Reforming the Models of Competition Law and Addressing Intersectional Discrimination in South Africa

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Doctor of Philosophy

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DECLARATION

I,…Yolani Ndamase… hereby declare that the work on which this thesis is based on my original work (except where the acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other University. I authorise the University to reproduce for the purpose of research either whole or any portion of the contents in any manner whatsoever.

ABSTRACT

The Competition Act of 1998 was enacted as a transformative measure to address our egregious history. This is evident in the inclusion of public interest objectives that sought to promote competition and economic change, particularly for the benefit of businesses owned and controlled by those previously marginalised. As a result, the 1998 Act departs from the mainstream of the Chicago and post-Chicago schools, which had achieved hegemonic status in competition/antitrust law when the Act of 1998 was passed. The law diverged significantly from these schools due to general concerns about the concentration of the South African economy in the hands of a few white minority population and the barriers erected by the colonial and apartheid eras that prevented the majority black population from fairly participating in the then economy on racial and gender grounds. Notwithstanding the ambitious goals of the 1998 Act and the expanded goals of the 2018 Amendment Act, the goal of reducing market concentration and increasing the participation of black South Africans has not been adequately addressed. This is partly due to the continued adherence to the mainstream consumer welfare standard. Although one of the main goals of the current Competition Act is to promote more excellent ownership dispersion and to increase the ownership shares of historically disadvantaged persons, it continues to treat the category of historically disadvantaged persons without recourse to the nuances and consequences of intersectionality. Therefore, there is a need to explore the possibilities of transformative competition policy which considers intersectionality.

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ABBREVIATIONS AND ACRONYMS

ANC	African National Congress
B-BEE	broad-based economic equity
BEE	black-economic empowerment
BLM	black lives matter
CAC	Competition Appeal Court
CEA	Council of Economic Advisors
CODESA	Convention for a Democratic South Africa
COIDA	Compensation for Occupational Injuries and Diseases Act
CWS	consumer welfare standard
dtic	Department of Trade and Industry and Competition
DOJ	Department of Justice
FTC	Federal Trade Commission
GAFA	Google, Amazon, Facebook, Apple
GEAR	growth, employment and redistribution
GRMI	grocery retail market inquiry
HDI	Historically Disadvantaged Individuals
HHI	Herfindahl-Hirschman Index
ICN	International Competition Network
IMF	International Monetary Fund
JSE	Johannesburg Stock Exchange
MLR	Marine Living Resources Act
NEDLAC	National Economic Development and Labour Council

SANEF	South African National Editor's Forum
NDP	National Development Plan
OECD	Organisation of Economic and Community Development
RET	radical economic transformation
RDP	Reconstruction and Development Programme
SABC	South African Broadcasting Corporation
SME	small and medium-sized enterprise
StatsSA	Statistics South Africa

CHAPTER 1

INTRODUCTION

1.1 Background on the Problem

The South African competition policy sought to extend beyond the limits of Chicago and post-Chicago competition law and policy models. This ambition is made clear from the structure of the Competition Act [1] (the Act), particularly the Preamble and the purpose clause. It is given concrete expression in the public interest provisions relating to mergers. The Act took this decisive step to transcend the limits of these models of competition law and policy at a time when the models dominated global competition law.

However, even after extensive amendments to the original 1998 Act (as effected in the 2018 Amendment Act), the South African economy has not transformed as promised by the legislation. This is because the Act has continued to be insufficiently nuanced in particular, its treatment of historically disadvantaged individuals (HDIs) without considering the gender disparities that may exist for some members of this cohort, i.e., black women. As a result, the Act has failed in its transformative obligations. This thesis suggests the possibility of a transformative competition Act that recognises inter subjectivity's complexities and avoids treating all HDIs as a single global entity.

The Preamble of the 2018 amended Act intends to facilitate the "promotion of competition and economic transformation through addressing the structures and de-concentration of markets". Understanding the structures of markets means understanding the identities of the market participants. This thesis asserts the

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[1] *Competition Act,* 1998, ibid., *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

importance of adopting an intersectionality lens in enforcing the Act's public interest objectives. For instance, the thesis suggests we provide differential treatment for those small firms owned by black women—because their identities place them at the intersection of race, gender and firm size, therefore warranting specific considerations.

Intersectionality is a concept that was coined by Kimberlé Crenshaw, a legal scholar and feminist, in the late 1980s. It refers to the interconnected nature of social categorisations such as race, gender, class, sexuality and other aspects of identity. The idea behind intersectionality is that these different facets of identity do not exist independently but instead intersect. Intersectionality is a framework for understanding the complexity of social identity and the various forms of discrimination and privilege that individuals may experience as a result of their intersecting identities. It has been instrumental in promoting a more inclusive and holistic approach to social justice and equality.[2]

I acknowledge that the 2018 Act implemented specific provisions aimed at enhancing the ownership and participation trends of HDIs and provisions intended to improve the determination of prohibited practices. Nevertheless, even five years after the 2018 Amendment Act was implemented, ownership trends remain skewed, and the desired transformation has not happened.

We must examine the underlying normative framework underpinning the provisions of the Act and the philosophies the Competition Tribunal and courts may rely on when adjudicating competition matters. This thesis argues in favour of the broader normative framework in which to read and Act rather than the extensive reliance on a narrow consumer welfare standard advocated by the Chicago school.[3] In particular, this thesis

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[2] Crenshaw, K. 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum.* 8.

[3] Consumer welfare standard which flows from the Chicago competition law and policy model, is focused on solely enhancing the efficiency-based goals, i.e., limiting price and increasing output. However, the definition of consumer welfare will be reflected in chapter 4, specifically 4.2.4 below. It is beyond this thesis to discuss the contested debate of the CWS, however I do I acknowledge that defining CWS is a contentious issue.

seeks to engage with the broader concept of public interest, the objective of which was intended to transform the Constitution.

For centuries, the black population in South Africa was systematically prohibited from participating in the formal economy. It is because of this historical injustice that the 'new' democratic government introduced the Constitution[4], along with other legislative measures, including the Competition Act. The competition policy implemented in post-colonial and apartheid South Africa can be characterised as the 'new' democratic government's effort to address and remedy these historical injustices experienced by the back South African population. In other words, it can be argued that one of the primary objectives of the Act was to promote redistributive justice[5] because the Act's provisions include various public interest objectives. These public interest objectives seek to redress the discriminatory past, which resulted in excessive market/wealth concentration and skewed ownership trends. Resultantly, one of the purposes of the Competition Act 18 of 1998 [6] was de-concentrating markets to ensure our markets reflect the demographics of South Africa versus a single population group.

The Preamble of the Act is the foundational text that seeks to remind us that one must understand that the purpose of our competition enforcement is to remedy the past injustices – which are present-day fundamental challenges. The Preamble of the Competition Act reads as follows:

> 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 that credible competition law and effective structures to administer that law are necessary for an efficient functioning economy. That is an efficient, competitive economic environment. Balancing the interests of workers, owners and consumers and focused on development will

[4] *Constitution of the Republic of South Africa,* 1996.

[5] See Markovits, D. 2003. How much redistribution should there be? *The Yale Law Journal.* 112(8):2291-2329. Available: http://www.jstor.org/stable/3657477 [2023/07/14/]. Below at page 174 of the thesis I note that redistributive justice is the theory of punishment, where accountability is defined as assuming responsibility and acting to directly repair the harm committed in the past for the purpose of maintaining a harmonious future.

[6] See sections 2(b)(e)(g) of the *Competition Act,* 1998, ibid.

> benefit all south Africans in order 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 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.

The abovementioned Preamble in the Act directs authorities to consider how conduct or Agreement would impact historically disadvantaged individuals (HDIs) and workers. As a result, in specific cases, the Act includes provisions that grant exemptions to firms owned by HDIs. Section 2(1)(c) of the Act states that its purpose is to promote employment and advance the economic welfare of the South African population. Essentially, the Act seeks to reach the public policy goal of protecting, empowering, and stimulating the growth of small and black businesses in post-apartheid and colonial South Africa. However, certain distortions and bottlenecks persist and are potentially attributed to the excessive reliance on the mainstream consumer welfare standard (CWS). Furthermore, perhaps because the Competition Tribunal and the courts continue overlooking the significance and impact of intersectionality when interpreting the Act. These aspects will be elaborated more below.

This thesis asserts we should consider whether mainstream competition ideologies[7] are the correct normative frameworks for post-colonial and apartheid South Africa. The thesis contends that the mainstream frameworks within which competition law is viewed cannot be effective within the context of the South African economy. It is important to emphasise that this context differs markedly from the developed world. Hence, the thesis cautions against an uncritical application of frameworks designed for far more developed economies. The South African context is recovering from deep oppression because of the discriminatory past that excluded a population group (black South Africans) from participating in the formal economy. Hence, the current

[7] The ideological voices that believe in free markets where there is limited government intervention because markets are self-correcting, and the autonomy of industrialists should be prioritized.

democratic dispensation deals with the legacy of colonialism and apartheid while trying to achieve radical economic change.

When the interim Constitution commenced on the 27th of April 1994, it was praised as a piece of legislation that reframed the discriminatory and unfair pre-democratic dispensation. The introduction of the Constitution and its constitutional approach to protecting civil and socio-economic rights was a beacon of hope for black South Africans. The foundational democratic values of equality, freedom and human dignity underpinned the interim Constitution. The final Constitution [8] has fulfilled the civil rights articulated in the Bill of Rights, but whether the same can be said for socio-economic rights is unclear.

