionary competition concerns, which were acknowledged to exacerbate the exclusion of HDPs from the South African economy. Notably, the GRMI shows that through the Act’s PICs, the Commission can prioritise the interests of HDPs both as consumers and owners of equity - seeking meaningful economic participation opportunities in high value generating sectors.

Case Study: GRMI - Prioritisation of public interest, and HDPs, in the grocery retail sector

This case demonstrates the cross-section of the competition issues in the sector; the role of the formal and informal grocery sector in providing meaningful economic participation opportunities for HDPs; and the importance of the informal grocery retail sector for lower income consumer groups, which are largely HDPs and women considering the racially skewed distribution of wealth in the South African economy and the prevalence of poverty amongst HDPs.¹⁶⁸

The GRMI needs to be considered in light of the following historical context. Townships in South Africa were largely a phenomenon of the apartheid government’s segregation laws and policies which created underdeveloped and densely populated areas inhabited by people of colour. Townships typically had no local shopping centres pre-1994, as a result, consumers in these areas were largely served by the informal grocery retail sector operated by families from their own residential properties.¹⁶⁹ These are current independent retailers that operate on the fringes of the formal sector and within the informal sector. These independent retailers comprise general dealer stores and spaza shops located within locations.

Post-1994, South African townships have seen an expansion of national supermarket chains into local shopping centres and malls, as well as convenient stores in township areas, which were historically and predominantly served by small independent retailers.¹⁷⁰ Such that now, in South African FMCGs make their way to consumers via a range of distribution channels primarily comprised of large national supermarket chains;¹⁷¹ as well as through emerging challenger supermarkets.¹⁷² Most of the independent supermarkets tend to target lower LSM¹⁷³ (income) consumer groups. There are also a range of other specialty independent stores with single or

¹⁶⁷ Background Note p13-14.

¹⁶⁸ Alexander, M., 2019. ‘Mapping poverty in South Africa’, South African Gateway, Online: <https://southafrica-info.com/people/mapping-poverty-in-south-africa/> (accessed: 27 May 2021). See also Stats SA, ‘Five facts about poverty in South Africa’. Online: <http://www.statssa.gov.za/?p=12075> (accessed: 27 May 2021).

¹⁶⁹ GRMI Report, p 98 - 99.

¹⁷⁰ Ibid., p 98.

¹⁷¹ Such as Shoprite, Pick n Pay, Spar, Woolworths, Makro and Game.

¹⁷² Such as Cambridge Foods, Food Lover’s Markets, Choppies and Boxer (page 48 to 54 of the GRMI Report.)

¹⁷³ LSM is a living standard measure widely used in marketing research in Southern Africa, which categorises population into 10 LSM groups with 10 being the highest and 1 being the lowest. See the South African Audience Research Foundation’s definition for more details, Online: <http://www.saarf.co.za/lsm/lsm.asp> (accessed on 18 May 2021).

multiple operational locations such as butcheries and liquor stores.¹⁷⁴ As well as, of course, the small independent retailers.

Notwithstanding the availability of the large and emerging supermarkets in townships, a large portion of consumers in townships (and peri-urban and rural areas) rely heavily on independent retailers in the informal sector.¹⁷⁵ The Commission's consumer behaviour surveys show that consumers rely on spaza shops for convenience shopping and top-up shopping on a daily basis.¹⁷⁶ From a survey with 1558 respondents,¹⁷⁷ the Commission established that 71% of the respondents had visited spaza shops and 27% had visited a general dealer store.¹⁷⁸

It is clear from the above that independent retailers continue to play a key role in the grocery retail sector in South Africa, particularly in catering for low-income consumers.¹⁷⁹ These consumers particularly benefit from the credit provision available in their local grocery retail spaza shops,¹⁸⁰ which allow customers to take basic grocery items on credit payable on a weekly or monthly basis.¹⁸¹ Further, spaza shops offer consumers the convenience of proximity to their homes (key for saving on transport costs) and offer extended trading hours.¹⁸² The informal grocery sector also benefits the business owners, as they often operate the retail stores to generate subsistence income.