Both the interim and final Constitution set out to enact legislation that would succeed in fulfilling the foundational democratic values. In other words, progressive legislation and policies accompanying the Constitution were supposed to help transition to the new democratic dispensation. The transition to the new democratic dispensation saw the need to protect the vulnerable groups prohibited in the previous dispensation from participating in the economy. This is because there were issues of inequality and too much economic power concentrated in the hands of the minority white population. Hence, the Constitution, its foundational values and accompanying legislation were trusted to be the instrument to change the inequality and concentration issues. It is worthwhile to note that section 1(2) of the Act also directs that the Competition Act must be interpreted consistently with the Constitution.

There is compelling research that confirms that the presence of economic and political inequality threatens democracy because it leads to turning a country into an oligarchical and not a democratic /republican form of governance. [9] Hence, the Competition Act was introduced, which was trusted to restrain wealth inequality and

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[8] *Constitution of the Republic of South Africa,* 1996.

[9] Fishkin, J. & Forbath, W. 2022. *The anti-oligarchy constitution : reconstructing the economic foundations of american democracy.* Harvard University Press. at 1.

oligarchy from attaining genuinely democratic and republican governance within post-apartheid and colonial South Africa.

Despite the introduction of redistributive policies like the Competition Act, post-colonial and apartheid South Africa continues to have a concentrated market, racially skewed economy and high barriers to entry for firms owned by HDIs. The current Competition Act seems ineffective in fully benefiting firms owned by the majority black population and addressing these skewed ownership trends that are legacies of our colonial and apartheid past. Since the previous dispensation, monopoly or market power has continued to primarily belong to the firms owned by the minority white population. The attempts by post-colonial and apartheid government to ensure that sustainable growth and adequate economic transformation is achieved has been relatively slow. The current rate of economic transformation is a far cry from the deliberate plans drafted in the 1955 Freedom Charter. [10]

In the Freedom Charter, the African National Congress (ANC) liberation movement at the time was committed to implementing a series of measures to establish sustainable growth and sufficient economic transformation. One of the Freedom Charter's key commitments was to ensure equitable wealth distribution, reducing barriers to entry for black businesses and enhancing the skewed ownership trends. Hence, the post-1994 government sought to address these issues by implementing the Competition Act.

Notwithstanding the earlier dominance of Chicago and post-Chicago models of competition law and policy, it is significant that these traditional frameworks have come under increasing scrutiny in recent times. For instance, the United States (US) is undergoing a significant paradigm shift in its antitrust law and policy. It is moving away from a strict non-interventionist approach and making space for the influences of alternative philosophies. Furthermore, the Biden administration and the Federal Trade Commission (FTC) chair, Lina Khan, emphasise the need to allow different

[10] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

philosophies to underpin or influence antitrust enforcement. Within this context, it is opportune that South African competition law also engages in autocratic to develop a framework for competition law which will foster an inclusive economy and effectively address concentration and skewed ownership of the economy. As a result, this thesis will engage with the ideological underpinnings of the various schools of thought to deconstruct their assumptions and evaluate their appropriateness for the South African context.

Unless we abandon the non-interventionist approach and critically examine the current normative frameworks that have dominated South African jurisprudence, the transformative objectives of the Competition Act will remain stillborn. It will be argued below that the current strict consumer welfare standard, which flows from the Chicagoan philosophy, has compromised the effective enforcement of the Act and, most importantly, successfully addressing public interest objectives.

As a developing country that seeks to undo the discriminatory apartheid and colonial era, the Chicago school theory contradicts the purpose of the Competition Act of fulfilling public interest goals like fairness and equality.

Given the progressive ambitions of South African competition policy, which transcend the narrow consumer welfare standard, this thesis seeks to explore alternatives to ensure that the previously marginalised black women are effectively supported through the Act. It is argued that to enhance the redistributive justice aspects of competition policy by moving away from the mainstream consumer welfare standard and embracing a different criterion. We need to embrace the intersectionality criteria. We will not, and cannot reach a point of *true* redistributive justice, competition and fairness until we acknowledge intersectionality when assessing firm conduct or dealing with merger considerations. Adopting a non-interventionalist philosophy, which rests on the notion that businesses should be left alone because markets are self-regulatory, does not serve our best interest. The embrace and application of intersectionality require that, when necessary, we allow the Tribunal or courts to intervene effectively to support the HDIs, particularly black women.

Unfortunately, because of their identity, black women find themselves at the intersection of race and gender (and other subjective impediments like disability, class, etc.). This placement exposes black women to impediments that different equally vulnerable demographics may not experience. Professor Crenshaw sheds light on the concept and effect of 'intersectionality'.[11] Presently, the Act fails to distinguish between singularly disadvantaged individuals based on race and those who face multiple disadvantages based on race, gender and size of their firm.

The essential argument of this thesis is that when competition law and policy respond to the issue of market concentration and the barriers to entry for HDI-owned firms, there is a compelling need to develop a nuanced conception of inequality and interrogate how best to ensure the beneficiaries of competition policy are the broadest cohort of people who can participate within the economic activity of the country. The experiences of those HDIs exposed to racism, sexism, ableism and other forms of discrimination create additional barriers to accessing the full economic 'benefits' of our competition policy. The upcoming chapters will delve deeper into this intersubjectivity subject.

It cannot be overemphasised that the effective enforcement of the Competition Act has far-reaching effects on black South Africans. An effective Act and competition policy in South Africa has the potential to bridge the gap between persistent poverty and wealth inequality and attain economic and social transformation. The Act can close the inequality gap and empower a broader section of the black population, mainly black women –if there is reliance on a theory of intersubjectivity as proposed in this thesis. The failure to develop a policy in keeping with the overall objectives of the Act will result in many HDIs remaining in a state of disempowerment and perpetual poverty. This thesis recognises that these objectives may be a significant burden for the adjudication of competition law, but that is what the Act, read as a whole, sought

[11]Intersectionality will be delved more in the coming chapters. For more information on intersectionality see Crenshaw, K. 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum.* 8.

to achieve. The legislative intent is best viewed in earlier ANC policy documents, particularly the 1992 ANC Policy Guidelines for a Democratic South Africa[12] and the 1955 Freedom Charter. [13] Chapter 1 below will delve deeper into the ANC policy documents which precede the Act and provide a comprehensive understanding of the legislative intent.

1.2 Motivation and context

Whilst I was growing up in a middle-class in the post-colonial and apartheid-era South Africa, firm ownership seemed unattainable. As a child of professional teachers, I knew that my future would likely involve being employed by someone rather than owning a competitive business. The prospect of becoming an owner of a competitive firm was never something I felt was within my reach. I was never exposed to successful black women industrialists, and perhaps that scarcity was because legislation, like the Competition Act, failed to support them adequately. In turn, I *was* exposed to poverty, income and wealth inequality within my community. The racialised wealth inequality unconsciously conditioned me to associate wealth and firm ownership with whiteness, perpetuating my belief that firm ownership was out of reach. Despite policy frameworks that are supposed to dismantle skewed firm ownership in post-colonial and apartheid-era South Africa, black women are rarely associated with firm ownership or successful industrialists.

I became increasingly aware of the skewed ownership trends in post-colonial and apartheid-era South Africa during my teenage years. I learned that a local high-end grocery store owner also happened to own a lower-end grocery *and* a popular clothing store. Moreover, I realised that most firms operational in the apartheid era (obviously

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[12] *ANC policy guidelines for a democratic South Africa.* 1992. at 15 “The ANC is not opposed to large firms as such. However, we will investigate the possibility of introducing anti-monopoly and mergers policies in accordance with international norms and practices to curb monopolies, continued domination of the economy by a minority within the white minority and promote greater efficiency in the private sector.”

[13] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

white-owned) continue to thrive in democratic South Africa. This eye-opening discovery opened me up to the world of South African conglomerates and the lack of fair and equal market participation that still engulfs Africa's poster child. Although the post-democratic economy might have been non-discriminatory in the sense that it provided the black population equal opportunity to participate in the formal market, the reality is that there are ongoing disparities in firm ownership trends and economic power.

Post-colonial and apartheid-era South Africa, considered one of the most successful constitutional democracies in Africa, has earned praise as one of the continent's most functional States. The shift from colonialism apartheid to democracy has been incredibly successful in terms of granting all demographics equal human rights. However, extreme economic power disparity, skewed ownership trends, market concentrations, etc., remain an issue weighing over this successful democratic State.

Understanding the barriers to poverty and inequality and the factors perpetuating them is essential for South Africa to achieve its 2030 goals of reducing poverty and inequality. [14] One of the factors that contribute to poverty and inequality is an ineffective competition policy. Understanding the obstacles black women face in the HDI cohort is crucial for achieving the 2030 goals of reducing inequality and poverty. This analysis aims to provide the areas of intervention or recommendations that may increase the presence of black women firm owners' ability to be effective market participants.

[14] Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities. at 4

The unique structure of the South African competition law and policy is noteworthy. The Act incorporates public interest objectives relevant in the cases of mergers[15], exemption applications [16] and abuse of dominance [17]. These objectives are prefigured in the policy documents preceding the Act, the Preamble, and section 2 of the Act [18]. The Preamble and section 2 of the Act mandates competition authorities to strike a balance between efficiency and traditional competition goals as well as the transformative objectives of the Act as set above. The aim is to facilitate socio-economic transformation and market access for previously marginalised black industrialists and diminish their barriers to market entry.