Through this market inquiry, the Commission was able to advocate (in its final GRMI Report of 25 November 2019), for evidence-based policy reforms and government initiatives that benefit HDPs both as economic participants - owners of equity and employers - and as consumers, especially as members of lower income consumer groups. The measures recommended by the Commission include broader industrial and regulatory, including competition, policy reforms and government initiatives that seek to facilitate meaningful participation by, and the competitiveness of, HDPs and independent small retailers, wholesalers and fast-moving consumer goods ("FMCG") suppliers in the grocery retail sector. The GRMI also shows how important of a forum the competition authorities are in advocating for broader policy reforms and government initiatives to address competition issues and the exclusionary effects and structure of the South African economy.

Competition and public interest concerns identified

The Commission's GRMI focused on a range of objectives and identified a number of competition concerns; however, relevant for this paper, are the competition concerns which exacerbate the inability of small and independent retailers, that are mostly HDPs, to meaningfully participate in the formal grocery retail sector. In this regard, the Commission's GRMI found that

¹⁷⁴ For example, OBC and Liquor City (Page 48 to 54 of the GRMI Report)

¹⁷⁵ GRMI Report, 67 -69.

¹⁷⁶ Ibid.

¹⁷⁷ The age of the respondents ranged between 18 and 70 years old located across 10 selected South African towns/areas i.e. Winterveldt and Ivory Park in Gauteng, Vrygrond in the Western Cape, Mmabatho in the North West, Embalenhle in Mpumalanga, Thabong in the Free State, Mthatha in the Eastern Cape, Kimberley in the Northern Cape, Giyani in Limpopo and KwaMashu in KwaZulu-Natal province. See page 67 of the GRMI.

¹⁷⁸ GRMI Report

¹⁷⁹ Ibid.

¹⁸⁰ As defined by Wikipedia, "A spaza shop, also known as a tuck shop, is an informal convenience shop business in South Africa, usually run from home. They also serve the purpose of supplementing household incomes of the owners, selling small everyday household items." See https://en.wikipedia.org/wiki/Spaza_shop. Accessed on 15 May 2021.

¹⁸¹ Page 105 of the GRMI Report

¹⁸² Page 105 of the GRMI Report

the formal grocery retail channel is highly concentrated with the national supermarket chains collectively holding a 64% share of this segment of the market.¹⁸³ The concentration levels are reinforced by the significant barriers to entry including acquisition of land and operational facilities, capital expenditure required to invest in the operations, establishing an extensive distribution network in order to be competitive, as well as compliance with stringent regulatory requirements.¹⁸⁴ These high barriers were identified in both the formal retail channel and the FMCGs supplier level of the value chain.¹⁸⁵

Exclusive leases

More specifically the Commission found that there are rampant exclusive leases that benefit national supermarket chains while excluding small, independent and emerging retailers. The terms of these exclusionary leases include long lease periods for anchor tenants (i.e. supermarkets); exclusivity clauses; usage of space clauses which limit the rights of the landlord in relation to the use of the space being leased, which benefit the anchor tenants; and clauses that set a base for the payable rent and provide for the determination of the rent based on the turnover of the tenant.¹⁸⁶ The Commission found that these terms have the effect of reinforcing the concentration levels in the formal sector, and maintain the incumbency position of the national supermarket chains.¹⁸⁷ Further, these lease terms have an adverse impact on the ability of independent retailers to potentially benefit from foot traffic occurring in shopping centres, as they are left to operate in isolated areas, which hinders their ability to effectively compete with national supermarket chains and enter the formal grocery retail sector.¹⁸⁸

Buyer power

The national supermarket chains benefit from their ability to exercise buyer power to the detriment of independent and smaller retailers, as these retailers do not have the economies of scale that national supermarket chains have in procuring goods from FMCG suppliers.¹⁸⁹ The Commission does, however, recognise that buyer power in the grocery retail sector does have beneficial competition outcomes, especially for hybrid wholesalers and independent grocery retailers.¹⁹⁰ In relation to the buyer power exercised by national supermarket chains, the Commission also found that these retailers are likely to have unequal bargaining power *vis-a-vis* FMCG suppliers. Due to the unequal bargaining power between FMCG suppliers and the national supermarket chains, the supermarket chains are able to extract more favourable supply terms (and higher rebates) that are not available to other players in the wholesale FMCG channel.¹⁹¹ The rebates extracted by national supermarket chains include costs incurred by the supermarket chains in getting the products to the shelf.¹⁹² Without any buyer power or direct relationships with FMCG suppliers, small and independent retailers do not have access to these rebates.¹⁹³

¹⁸³ Page 260 of the GRMI Report

¹⁸⁴ Page 260 of the GRMI Report

¹⁸⁵ Page 260 of the GRMI Report

¹⁸⁶ Page 132 to 144 of the GRMI. See also Annexure 5 of the GRMI Report for an overview of the exclusive lease terms considered by the Commission in the GRMI.

¹⁸⁷ Page 142 to 143 of the GRMI Report

¹⁸⁸ Page 143 of the GRMI Report

¹⁸⁹ *Ibid.*, p 262

¹⁹⁰ *Ibid.*, p 215 to 217, and 220 to 221

¹⁹¹ *Ibid.*, p 247 to 248

¹⁹² *Ibid.*, p 247 to 248

¹⁹³ *Ibid.*

Entry of national supermarket chains in townships

The shift in the competitive landscape in the South African grocery retail sector, in particular, the entry of national supermarket chains into townships has resulted in the decline and exit of spaza shops and independent retailers, which are typically owned or controlled by HDPs.¹⁹⁴ This shifting competitive landscape, coupled with the buyer power of the national supermarket chains, it is unlikely that independently owned spaza shops and independent retailers will be able to effectively compete on prices with national supermarket chains.¹⁹⁵ The exclusion of spaza shops and small independent retailers from the grocery retail sector also has an adverse impact on lower LSM consumers, as spaza shops remain a key alternative to national supermarket chains to these consumers' daily and weekly shopping for small everyday goods.¹⁹⁶

Recommendations

The GRMI Report provides a range of recommendations relating to remedial actions to be undertaken in order to address the competition issues noted above, as well as their impact on the viability of SMEs and HDP retailers and consumers. The remedial actions include:

- Changes in the behaviour of national supermarket chains in relation to long term exclusive leases: It is recommended that these supermarkets should refrain from agreeing to new exclusivity clauses; and that they cease to enforce existing exclusivity provisions against SMEs, speciality stores and other retail stores located in shopping centres in non-urban areas.¹⁹⁷
- In relation to the rental costs the use of fair, transparent and commercially justifiable criteria for rental rates in the grocery retail sector (i.e. in shopping centres),¹⁹⁸ the GRMI recommends an introduction of a code of good practice and the establishment of an industry Ombudsman to enforce and monitor rental rates and terms imposed by property owners and managers.¹⁹⁹ Alternatively, the Minister of the Department of Trade Industry and Competition should appoint a facilitator to comply with the GRMI's recommendations in relation to rental rates and terms.²⁰⁰
- With regards to small FMCG supplier's access to shelf space in the national supermarket chains, the Commission recommended that the (then proposed) buyer power and price discrimination regulations and the relevant guidelines be finalised, and be publicised to empower small and HDP suppliers in negotiations with the large national supermarket chains.²⁰¹ The existing enterprise development programmes of the national supermarket chains should be formalised and strengthened by setting binding industry targets that ensure that a proportion of the turnover of the retail chains is supplied by SMEs and HDP suppliers.²⁰²
- In order to improve the competitiveness of small independent retailers and spaza shops, the Commission recommended that the government should adopt measures that seek to support

¹⁹⁴ Ibid., p 263

¹⁹⁵ GRMI Report.