However, the implementation of these public interest objectives is ineffective. The role, scope and tests that guide applying public interest objectives are not aggressive in bringing about progress. I say this because there is vagueness surrounding the role, scope and test that should guide authorities in applying the Act. The vagueness leaves significant guiding discretion to the authorities to assess each case and weigh the

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[15] See s12A(3) of *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .for the listed public interest objectives that should be considered in merger considerations.

When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged

persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

[16] In terms of section 10 of the Competition Act; SMMEs and firms that are owned by historically disadvantaged individuals may apply to the competition authorities to be exempt from cartel behaviour. The exemption may be granted if there may be contribution towards listed public interest objectives in section 10(3)(b) of the Act.

[17] See section 9(1)(a)(ii) of the *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

[18] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.

competing interests of public interest and efficiency. This practical case-by-case approach exacerbates the argument that public interest objectives lack clarity and uniformity in implementation. This critique, in my opinion is not dissatisfactory, but welcomed. I say this because, the application of public interest objectives, and my proposal of intersectionality, requires such case-by-case analysis to be adopted. I must mention that adopting a one-size-approach that may provide clarity and uniformity has never been the norm in South Africa since the practice is for the courts and Tribunal to decide on a case-by case basis decide whether an act is contravening our public interest goals.

Twenty years after the introduction of the South African Competition regime, the markets are still monopolistic, concentrated and characterised by high barriers to entry. [19] A few firms dominate various industries, and white individuals primarily own those firms.

Research has shown us that there is a strong correlation between market concentration and wealth inequality, and it is worth mentioning that the collusion between these dominant firms has stifled wage growth for workers, resulting in low income for them. At the same time, the owners and shareholders get higher profits. [20]

Despite implementing the policies, active black industrialists seem to lag still regarding market participation. At the same time, several factors contribute to this challenge, such as limited access to funding, the impact of the COVID-19 pandemic, the 2008 financial crisis, etc. However, one significant contributing factor is the lack of well-implemented competition enforcement over the past decade. However, the South

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[19] See the Preface of Arkebe, O., Fiona, T. & Imraan, V. 2022. *The oxford handbook of the South African economy.* Oxford, United Kingdom: Oxford University Press, Incorporated. Available: http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6802234.(“ By most developing country standards, its tax to GDP ratio at 29 per cent is fairly high. Yet, growth rates have been very weak with manufacturing contracting with the challenge of premature deindustrialization and a lack of structural transformation. Furthermore, the economy remains dependent on exports of mineral products, unemployment remains intractable, and ownership remains concentrated.”)

[20] Crane, D. 2016. Antitrust and wealth inequality. *Cornell Law Review.* 5(101).

African competition law and policy have taken a commendable active role in attaining racial equity and justice. The broad mandate of the 1998 Competition Act was to disperse economic power that belonged to white-owned large conglomerates established in the pre-democratic era. The Act intended to "provide all South Africans equal opportunity to participate fairly in the national economy". [21]

Caution should be expressed even at this thesis stage; a revitalised hybrid competition regime alone cannot effectively fight inequality and poverty and fulfil our developmental goals. In the same breath, it is essential to recognise that a well-implemented revitalised hybrid competition regime would significantly address the root causes of wealth inequality and promote inclusive markets, benefiting our developing nation's economic, social and political landscape.

By facilitating the redistribution of wealth, which has been blocked by concentrated industries, competition laws and policies can play an essential goal in becoming part of the solution. Therefore, a revitalised competition law and policy is a precious measure that can tackle the challenges that post-colonial and apartheid-era South Africa faces.

This thesis aims to identify strategies through which the Competition Act can effectively reduce the barriers to entry for HDIs, mainly black women-owned firms, in post-colonial and -era South Africa. The goal is that the incumbents achieve effective and equitable participation in the formal economy while addressing the issue of market concentration.

1.3 Research question

This thesis asks a fundamental question: As a policymaker in a country that experienced racial marginalisation, inherited high barriers to entry and concentrated markets that do not reflect the country's demographics, what would be the foundational

[21] Preamble of the Competition Act, 1998.

perspective(s) that would be the guides for formulating and enforcing the country's competition law?

The research explores South African Competition Law's regulatory approach, focusing on benefiting black women-owned firms' public interest. The study explores whether the existing structure and enforcement strategies are well suited to fulfil the proclaimed public policy goals outlined in section 2 of the Act. These public policy goals seek to dismantle barriers to entry for HDIs in post-democratic South Africa and protect the vulnerable worker population that may suffer harm from influential firms.

The Competition Act fails to address the subjectivity of the HDIs in South Africa, viewing them as a collection of people. The Act is gender-blind and not necessarily racially blind. The thesis will deal with the possible limits of using competition law to repair marginalisation and empower black women industrialists in South Africa. Furthermore, it will reflect on how the proposed measures may successfully operationalise.

1.4 Chapter overview

Chapter 1: Introduction

This chapter gives an overview of the topic of research. It presents the problem statement, the motivation and context of the research, the research questions and an overview of the thesis.

Chapter 2: Historical Development of the Competition Act's Public Interest Objectives

This chapter traces and reflects on the historical context of the economic landscape which led to the enactment of the 1998 Competition Act. The main objective of this chapter is to look into the past by reviewing the previous dispensation's competition

policy. The review will draw insights from the ANC's Freedom Charter [22]and David Lewis's *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* [23]. The reflection in this chapter is limited to highlighting the reasons that led to the inclusion of public interest goals in the South African Competition Act. As such, this chapter includes a statistical analysis of the level of racial concentration of the economy pre-1994 and provides insight into the challenges the ANC faced when it formulated its economic policy.

Chapter 3: The Current Wealth Inequality in South Africa

This chapter provides a factual analysis of the current market concentration racial and gender wealth inequality that still engulfs our economic landscape – despite the Competition Act being introduced to repair such. The ownership trends continue to be painfully unrepresentative of the different demographics in our country – the minority white population continues to hold the lion's share. This chapter articulates the deep systematic inequality that small black women-owned firms experience. The analysis showed that black women-owned firms were still lagging in being effective market participants. This data then informs whether racial and gender inequalities block effective market participation.

Chapter 4: Exploring a New Conceptual Framework or Economic Theory

This chapter examines the various schools of thought influencing antitrust laws' regulation and enforcement. It explores the schools of thought of thought that the West usually adopts. This investigation will determine whether mainstream traditional views should be considered and whether such schools will benefit black women-owned firms. This examination is limited to four schools of thought: Harvard, Chicago, Brandeisian and Ordoliberalism. The benefits and shortcomings of these schools are

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[22] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

[23] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.

canvassed to develop a conceptual framework that will strengthen and align with the South African public interest goals.

Chapter 5: The Role of the Mainstream Consumer Welfare Standard in Post-Colonial and Apartheid South Africa

The Consumer Welfare Standard has been studied intensively in the antitrust law circles recently. Antitrust scholars are often divided about whether the Consumer Welfare standard is the correct standard to manage monopoly and competition in the US. However, little study has been done on South Africa and whether the standard is an adequate response for fulfilling our public interest goals. The rationale for the study explained in this chapter is to ascertain whether the standard's normative framework fits our various public interest goals.

Chapter 6: Racial and Gender Inequalities: Blocking Effective Market Participation?

The Competition Act states that one of its objectives is to ensure effective participation for firms owned by HDIs. The goal of redressing past marginalisation is not targeted with precision because we still retain the one-size-fits-all approach instead of the approach in which one recognises the incumbent’s characteristics—the personal characteristics like the gender and race of the incumbents. Using the intersectional theory, this chapter proposes a more intersectional approach to redress past injustice and empower black women-owned businesses to be effective market participants. When one recognises the black women’s characteristics that make her/them vulnerable to multiple discrimination, it may assist in closing and responding effectively to barriers that block effective market participants of HDIs. A black woman is often a victim of multiple discrimination because she/they are automatically placed at the intersection of race and gender. Her/their injury may flow from either their gender or their race. This is not the case with black men or white women because the competition policy seems to ignore the systematic oppression that black South African women particularly face in owned businesses. The current approach to ensuring effective participation for black women overlooks systematic oppression that black women face. This is evidenced by the few firms owned by black women industrialists

(compared to white women and black men). This chapter suggests that policymakers recognise the placement of South African black women industrialists at the intersection of race and gender. In other words, there should be some recognition and different treatment of those HDIs who face multiple discrimination, i.e., race and gender. Thus, this chapter recommends how to effectively respond to barriers that block effective participation for black women in post-colonial and apartheid South Africa.

Chapter 7: Concluding remarks and recommendations

This chapter explores the suggested approach that South African competition law and policy law should adopt. In this part of the thesis, I suggest embracing an intersubjectivity/intersectionality-centric perspective and exploring a new conceptual framework by moving away from the strict consumer welfare standard (CWS). The proposal is to move away from the strict CWS and embrace a broader measure that will effectively address the issues of skewed ownership trends, concentrated markets, high barriers to entry for HDIs (particularly black women), wealth inequality, etc. The question is, once the inadequacies of the mainstream CWS to achieve our public interest objectives have been canvassed, what alternative should replace it?