¹⁹⁶ Ibid., p 95 to 97.

¹⁹⁷ Ibid., p 263 to 264.

¹⁹⁸ GRMI Report.

¹⁹⁹ Ibid., p 264.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

these retailers.²⁰³ These measures include, establishing an incentive programme to provide seed finance for private businesses that aim to offer support for informal spaza shops, such as effectively incorporating spaza shops into buyer groups and large wholesaler operations; generating key information on individual spaza shops to ensure that they have key data that can enable their access to credit facilities; and providing training to help spaza shops improve their business, customer and financial management skills.²⁰⁴

The GRMI considers a range of key competition and public interest issues and the above-discussed aspects of the inquiry demonstrate how competition concerns can exacerbate the exclusion of HDPs in sectors of the South African economy. The GRMI shows how competition concerns can intersect with a public interest, especially when markets and economic structures exhibit exclusionary effects. As such, it is imperative for competition authorities to prioritise PICs when addressing competition concerns in such sectors and given the important and powerful role of competition authorities, through their advocacy initiatives, they can advocate for key industrial and regulatory (including competition) policy reforms that foster inclusive markets and economic policies.

Despite the valuable, added nuance created through the prioritisation of HDP interests, we argue that the understanding of the competitive dynamics in the sector may have been better finessed by the Commission had it also sought to prioritise the gendered disparities present in the market. das Nair alludes to there being a gendered dynamic to the market in relation to supermarket chains' access to house brands or private labels.²⁰⁵ As well as further un-explored nuance to the potential abuse of buyer power against women-owned businesses.²⁰⁶

The FMCG sector, especially the informal food retail segment, is a key economic sector for many unemployed women in South Africa. Research into Cape Town's informal food retail sector (**CT Study**) offers key insights on the importance of this sector for women.²⁰⁷ Data on the demographics of food vendors in the CT Study highlights the prevalence of women in the informal food retail sector. The data indicates that out of the 1,108 food vendors who participated in the study, 51.7% were women born in Cape Town; 65.1% were women born in another city in South Africa; and 75.5% were women born in a rural area in South Africa.²⁰⁸

Literature on the informal retail sector indicates that street vending enterprises are generally operated either by individuals who are pushed to the sector to generate subsistence income (the survivalists) or individuals who are interested in the sector due to its economic and social

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ das Nair, R. 2020. 'Competition, Regional Integration, and Women-owned Businesses in the Context of the African Continental Free Trade Area (AFCFTA)', Online: https://www.shetrades.com/application/files/3316/0760/5833/SheTrades_AfCFTA_-_Policy_Brief_-_Competition_regional_integration_and_women-owned_businesses_-_ENGLISH.pdf (accessed: 20 June 2021).

²⁰⁶ Ibid., p 7.

²⁰⁷ Hungry Cities Partnership,

²⁰⁸ Tawodzera, G. and Crush, J., 2019. 'Inclusive growth and the informal food sector in Cape Town, South Africa'. *Hungry Cities Report*, (16), p5. . Online: <https://hungrycities.net/wp-content/uploads/2019/08/HCP16.pdf> (accessed 16 August 2021). The overall CT Study data on the sex of vendors how that that are more men street vendors (53%) than women (47%) in Cape Town, this is due to the fact that the data sample contained a significant number of migrants from outside South Africa, 72% of which were men and only 28% were women. Accordingly, to provide a more accurate reflection of the prevalence of women in this sector, the data is split based on the place of birth of women.

advancement opportunities (the opportunists).²⁰⁹ Data collated in the CT Study found that a significant number of the street vendors who participated in the study ranked economic survival; financial support of dependents; and inability to find a job as the most popular reason for starting an informal food vending business.²¹⁰

Prioritising gender in the Commission's GRMI would have also had multiplier outcomes for women in the FMCG (and food) retail sector in South Africa, especially in highlighting market access obstacles faced by women in the sector and in investigating (competition policy and broader industrial policy) measures that could be adopted to facilitating women's access to the formal and higher value generating segments of the sector. As reflected above, the advancement of women in the informal retail sector benefits not only the women in realising their entrepreneurial aspirations, but also the families dependent on them and their communities, benefiting from lower prices and interest free credit.²¹¹

5. Progressive implementation of public interest considerations

We realise that in order to build the necessary capability, capacity and stakeholder appetite for the infusion of gender inclusive public interest norms into competition law, legislation and enforcement may need to progress incrementally.