CHAPTER 2

HISTORICAL DEVELOPMENT OF THE COMPETITION ACT'S PUBLIC INTEREST OBJECTIVES

"Just because everything is different doesn't mean anything has changed" - Irene Peter

2.1 Introduction

The bulk of today's private ownership was acquired when the majority black population was legally excluded from acquiring and exercising private property rights. The then-nationalist government had passed legislation and policies that resulted in the majority black population living a life of economic subordination. The policies the then government pursued have led to the concentration of economic power in the hands of a few conglomerates. Hence, one of the fundamental responsibilities of the then-liberation movement, the ANC, was to have policy mechanisms to break up harmful conglomerates and enhance the black population's ownership trends. This exercise was meant to respond to the structural impediments, market concentration and possible barriers to entry that historically marginalised individuals may face. In essence, the then ANC leadership recognised that post-apartheid South Africa would need economic recovery plans to aggressively respond to the historical and structural inequalities and a Bigness issue. Some of those elected structural reforms are at the centre of this thesis – high barriers of economic concentration, market access for the black population and addressing racial and gender inequalities that block the black population from effective market participation.

The apartheid government found it reasonable to regulate competition and specifically passed legislation addressing monopolies or bigness. Perhaps the US influenced this focus, or that was the only problem the previous dispensation faced. The developed global economies at the time, like the US, were dedicated to curbing monopoly, specifically in integral industries like freight/passenger railway, oil and steel industries.

Sherman Act empowered the US courts[24] and later Clayton Act[25] to order anticompetitive conduct unlawful and remedy such anticompetitive conduct by ordering divestiture.[26]

Fast forward to post-democratic South Africa, the Competition Act[27] was introduced. The Act served as one of many policy mechanisms aimed to be instruments of economic transformation/economic justice. The Act's Purpose was that post-apartheid and colonial South Africa would see a greater spread of ownership, in particular, to increase the ownership stakes of HDIs' and the effective participation for firms owned or managed by HDIs and small and medium-sized enterprises (SMEs). Minister Patel affirms the competition policy's obligation to economic justice and transformation in the 2021 Budget Vote Speech:

> South Africa's competition regime blends traditional competition concerns with developmental outcomes appropriate for its unique circumstances. Competition policy aims to address and promote economic inclusion and transformation."[28]

In this chapter, the thesis seeks to narrate the historical context of the South African competition policy to determine the exact failure of the objectives. Why has the statute failed to promote equity and fairness?

Understanding the historical context and intention of the competition law makers in pre-democratic South Africa is essential. By focusing on the context and history, we seek to understand the pressures that brought about the kind of competition law and policy by the apartheid government. I begin by providing the context of what gave rise to the passing of the two anti-monopoly legislations and whether they had any

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[24] The Sherman Antitrust Act, 1890.

[25] *Clayton Antitrust Act,* 1914.

[26] The Standard Oil Company of New Jersey et al v The United States. 1911. Supreme Court of the United States.

[27] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

[28] Patel, E. 2021. *Competition policy for jobs and industrial development.*at 1.

shortcomings or strengths which may be considered in post-1994 democratic South Africa.

Other old policies sought to transform and include the previously marginalised persons into a formal economy and protect vulnerable incumbents from monopolies. The policy mechanisms were penned and adopted by the (then) liberation movement – the ANC. [29]

2.2 Pre-democracy competition law and policy

The apartheid government of South Africa did not, in any shape, way or form, prioritise equality, fairness and dignity. The system's essence was to marginalise a specific population while empowering another. The laws and policies that were in place reflected the priority to ensure that markets remained untransformed, racially divided and disempowering black firm owners.

By the end of the 1930s, discriminatory policy measures of the apartheid regime excluded black entrepreneurs from participating in the formal economy. In turn, policy measures supported and "shielded white farmers and their businesses against black competition", which means that black industrialists were excluded from the right of market participation. White farmers were given land ownership and granted preference over their black counterparts. Additionally, the white farmers received government support through subsidies and support programmes. [30]

As a result, the pre-democratic South African market may be described as a highly concentrated market where black industrialists were excluded from participation. During this period, anti-monopolistic provisions that resemble current Competition Act provisions were passed. These provisions and legislation will be fully described below.

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[29] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

[30] OECD. 2003. *Competition law and policy in South Africa: an OECD peer review.*

The then highly concentrated market consisted of a few dominant firms owned by white minority industrialists (to the exclusion of the black majority). The apartheid government's concern was the increasing monopoly. Hence, one might understand the apartheid government saw it fitting to follow nations statutes similar to the US and pass laws protecting consumers from monopoly power and abuse. During this era, competition law and policy certainly did not focus on helping open the market to the black population and imposing transformative measures to help empower black entrepreneurs. As time progressed, in preparation for ushering in democracy, the then liberation movement (the African National Congress) argued that the only way to remedy the concentration, monopoly harm and non-inclusive market was to use nationalisation mechanisms and revoke private power—these 'nationalisation' aspirations by the then liberation movement where penned in the historical 1955 Freedom Charter. [31]

During the 1980s, four diversified conglomerates and two financial companies were said to dominate ownership and control within the then economy. [32] At the time of the regime change in 1994, five investment conglomerates owned 84% of the capitalisation of the Stock Exchange, and one of them accounted for 43% all by itself. [33] These conglomerates were in the finance, mining and minerals sectors. Notably, these conglomerates were notorious for their anticompetitive and predatory behaviour and were part of the absence of dynamic SMEs. [34] The discussion documents on economic policy indicated that the wealthiest 5% of the then population owned 88% of all personally owned wealth. At that time, only 2% of the total assets of the private

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[31] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

[32] Arkebe, O., Fiona, T. & Imraan, V. 2022. *The oxford handbook of the South African economy.* Oxford, United Kingdom: Oxford University Press, Incorporated. Available: http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6802234.At 119.

[33] OECD. 2003. *Competition law and policy in South Africa: an OECD peer review.* At 10

[34] See Arkebe, O., Fiona, T. & Imraan, V. 2022. *The oxford handbook of the South African economy.* Oxford, United Kingdom: Oxford University Press, Incorporated. Available: http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6802234.At 119.

sector were owned by black people and 90% of the managerial positions were set to remain in the hands of the white population.

In the 1996 population consensus, whites' average per capita income was 7.5 times that of African South Africans. Additionally, 62% of Africans fell below the poverty line set at R250 in 1996, in contrast to the 3% of white people with a lower poverty line at R250.[35]

2.3 The regulation of monopolistic tendencies in apartheid South Africa: A reflection

As mentioned above, the apartheid government was concerned with controlling the growing monopolisation. The first piece of legislation that the then Parliament passed was an Act containing provisions which sought to prevent monopolisation encapsulated in section 3 of the Cape Meat Trade Act No.15 of 1907.[36] Even though a comprehensive measure that dealt with anti-monopoly was only in 1937, the introduction of the Board of Trade and Industries (the Board) was a turning point because this was the first independent body that would investigate or detect undue restraint of trade. The role of the Board was to inquire into and advise the government on various aspects. The Board's responsibilities included investigating combinations, trusts, monopolies and restraint of trade. [37]The Board was also responsible for "determining whether a specific monopolistic condition was compatible with public interests". [38]However, the fundamental weakness of this 'independent' Board is that it had no administrative powers and could not issue sanctions if the Board concluded that there indeed was anti-competitive conduct on the part of a corporation. Another

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[35] Ibid.At 12.

[36] See Section 3 of Cape Meat Trade Act No.15 of 1907 held that "every act, contract, or conspiracy in unreasonable restraint of trade of a butcher is hereby declared to be illegal".

[37] Republic of South Africa: report of the commission of inquiry into the regulation of Monopolistic Conditions Act, 1955 foreign antitrust. 1978. *Antitrust Bulletin.* 23:147.At 149.

[38] Ibid.At 149.

weakness of the Board was that it relied solely on complaints referred to by the then Department of Commerce and Industries.

As mentioned above, there came a time when the problem of monopoly, association and combinations was met with government intervention. The intervention came in legislation that would help in this regard. However, the then Minister of Economic Affairs first wanted the Board to investigate the effects of monopolistic tendencies and firm combinations on consumer prices. [39] Before this, Parliament surprisingly passed the Unlawful Determination of Prices Act No. 24 of 1931 (as amended) that would declare it an offence to compel or induce resale price maintenance (RPM) that increased the price of petrol (later amended to include all products). [40]

Six years later, while the Board was still conducting this investigation, an interim measure was passed in 1949. Parliament passed the Undue Restraint of Trade Act 59 of 1949 (the URT Act). The URT Act was introduced as an interim measure against 'monopolistic tendencies' that engulfed the then market. It is worth noting that the monopoly problem happened despite the ongoing marginalisation and exclusion of black industrialists.

The URT Act restricted rival distributors of commodities who would agree not to compete when committing price-fixing. Additionally, the URT Act found that any kind of undue restraint of trade where such conduct was detrimental to the public interest of the time was unlawful. In terms of the URT Act, the conduct of RPM was to be criminally prosecuted. However, the weakness of the URT Act was that it vested significant power in the minister. There was no independent body to investigate and prosecute the occurrence of harmful activities because the Board could only 'advise' the minister if the inquiry revealed harm. The sanction the minister could impose was the publication of practice. [41] This sanction of possibly tainting the firm's publicity was

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[39] Ibid. At 151.