South Africa pursued equity-related PICs first through merger policy, weighing particular distributive efficiency objectives as a factor of the PIC component alongside the SLPC assessment. Progressing with cases like Harmony Gold²¹² and culminating in the Walmart/Massmart CAC Decisions, jurisprudence has developed overtime, in terms of which more innovative, bespoke remedies have been the outcome of the negotiations facilitated by the Commission between merging parties and third parties, considerations which the Commission evaluates as part of its information gathering process enabling it to make a recommendation not only on the competitive effects of the merger but also the merger's effects on the public interest. The Commission's evaluation and determinations on the balance form the basis of the Commission's merger recommendations.

Even the establishment of the Commission's PICs Guidelines was an iterative process. They were published in 2016 after having provided for public comment, holding workshops with stakeholders, publishing a revision and then only a year later publishing the final guidelines.²¹³ The progressive implementation of PICs reflected in the staggered introduction of PICs of the Act, starting with the merger provisions and now the recent abuse of dominance provisions. The 2017 Competition Amendment Bill, together with the accompanying Background Note and Explanatory Memorandum, reflect the progressive implementation approach of the Act, as the Background Note reflects on ways the Act can better address concentration and ownership in the South African economy: "*Notwithstanding transformative success across a number of areas*

²⁰⁹ Ibid., p 9.

²¹⁰ Ibid., p 9 to 10.

²¹¹Wegerif, M., 2020. "Informal" food traders and food security: experiences from the Covid-19 response in South Africa', *Food Security*, 12: 797–800. Online: <https://doi.org/10.1007/s12571-020-01078-z> (accessed: 8 August 2021).

²¹² Harmony Gold Mining Company Ltd and Others v The remaining gold mining South African operations of AgloGold Ashanti Ltd (LM171Mar20) [2020] ZACT 22 (27 May 2020). Online: <http://www.saflii.org/za/cases/ZACT/2020/22.html>

²¹³ See Competition Commission Website: <https://www.compcom.co.za/guidelines-for-the-assessment-of-public-interest-provisions-in-mergers/>.

*of the economy since the transition to our constitutional democracy, public disquiet understandably exists about high levels of economic concentration in the economy.*²¹⁴

Notably, the Background Note to the Competition Amendment Bill includes the Commission's study on the concentration levels of the South African economy, which indicates that the amendments are borne out of the concentration and ownership concerns witnessed by the Commission in its enforcement of the Act since its inception.²¹⁵ As such, the amendments are purposeful and targeted at concerns that require urgent redress in order to create an inclusive economy with fragmented and competitive markets.

The progressive implementation approach is also reflected in the enforcement of the PICs of the Act; in particular, how the Commission has built the capacity and appetite to be more vigorous when using the PICs to enhance the interests and meaningful economic participation of HDPs. With the implementation of the 2018 Amendment, we are now in a second phase of enforcement whereby equity-related PICs are being more articulately woven into the consideration of prohibited practices, more attune to the exercise of a dominant firm's market power not to all competitors but with forced consideration of the effect of the exercise of market power is upon HDPs. Said differently, this is less of a discussion about the exercise of market power universally but asks competition authorities to consider the relative power between particular market players within and between value chains.

The first prohibition based on adverse public interest effects, with regard to the spread of ownership, was nine years after Walmart/Massmart and after publication of the 2018 Amendment. The 2018 Amendment fortified the CAC's interpretation of the balance to be struck between the SLPC and PIC assessments.