[40] Ibid. at 150,151.

[41] Ibid. at 152,153.

another fundamental weakness of the Act: inadequate deterrence. Another weakness of the URT Act was that it "relied too much on voluntary complaints, which cannot be regarded as a satisfactory method for detecting harmful practices." [42]

The second comprehensive anti-monopoly legislation was passed in 1955 through the Regulation of Monopolistic Conditions Act of 1955 (RMC Act). Again, the elected Board was elected to administer the Act in the capacity of a (not so) independent decision-making body. The RMC Act may be considered cautious and permissive because it lacks a critical (now) prohibited practice like collusion. Restrictive agreements were not *per se* prohibited and were to be "carefully watched". [43]This meant that firms in the apartheid era were left to their own accord and could at any time collude without any legislation sternly prohibiting such harmful anti-competitive conduct.

The RMP Act did not provide direction for the merger review process as most current pieces of competition legislation provides. Additionally, the RMP Act excluded the presence of an independent decision-making authority. Instead, the minister (not an independent decision-making authority) had extensive powers. The elected Board of Trade "provided for an administrative process to examine particular cases and recommendation action". [44] This division of power was problematic because ministerial power was so great that the Board's advisory power probably rendered the enforcement of the RMP Act weak or ineffective. In such instances when Ministerial power is so high, corruption is rife, and concentration of private economic power is rife, too. It doesn't help that competition enforcement contains incredible discretion that needs experienced decision-makers (not elected ministers).

Not only was the economy designed to benefit white capital exclusively, but the laws passed were structurally unable to deal effectively with anti-competitive conduct.

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[42] Ibid. at 152.

[43] Ibid. at 154.

[44] OECD. 2003. *Competition law and policy in South Africa: an OECD peer review.*

Parliament of the apartheid era passed laws that failed to effectively deal with levelling the market playing field. The introduction of the Board without administrative powers proved the government's lack of dedication towards a competitive market free from collaborations that sought to monopolise markets. The common thread in all the legislation passed by the Parliament is the amount of power conferred to the minister. The minister had administrative power to institute weak and inadequate sanctions in response to harmful conduct. Resultingly, after the ineffectiveness of the legislation mentioned above, the liberation movement needed new legislation to undo the monopolistic tendencies that left the market concentrated and untransformed. The liberation movement sought to nationalise all powerful and efficient firms. The rationale for relying on nationalisation was to broaden ownership and ensure the black population gets a 'piece of the pie' they were long denied. To undo the concentration of private power and racially assigned privilege, the ANC elected several policy mechanisms to solve status quo solutions, namely, the nationalisation of private resources.

2.4 Nationalisation and anti-monopoly framework

Nationalisation was initially the favoured mechanism to break up harmful conglomerates and broaden ownership that would reflect the demographics of South Africa. Throughout the years, we have seen the then-liberation movement, the ANC, grapple with the type of policy orientation to break up conglomerates and broaden ownership. In the pre-1994 era, the ANC sought to utilise nationalisation to break up harmful conglomerates and broaden ownership. [45] However, post-1994, the contemporary ANC's sentiment transitioned to electing to utilise robust competition

[45] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.(Considering the pronouncements of the Freedom Charter, the prevailing viewpoint implied an expansion of state ownership through the nationalisation of mineral wealth, banks, and monopoly industries).

enforcement to break up conglomerates for expanding ownership. [46]This transition will be dwelled on more below.

The 1955 Freedom Charter [47] *was* identified monopolies as targets in their quest for policy reform. This is stipulated under the heading *The People Shall Share in the Country's Wealth*, showing that dominant conglomerates were a concern as far back as 1955. [48]

In 1992, the Policy Unit of the African National Congress drafted a document entitled the *ANC Policy Guidelines for a Democratic South Africa* [49] (the Policy Guidelines). The Policy Guidelines were basic objectives that contained non-mutually exclusive goals that served as the ANC's vision for democratic South Africa. One of the objectives was to reform and remedy the "legacy of inequality and injustice" which left black South Africans destitute.

The Policy Guidelines intended to shift and transform economic power concentrated within the minority white population because of the apartheid system. [50]The plan was not only to adopt a law that followed international norms and practices but also to curb "continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector." The Guidelines sought to undo the

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[46] Ibid.(But the problem of concentrated ownership had not gone away and so support for an alternative, robust intervention in the exercise of private property rights came to the fore, this being robust antitrust enforcement – largely because it was viewed as a mechanism for breaking up the conglomerates, for broadening ownership).)

[47] *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

[48] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.

[49] *ANC policy guidelines for a democratic South Africa.* 1992.

[50] OECD. 2003. *Competition law and policy in South Africa: an OECD peer review.*at 14 (The plan was not only to adopt a law that followed international norms and practices, but also to curb "continued domination of the economy by a minority within the white minority and to promote greater efficiency in the private sector").

apartheid's laws that prepared the black population for "lives of subordination and low-income jobs".[51]

Additionally, the Policy Guidelines acknowledged that South African women had been highly disadvantaged and poverty-stricken HDIs. Hence, there is a need to use policy mechanisms (like the Competition Act) to mitigate such disadvantages and integrate them into the formal market. [52]

The Guidelines envisioned that post-1994 economic transformation policy would utilise various mechanisms to achieve effective transformation. The ANC Policy Guideline intentionally utilised a more broadened approach whereby the new government does not rely on a single or legitimate policy to advance effective economic transformation. Hence, there was a plan to introduce anti-monopoly and merger considerations that coincide with international norms and practices.

As mentioned above, the initial economic policy of the ANC outlined in the 1955 Freedom Charter emphasized nationalisation and redistribution. Following Nelson Mandela's release from prison in February 1990, his inaugural speech at Cape Town City Hall affirmed the ongoing commitment to nationalisation as a method to fundamentally transform the prevailing white monopoly power.[53] During this time, other prominent ANC leaders were strongly advocated for the renationalisation of previously privatised public utility corporations.[54]However, over time, support for nationalisation diminished, supposedly due to adverse reactions from the market and other business

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[51] *ANC policy guidelines for a democratic South Africa.* 1992.at 3.

[52] Ibid.

[53] South Africa's New Era; Transcript of Mandela's Speech at Cape Town City Hall: 'Africa It Is Ours! 1990. Available: https://www.nytimes.com/1990/02/12/world/south-africa-s-new-era-transcript-mandela-s-speech-cape-town-city-hall-africa-it.html. Available: https://www.nytimes.com/1990/02/12/world/south-africa-s-new-era-transcript-mandela-s-speech-cape-town-city-hall-africa-it.html.

[54] Habib, A. & Padayachee, V. 2000. Economic Policy and Power Relations in South Africa's Transition to Democracy. *World Development.* 28(2). At 248

constituencies.[55] Some argue that it reflects a shift in the intellectual stance of the ANC leadership, although this remains uncertain.

2.5 Public interest objectives in post-apartheid South Africa

Since the ANC shifted from the above mentioned position on nationalisation, as the new government, they had to ensure that the best possible strategy to achieve some economic transformation was in place. Hence, many policies were adopted to achieve economic equality fairness and restore dignity of the previously oppressed population. The restoration of previously impaired dignity because of discrimination has long been attributed to advancing the economic wellness of previously marginalised persons. [56] The various policies will be discussed below. It is important to note that in the previous dispensation, Parliament would include anti-monopoly provisions in different pieces of legislation. The lesson was that as effective as it is to have provisions prohibiting anti-competitive conduct in other pieces of legislation, having a comprehensive policy provides fundamental effectiveness. Hence, it is unsurprising that Parliament passed a comprehensive legislation a few years later in 1998.

Post-colonial and post-apartheid South Africa are regarded as a work in progress of a democratic, inclusive and economic emancipation and well-being for all. The upcoming competition law and policy included features that respond directly to the unique situation of South Africa. In some contexts, the Acts permit consideration of equity issues such as empowerment of HDIs, employment, and concern for SMEs. [57] Hence, the 1998 Competition Act was one of the policies that would help achieve the vision of economic transformation. The Act was a response to remedy the total exclusion of black industrialists from market participation in the years of colonialism

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[55] Seekings, J. 2010. Race, class and inequality in the South African city. Available: http://hdl.handle.net/11427/20221.at page 346

[56] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. At 34, 35.

[57] OECD. 2003. *Competition law and policy in South Africa: an OECD peer review.*

and apartheid regime. The new government prioritised increased ownership, market access and participation by using the Competition Act as a legislative measure to fulfil such aspirations.

In 1994, the Interim Constitution was passed into law. The Constitution of South Africa is supreme and was adopted after dismantling the discriminatory apartheid regime. The Constitution's foundational values are equality, fairness and dignity. These foundational values contrast with the past racially discriminatory laws that thrived on the disempowerment of the majority black population.

The South African Constitution is supreme [58] , and section 39(2) of the Constitution commands that all courts "promote the spirit, purport and objects of the Bill of Rights when interpreting legislation" because the Bill of Rights is the "cornerstone of our democracy". [59] The Constitution affirms the democratic values of human dignity, equality and freedom. We must affirm these values and intentionally create a transformative change in our markets that does not abandon our democracy.

Social transformation is almost worthless if the previously marginalised are not empowered through economic liberty. The system of democracy is founded on beliefs like freedom, majority rule, and social equality. The Constitution of the Republic [60] has brought about social transformation through enacted economic, legal and social frameworks that help jurisdictions against inequality. [61] The enacted legislation like the Competition Act has the responsibility to bring about economic transformation inclusion, fight against the cancer of wealth inequality and bring about deconcentrated

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[58] Section 2 of the Constitution of the Republic of South Africa, 1996.("This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.")

[59] Ibid

[60] Constitution of the Republic of South *Africa,* 1996.

[61] Stiglitz, J. 2014. The Price of inequality: how today's divided society endagers our future. *Sustainable Humanity, Sustainable Nature: Our Responsibility*. Vatican City, 2014.At 5.

markets that reflect the demographics of this Democratic Republic. [62] By adhering to such a responsibility, the Competition Act would advance our democratic values because the Competition Act seeks to guarantee previously marginalised market participants equality and inclusion in the formal market. [63]

2.6 Locating socioeconomic transformation in a constitutional democracy

It is essential to understand and locate the place that economic and social transformation has in our constitutional democracy. Justice Ngcobo articulated this in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others. [64] Justice Ngcobo penned a judgment highlighting "the importance of transformation" and concurring with the main judgment. However, he made a separate one to make the following points. Justice Ngcobo held that a transformational objective (*Discussion document on equity ownership by historically disadvantaged groups and the application of the ICT sector code*, 2017)of a piece of legislation [65]section 9(2) in particular. [OBJ] It is widely known that before the current government, as of 1994, black industrialists were forbidden from participating in a formal economy, including the lucrative South African fishing industry. In 2002, this industry generated sales of more than R1,45 billion. This previous exclusion led to the industry being dominated by firms established under the apartheid era and owned by a privileged white population.

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[62] Post-colonial and apartheid South Africa is regarded to be among the most unequal societies where 85% of the private wealth is concentrated in the hands of the top 10%. See Arkebe, O., Fiona, T. & Imraan, V. 2022. *The oxford handbook of the South African economy.* Oxford, United Kingdom: Oxford University Press, Incorporated. Available: http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6802234.at 1179.

[63] Preamble of Competitio*n* Act*,* 1998. ("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.")

[64] *Bato Star Fishing (Pty)Ltd v Minister of Enviromental Affairs and Tourism and others.* 2004. Constitutional Court.. at 43.

[65] *Produkte (Pty) Ltd and Others v Minister of Environmental Affairs and Tourism and Others.* 1999. Constitutional Court.at 50

The concentration of the lucrative fishing industry in South Africa is not isolated or novice. Our historical marginalisation systems and framework heightened barriers to entry. The laws and policies passed post-apartheid are supposed help our democratic dismantle monopolies, barriers to entry, etc. In response to this marginalisation, Parliament enacted the Marine Living Resources Act 18 of 1998. Some objectives of this Marine Act were to advocate for the transformative goals to achieve equity in the fishing industry stipulated in section 2(j) of the Marine Act. [66] In interpreting the construction section that promotes transformation provision, the legislature was aware that the competitive policy in post-apartheid South Africa needed to function within and be guided by our constitutional system, which guarantees equal protection and benefit to the law.

Achieving equality, poverty alleviation, increased employment, market access for black business and wealth equality (and transformation) is one of the fundamental goals for post-apartheid South Africa. [67] There is recognition of the historical imbalances caused by unfair past discrimination. And a sense of hope to breed an equal society where all populations enjoy a fundamental right to equality. [68] Equality is a foundational value recognised as the "bedrock of our constitutional architecture" and a standard that should inform *all* laws. [69] The Competition Act is no exception.

The new government led by the African National Congress) prioritised redressing past imbalances by using the competition policy to conduct such redress and economic

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[66] See *Bato Star Fishing (Pty)Ltd v Minister of Enviromental Affairs and Tourism and others.* 2004. Constitutional Court.at 2-3. One of the objectives listed in section 2 of the Maritime Act reads as follows: "(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry".

[67] *See* Preamble of *Interim Constitution of the Republic of South Africa Act 200,* 1993.*"All South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".*

[68] *Bato Star Fishing (Pty)Ltd v Minister of Enviromental Affairs and Tourism and others.* 2004. Constitutional Court. at para 74.

[69] Ibid. At 14; See also See Albertyn and Goldblatt 's "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality". (1998) 14 *SAJHR* 248. At 272-3.

equality. [70] When the country was transitioning to a democratic State, the policy instruments utilised were deemed to encourage the private sector to transform the economy. They thought to transform the economy by changing the ownership patterns to reflect the diverse demographics of all South Africans. Additionally, most policy instruments had the objective to offer opportunities for HDI-owned firms and small businesses to ensure that South Africa gained the integrity of a truly competitive market would come to fruition—a fair and competitive market which would be different to that of the Apartheid era. [71]

This thesis will focus on economic inequality. Equality claims that arise from economic inequality, for this thesis, mean unequal access to opportunities and material resources for effective participation in a market. Our Constitution is committed to the foundational value of 'equality' and directs various legislation to achieve structural reform in line with the value of 'equality'. Post-apartheid South Africa values eradicating systematic inequalities like political, social and economic inequality brought about by the previous dispensation. Unfortunately, Black South African women experienced a mix of political, social and economic inequality and consequently experienced heightened vulnerability. At the same time, the white minority population experienced privilege and affirmed.

Structural reform of economic inequality can occur once we acknowledge the link between social, political and economic order *and* our democratic Constitutional order.

Recent US literature helps highlight that the constitutional values of a State are inextricable from the economic and political life. As such, a constitutional democracy ought to include economic democracy.

The economic policy in South Africa has not considered the constitutional imperative sufficiently, i.e., if the Constitution is to be vindicated, economic policy must be

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[70] Secretariat. 2003. *The objectives of competition law and policy*. Session I of the Global Forum on Competition. at 4.

[71] Ibid at footnote 8. at 30.

congruent. In their book, Fishkin and Forebath believe one should ask some important questions to bring about structural reform of the US political economy. One crucial question was asking, “What kind of social, political, and economic order does the Constitution promise to secure for all its members*?”* According to the book *The Anti-oligarchy Constitution*, the standard way of thinking about the US Constitution is that it is inextricable from the economic and political life structure. Fishkin and Forebath argue that the guarantees of the US Constitution are inextricable with the principle of “a constitutional political economy”. [72]

A robust competition law and policy is crucial to a healthy constitutional democracy like the Republic of South Africa. In his book *The Curse of Bigness,* Wu mentioned that Justice Brandeis once emphasised that the right to life guaranteed by our Constitution should be understood as ‘the right to live, and not merely to exist’. This means that to live, individuals “must have the opportunity of developing their faculties and live under conditions in which their faculties may develop naturally and healthily.” [73] A society with robust competition enforcement enables individuals to develop and live under economically sound conditions.

Before the democratic dispensation, the Anglo-American Corporation (a global mining company) controlled many shares in the Johannesburg Stock Exchange (the JSE). At the same time, white-owned conglomerates like the Rembrandt and De Beers Group owned the remaining market shares. David Lewis stated, “So wide was the reach of these behemoths that it would have been difficult for any player in the South African economy to avoid engagement as a customer, supplier or competitor with interest that dominant conglomerates controlled”. This is the fundamental continuity in patterns of

[72] Fishkin, J. & Forbath, W. 2022. *The anti-oligarchy constitution : reconstructing the economic foundations of american democracy.* Harvard University Press. at 6.

[73] Except from Wu, T. 2018. *The curse of bigness : antitrust in the new gilded age.* New York: Columbia Global Reports. at 41

advantages and disadvantages that was canvassed by Seekings and Nattrass in their book *Race, class and Inequality in South Africa.* [74]

The same HDI-owned firms who wish to enter the formal market as effective competitors still cannot avoid interacting with white-owned dominant conglomerates. Lewis further makes a fantastic example of how the smallest spaza shop (a convenience shop) located in the township (a segregated urban area that is a result of the apartheid's segregationally and restrictive laws) is likely to be a perpetual state of relying on the dominant white-owned conglomerate as supplier.

Years after the establishment of the democratic dispensation, black industrialists continued to struggle with participating in the formal economy. In response to the 2015 Debate on the State of the Nation Address, former President Zuma claimed that the majority of the black population's JSE direct investment ownership was a low three per cent of shares. [75] He emphasised that intensive work needs to be done to ensure the economic emancipation of the previously marginalised. Two years later, at the 2017 *State of the Nation Address*, Former President Zuma reaffirmed that the goal of radical economic transformation remained unfulfilled.[76]In his address to Parliament, he said the following:

> "Two key challenges we face are high economic concentration levels, where small groupings control most of the market. The collusion and cartels squeeze out small players and hamper the entry of young entrepreneurs and black industrialists".

Former President Zuma announced that there would be an amendment to the 1998 Competition Act to promote "transformational democracy". [77] This address formed the catalyst of the current 2018 Competition Amended Act, which promotes inclusivity to

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[74] Jeremy, S. & Nicoli, N. 2005. *Race, class and inequality in South Africa.* Yale University Press. Available: http://hdl.handle.net/11427/20221.

[75] Zuma, J. 2017. *State of the nation address.*

[76] Ibid.