What does progressive implementation mean for the incorporation of gender into competition analysis? The prioritisation of gender in competition enforcement may require the investment in what Khan calls "transition costs" that is, "*the collective social costs of creating new rights or altering or destroying existing rights*" which could also be said to be instances where not only new rights are created but also in instances where there is the creation of economic rents.²¹⁶ There are two types of transition costs. Firstly, the costs associated with organising negotiated transitions; and secondly, political contestation costs between different stakeholders, which amount to the costs that parties may impose on each other and the state to signal their unwillingness to lose rents.²¹⁷ Further, the extent of a resultant action's "*[t]ransition costs depend on how intensely the distributive implications of changes in property rights are resisted. The resistance to changes in property rights depends on the distribution of organizational and political power in society, but also on how specific changes are perceived in terms of prevailing concepts of distributive justice.*"²¹⁸ Thought will need to be applied to managing the transition costs associated with creating new distributive institutions that will change the allocation of rents. As the Commission continues to engage in the inclusive enforcement of the Act, it is also building evidence for more progressive ways that the Act can be used to address the exclusion of HDPs from, and to preserve the meaningful participation of HDPs in, the South African economy. Gender inequality has surely been left behind and is a key area that is gapingly absent from South African competition enforcement. However, as the Act continues on this progressive

²¹⁴ Competition Amendment Bill, 2017 (published on 1 December 2017 under GG 41294 in GNR 1345), p12.

²¹⁵ *Ibid.*, p 9 - 14.

²¹⁶ Khan, M., 2009. 'Governance Capabilities and the Property Rights Transition in Developing Countries', DFID. [Unpublished]. Online: <https://eprints.soas.ac.uk/9966/> (accessed: 20 June 2021).

²¹⁷ *Ibid.*, p 52.

²¹⁸ *Ibi.*, p 37.

agenda striving towards the inclusive economy ideal, we are beginning to see the markings of gender inequality being seen as more of a priority by competition authorities.

We believe the first step to implementing gender aware competition policy is to spend time thinking about the most high-impact strategy based on evidence (gathered from scholars and market participants), legislative possibility and stakeholder appetite. In South Africa currently, it includes:

- Continuing to prioritise “women” in merger remedies - in relation to rent creating or rent allocating conditions - that aim to address equity-related PICs,.
- Call for those notifying mergers to provide information regarding potential gendered outcomes of their merger including
 - data relating to women representation in industry as compared to the merging firms;
 - representation of women at management levels and higher;
 - the percentage merging parties’ SME and/or HDP suppliers that are women;
 - data collection on the percentage of female ownership in the merging parties.²¹⁹

Part 3. Concluding remarks and recommendations

We acknowledge that the implementation of competition policy takes on different forms in different countries, where different levers are used more than others. Mondliwa *et al*/ list a set of key, interrelated choices regarding the setting and enforcing of market economy rules through competition enforcement and regulation.²²⁰ Each of the four choices is seen as a continuum reflecting a state’s willingness to regulate and intervene in markets through competition laws. First, do competition institutions value participation in the competition process or are processes set in terms of outcomes. In other words, do competition laws set a test for unfair competition, or are competition rules set such that competition authorities must first provide evidence for consumer harm.²²¹ Second, do competition institutions view co-operation between firms in the same market as inherently anti-competitive, or do they recognise the values of co-operation for building competitive capabilities? If viewed in the neoclassical sense, competition authorities function purely as policing the market, as opposed to a ‘rule-making’ competition authority, that acknowledges that co-operation has potential to create competitive capabilities. Third, do those institutions consider competition as a dynamic process of rivalry or as a static market outcome measured solely in terms of consumer welfare? Fourth, do competition authorities see themselves as independent or part of the state’s institutional framework for managing the economy.²²² The discussion above demonstrated that South Africa is on the more interventionist end of each continuum. Discussing the South African experience of competition law enforcement brought clarity to the debate on “how” to incorporate gender in competition policy.