[77] Ibid.

ensure that those marginalised populations become effective competitors in the various sectors of our economy. The meaning of 'transformational democracy' is not mentioned in the Address, Amended Act, nor tested. It is imperative to clearly define material terms like 'transformational democracy' what this term means. The lack of clarity is one of the shortcomings of the 1998 Competition Act. This is depicted in the appeal case of *Nationwide Poles* cc. (which will be expanded further in the thesis).[78]

The democratically elected government had to consider the years of racial marginalisation suffered by the majority native black population. During the apartheid era, there were legal prohibitions against black people from participating in the economy's formal industry. White industrialists were privileged enough to have various subsidies and support programmes from the apartheid government. It is safe to say that the support granted an advantage and protected the white industrialists while discriminating against black industrialists. The prohibition resulted in a substantial wealth inequality gap, poverty, racially assigned economic privilege and a highly concentrated market. It made sense that these marginalised incumbents had to be 'remedied', using various legislation (like the Competition Act) to ensure equity, fairness, and equality existed in post-1994 South Africa.

In Competition Commission v Senwes [79], Justice Jafta held, "Some of its (the Competition Act) objectives are directed at addressing the inequalities and imbalances created by the apartheid order". This redress is done by including these public interest objectives [80] throughout the to rectify the black population's inequality—thereby affirming that South African competition policy was introduced to respond to broad issues related to non-efficiency-based objectives. This is as opposed to being boxed by the narrow objectives of economic efficiency and consumer welfare maximisation.

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[78] *Sasol Oil (Pty) Ltd v Nationwide Poles cc.* 2005. Competition Appeal Court.

[79] *Competition Commission of South Africa v Senwes Ltd. 2012. Constitutional Court.*

[80]. The phrases "public interests objectives" and "public policy goals" are used interchangeably throughout this thesis.

The point is that the current wealth is not (unilaterally) merit-based, but because of the racial segregationist past of the market – which makes it a moral obligation to redress the HDIs effectively. Radical reform in our competition law goals and application will do just that. Since the white population enjoyed owning/managing farms or formal industrial enterprises decades before the new democratic dispensation, it is no surprise that the wealth is skewed towards the white population despite constituting a mere ten per cent of the South African population. [81]

Marginalised groups were prohibited from participating in the then economy because of the critical nature of business ownership in dismantling the chains of perpetual poverty for the present and future generations. Economic transformation has positive material effects, and unfortunately, in the quest for political liberation, economic liberation took the back banner.

The Act has undergone a multitude of amendments. The criticism mentioned above of persistently high concentration levels has, in part, prompted attention from the government through these amendments. The amendments seem to target the quest to remedy the previously marginalised firm owners and vulnerable SMEs that compete in the concentrated market.

In 1998, one of the objectives of the Competition Act was to ensure a greater spread of ownership, in particular, to increase the ownership stakes of HDIs. The objective of the second Amendment Act was to secure an equal opportunity to participate in the economy. More recently, the 2018 Amendment Act focuses on ensuring the effective participation of firms owned or managed by HDIs and SMEs.

To tackle the issue of concentrated economic power among the minority white population, the democratic government utilised public policy interventions like the

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[81] Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities, Zuma, J. 2017. *State of the nation address.*

Competition Act. The Act aimed to counter the influence of wealthy white families like the Rupert family, whose company generated its wealth from selling cigarettes and liquor during the apartheid era. [82] Today, the Rupert family's Remgro Ltd has diversified its interests in various lucrative sectors like logistics, technology, banking, finance, healthcare and mining.

This research project evaluates how the Act may be more effective and fulfil the non-efficiency objectives that support these marginalised and vulnerable incumbents while advancing efficiency-based goals. The above objectives seem not to have been effective in remedying the injustices of the past and ensuring a competitive market.

2.7 Black economic empowerment

The transition from apartheid was met with a desire to provide extensive economic empowerment for black South Africans. Hence, former President Mandela, his cabinet and Parliament introduced myriad policies to promote black economic empowerment (BEE). The objective of BEE was to introduce the policies as mechanisms to redress and empower the black population to enter and participate in the formal market.

The Reconstruction and Development Programme (RDP) was a policy framework trusted to advance BEE. The policy was developed by the liberation movement of the African National Congress, its alliances and "other organisations in the wider society". [83] One policy framework mandate was building the economy and democratising the state and society. Existing state institutions and regulations concerned with competition policy were to be reviewed.[84]

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[82] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.at 5. For a review of the Rupert Family's Remgro that has continued to diversify in post-apartheid south Africa see Arkebe, O., Fiona, T. & Imraan, V. 2022. *The oxford handbook of the South African economy.* Oxford, United Kingdom: Oxford University Press, Incorporated. Available: http://ebookcentral.proquest.com/lib/uoct/detail.action?docID=6802234.at 434.

[83] ANC. 1994. *The reconstruction and development programme (RDP).*

[84] Ibid.

We are almost three decades into democratic South Africa. The colonisation by Great Britain ended its reign, and immediately, the apartheid regime officially came to an end in 1994. However, the extent to which this marked a true and lasting transformation disjuncture of the racial segregationist apartheid and colonial past. Finally, there was equality. Alternatively, so it was thought. On 27 April 1994, all racial groups had the right to vote in the national elections – including the marginalised black South African population. What is distinct to the South African context is the prohibition of black South Africans from participating in the commercial business of the country.

Consequently, 1994 was dubbed the dawn of a new era and the beginning of the Rainbow Nation. This new era was expected to decrease inequality because of our past. Unfortunately, some 26 years later, income inequality and poverty have remained stubbornly high.

However, the objectives of the South African Competition law being reconceptualised have provided a glimmer of hope.[85]The legislature has since amended the Act, and the Amendment Act states that one of the Act's objectives is to "ensure to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons".[86] This reconceptualised framework seems to broaden the scope of Competition law. Unfortunately, even with this broadened scope, we seem to be still 'governed' by the narrow consumer welfare standard (CWS) goal. Justice Robert TOTAL introduced the CWS as a metric measured on price and output. [87] The CWS asks whether, from consumers' perspective, a conduct causes harm.

The appropriateness of this CWS will be reviewed in the pages that follow. Specifically, it addresses whether the CWS creates a barrier to effectively fulfilling the public interest objectives in the Competition Act.

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[85] *See* Competition Amendment Act 18 of 2018.

[86] The group of people that were discriminated before 1994 by their race.

[87] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.at 716.

South Africa is one of the most developed and richest nations on the African continent.[88] Like many developing countries, South Africa exhibits a "dual" economy described as having distinctly two societies in one. [89]The two societies represent two extremes: a poorly resourced society plagued with poverty, while an extreme is a well-resourced and privileged society. These two societal extremes can be seen in most urban areas nationwide. A textbook example of a location representing two societies in one is the coastal city in the Western part of South Africa – Cape Town.

When the ANC was engaging with the apartheid era, policymakers enacting a robust competition law and policy was not a concern; instead, what was a concern was industrial and trade policy matters.[90] However, years later, the new government decided to pilot through NEDLAC [91] and a parliamentary process a new and robust competition policy. [92] The piloted competition law and policy were to be distinctly different from what was introduced by the apartheid-era policymakers – regulations of the Monopolistic Conditions Act of 1955 and the Maintenance and Promotion of Competition Act of 1979. The then-proposed 1998 was distinct in that the policy makers "favoured more robust application of competition rules through an independent, decision-making authority". [93]

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[88] Lewis, J. 2001. *Policies to promote growth and employment in South Africa.*at 6 (42 million people, a GDP of US$127 billion, a rich natural resource base, and a total area of 1.2 million square kilometres, the country dominates the Southern African sub-region and accounts for more than a third of the output of all sub-Saharan Africa.)

[89] Ibid. At 6 (Even more than other "dual" economies, South Africa is really two societies in one. At one extreme, is a modern, first world society – there is electricity, running water and modern sanitation in almost every home; two thirds have at least a high school education, childhood mortality rates are low, and poverty is minimal. At the other extreme, there is another society – where half have less than a primary school education, over a third of children suffer from chronic malnutrition, only a quarter of the households have electricity and running water, and less than a fifth have modern sanitation.)

[90] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media. At 21.

[91] National Economic Development and Labour Committee

[92] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.

[93] Ibid.

Public interest grounds' strong influence and inquiry made the South African competition enforcement unique and "aroused huge controversy". [94]For those who support the influences of Chicago schools, this South African influence of public interest objectives may be lambasted because such pursuance invites government intervention. This is because the Chicagoans argue that competition policy ought to be *laissez-faire* [95].

The South African competition policy enforcement was introduced as a disciplinary mechanism for anticompetitive conduct *and* the transformation of the highly concentrated markets, which are disproportionally white. Over the years, these public interest grounds have slightly changed. However, their consideration has always been specified in the Act. In merger consideration, the Act directs the promotion of public interest because merger consideration promotes BEE. A merger consideration in post-democratic South Africa may be anticompetitive. However, a merger may be approved if the merger will result in black economic empowerment. The fact that BEE arguments could justify approval of an anticompetitive merger is said to have.

2.8 The 2030 National Development Plan

The goals of normative frameworks that influence the interpretation of provisions of the Competition Act may be described as confusing and ill-fitting for the developmental agenda and goals encapsulated in the South African National Development Plan (NDP). This is despite affirmative action, redress and equality being 'listed' as one of the purposes of the Competition Act.[96]

South Africa is a beacon of hope for the African community and the world. It is a beacon of hope for its peaceful transition from the devastating apartheid and colonial

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[94] Ibid. At 109.