Doctrinally we have discussed how the primary goal of competition law ought to extend beyond economic efficiency and consumer welfare, particularly in contexts of high inequity. We also hope to have shown that it is more inclusive and structurally transformative to consider, as the basis for intervention, ‘durable inequalities’ that are at the heart of the choice to intervene. This means ultimately seeking out ways to disrupt structural patterns. This can be done by using competition law to redistribute rents to designated groups, not only in their capacity as

²¹⁹ With prioritisation to more direct forms of ownership, like direct shareholding, as opposed to collective forms of ownership through pension schemes and the like.

²²⁰ Mondliwa, P., Roberts, S. and Ponte, S., 2020. ‘Competition and Power in Global Value Chains’. *Competition and Change*. Online: <https://doi.org/10.1177/1024529420975154> (accessed: 23 May 2021)

²²¹ *Ibid.*, p 9-10.

²²² *Ibid.*, p 9-10.

consumers which is seen as implicit but by using competition law to protect their interests as business owners and employees.

We have also discussed possible procedural and substantive legal mechanisms for inclusion. Creating avenues procedurally for stakeholders to participate in the enforcement “value chain” is critical to being able to create targeted remedies. The substantive legal principles that have been extrapolated relate to the nature to which the exercising of evaluating competing objectives involves a proportionality exercise and the best way with which to navigate this nexus is with reference to evidence and adherence to assessments taken from the legal text.

The type of advocacy efforts South Africa has employed are encapsulated by the themes related to prioritisation and coordinated messaging, engagement with stakeholders and issuing of support materials, like guidelines. We also note how advocacy was followed by incremental legislative change and enforcement action.

As detailed above, the most progressive measures to realise inclusive economic growth through competition law needs to deliberately seek, not only to advance women as consumers, but as employees and/or owners of equity. As such, key considerations relating to access to markets, decreasing market concentration, reducing barriers to entry, expansions and meaningful economic participation become key.

Drawing on the South African framework, and in thinking about developing a toolkit for the inclusion of gender as a public interest consideration in the competition enforcement framework, we recommend the following factors that jurisdictions should consider:

- A gender-aware competition policy in the interests of women as owners and key economic participants must prioritise gender in investigations such as the impact of mergers and prohibited practices on both key economic sectors for women and on women-owned businesses.
- Gender must be included in market studies, including the intentional collection and disaggregation of gender statistics on women’s participation in markets as consumers, owners of equity and employers and employees. This data is essential to take stock of, and make visible, the gendered impacts of anti-competitive practices.
- Prioritise gender in remedies imposed on prohibited practices and mergers in order to make markets accessible to women and to advance the meaningful participation of women in the high value-generating sectors of the economy.
- Competition law alone is not sufficient to achieve gender equity; it is thus essential that the inclusion of gender as a PIC complements a broader industrial policy framework that intentionally inculcates gender equity as a concern. We recommend that advocacy for the inclusion of gender as a PIC be conducted in tandem with other macroeconomic policies that centre gender issues such as gender responsive budgeting (implemented in Canada and Australia) and gendered/feminist trade policy.
- Wide stakeholder engagement is vital for these processes. Social compacts that include business, civil society, gender activists and government will be necessary for stakeholder buy-in.
- In applying the public interest criterion, competition authorities must also take into account the submissions of intervening parties. The submissions and the evidence of the intervening parties must be assessed against those of the merger parties.

The reflections that outline the approach adopted by South Africa in incorporating and framing PICs into its Act, have shown key lessons that can be used to inform a suggested approach for the inclusion of gendered public interest considerations in competition law. As detailed in this paper, gender inclusive competition law is an agenda that is relevant and urgent for every society in order to unlock the potential for competition policy to address gender inequality. Lastly, gender inequality is on the radar of many countries, one should not lose sight of the many forms of inequality and the ways in which they intersect and compound upon one another.

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