[95] For this Project, a laissez-faire economy may be described as market where the competitive aspect of market participation is unregulated in the form of legislation. A laissez-faire economy bans government intervention that is in the form of anti-monopoly, merger consideration and unilateral conduct like price-fixing

[96] *See* section 2 and preamble of the Competition Act 18 of 2018.

past to a united Rainbow Nation flourishing with a constitutional democracy. However, little can be said about the country's economic transformation, wealth inequality, unemployment, poverty, and highly concentrated and racially exclusionist market. South Africa is said to display market characteristics where competition lacks. [97]Hence, our 2030 NDP [98] is dedicated to growing an inclusive economy and ensuring that ownership of production is more diverse. The Plan seeks to emancipate its people from the legacies of marginalisation and unequal opportunity.

To accelerate progress, deepen democracy and build a more inclusive society, South Africa must translate political emancipation into economic well-being for all, and the Competition policy should be an instrument that provides economic emancipation for both HDIs and South African consumers. It is up to all South Africans to fix the future, starting a country where opportunity is determined not by birth but by ability, education and hard work.

South Africa needs to have an effective competition policy because the realisation of our NDP goals depends on it. A society with a compelling competitive policy may bear the brunt of lower efficiency, low er productivity and lower social stability. [99] By influential role, I mean an ineffective policy with 'no teeth' or a chilling effect that may be attributed to various reasons like substantive or procedural ineffectiveness or ill-fitting context.

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[97] *National development plan 2030: executive summary.* n.d.At 28

[98] Ibid. ("The Plan aims to eliminate poverty and reduce inequality by 2030…growing an inclusive economy".)

[99] Stiglitz, J. 2014. The Price of inequality: how today's divided society endagers our future. *Sustainable Humanity, Sustainable Nature: Our Responsibility*. Vatican City, 2014.

CHAPTER 3

THE CURRENT WEALTH INEQUALITY IN SOUTH AFRICA

3.1 Background

South Africa's history of colonial and apartheid systems violated civil rights and hindered a black person's economic power or ability to participate in the formal economy. The Competition Act 18 of 2018 attempts to undo these barriers and promote the effective market participation of HDIs This is crucial because, for centuries, the incumbents (HDIs) were oppressed and regarded as subordinates to other demographic groups in South Africa. The result of centuries of suppressing the black population's ability to participate in the formal economy is evident today. Today, South Africa is one of the most unequal nations in the world, with a Gini coefficient of 88.8.[100]

The structure of the South African economy and the fulfilment of particular public interest objectives depend on the legislative framework policies in place. The Nobel Prize-winning economist Joseph Stiglitz published a *Rewriting the Rules* policy report. In this 2015 policy report, Stiglitz challenged traditional economic thinking by arguing that "inequality is a choice we make by the rules we create to structure the economy".[101] According to Stiglitz, policy, rules or legal frameworks that are enforced will shape an economy and, secondly, the opportunities and outcomes. One framework policy that may shape the economy and fulfil specific public interest objectives like inequality is antitrust/competition law and policy. However, can

[100] The Gini coefficient measures wealth inequality by statistically measuring the dispensation of income or wealth distribution in a country. *Global wealth report*. 2023.at 61

[101] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. At 3.

government policy, including antitrust or competition laws, reduce income inequality and racial disparities?

Government policy, such as antitrust and competition laws, might help reduce income inequality and racial disparities by promoting fair competition, wealth redistribution, and targeted programmes. However, their effectiveness depends on proper design and implementation, faces political challenges and must consider broader economic and historical factors. While they can play a role, addressing these complex issues requires a comprehensive and sustained approach involving various stakeholders.

As mentioned above, South Africa's colonial and apartheid past used law and policy to create economic power and privilege for white South Africans. Black industrialists were prohibited from participating in the formal economy. When democracy was ushered in and the shackles of racist legislation were broken, black businesses and people were left vulnerable. Black businesses were competing with dominant firms who operated in pre-democratic South Africa. The same black businesses were faced with the risk of being susceptible to the abuse of dominance and limited market access. Hence, the South African competition regime, along with other legal and policy instruments, was enacted to redress past inequalities so that markets can reflect the demographics of our country.

The same government policies responsible for shaping the market forces may be the answer to the vast inequality problem faced by most nations, like South Africa. The colonial and apartheid legislation helped create the current wealth inequality problem in South Africa, and all legislation should be on deck to undo harm. Stiglitz argues that market forces alone are not responsible for the current inequality faced by the US.[102] He states that social pressures and government policies have shaped market forces. Thus, government policy is responsible for strengthening wealth and wealth remaining with certain race groups – excluding the historically marginalised.

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[102] Stiglitz, J. 2014. The Price of inequality: how today's divided society endagers our future. *Sustainable Humanity, Sustainable Nature: Our Responsibility*. Vatican City, 2014.At 29-33.

Determining and understanding one of the vital architects of inequality can lead to insights into how to reduce it or what not to do to perpetuate wealth inequality and wealth transfer. The past's social, economic and political legislative positions have disempowered and marginalised black South Africans and given white industrialists power centuries before black South African industrialists. When progressive policies are positioned not only to minimise wealth inequality as an intended goal but are enforced with precision, there might be progress in reducing the current extent of wealth inequality, poverty and market concentration. At this time, a progressive competition act that enforces laws and rules that respond to the root of inequality comes into play.

The South African competition regime can transform and diversify the market to reflect the Rainbow Nations' demographics. A transformed, inclusive and diverse market benefits any nation and will gain competitive markets, address poverty and unemployment, and create a more equal society while maximising mainstream consumer welfare through low prices, quality products and consumer choice. However, a deep reliance on the consumer welfare standard may block progress in curbing economic inequality. A review of the appropriateness of a consumer welfare standard will be presented below.

Efficiency is protected while advancing the broader developmental agenda and redressing centuries' worth of marginalisation. When public interest goals, substantive laws and normative frameworks deviate from mainstream competition considerations, markets will show progress in line with a development agenda. Most countries, including equity-based goals in their competition policy, regard them as secondary to mainstream efficiency-based goals.

Economic transformation has so many positive effects, and, unfortunately, economic liberation has taken a back seat in the quest for political liberation.

In *The Challenge of Inequality in the Competition Paradigm*, Mendelsohn held that "increases in concentration can generally be seen as a cause for inequality concerns, as high levels of concentration and economic power usually lead to great

socioeconomic discrepancies and less equal societies".[103] This has been true for South Africa because inequality, poverty and unemployment are South Africa's significant challenges, as identified in the 2030 National Development Plan (NDP).[104]

The efforts made by Minister of Trade and Industry and Competition Ebrahim Patel in the last amendments are illustrative of the point that the economy is still skewed, i.e., the ownership stakes of HDIs have not increased. Hence, in July 2018, the Minister introduced the Bill, now the Competition Act 18 of 2018, to the National Assembly. This Bill was set to amend its predecessor, the Competition Act 89 of 1998. This Bill intended to address the lack of economic transformation in the South African economy, focusing on opening the economy to small businesses owned by black South Africans. This proposed Bill was set (amongst others) to address high levels of economic concentration, limited transformation and dominant firms' abuse of market power. In December 2018, both houses of the parliament (considering public hearings held) passed the Bill and sent it to the president for approval. Once the president signed the Bill, specific provisions of the Act took effect in July 2019, and the remaining provisions took effect in February 2020.

In an interview with a presenter of the radio programme, Cape Talk [105], James Hodge, the chief economist at the South African Competition Commission (CC), described the changes in the Amended 2018 Act as a bid to make South Africa more "entrepreneur-friendly". He further mentioned that the amendments were intended to disrupt the dominance of specific business networks, particularly in the food retail/agricultural supply chain. The introduction of these amendments shows that HDIs were believed

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[103] Mendelsohn, J. 2021. *The challenge of inequality in the competition paradigm.* At 13

[104] See Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities.

[105] Qukula, Q. 2019. *Goverment publishes draft laws to make South Africa more entrepreneur-friendly* [Blog, Available: http://702.co.za/articles/365542/govermnt-publishes-draft-laws-to-make-south-africa-more-entrepreneur-friendly. Available: http://702.co.za/articles/365542/govermnt-publishes-draft-laws-to-make-south-africa-more-entrepreneur-friendly.

to finally gain access to the market they previously did not have access to. Hodge adds that these amendments were not trying to give an advantage to any group of firms but were about parity and trying to be in line with the standards of the rest of the world, i.e., European Union (EU) competition regulations concerning retail food chain markets, economic transformation and inclusion, which were the main focus of the 2018 Amendment Act.[106]

3.2 Levels of inequality in South Africa

In South Africa, most white individuals have more, while most black individuals have less. According to the UBS Global Wealth Report 2023*,* the South African Gini coefficient for wealth has risen from 80.4 to 88.8. [107] Chronic poverty and wealth inequality continue to undergird the black majority population in South Africa. Hence, the discussion below will illustrate how our economy continues to be skewed against small, black and black women-owned firms. This is to determine how the law has not helped remove the barriers to entry or factors that may impede effective market participation towards the firms owned by HDIs (particularly firms owned by black South African women).

The current economy structure in South Africa is one where private wealth and dominance continue to belong to conglomerates predominantly owned by the white population. Private wealth was accumulated when whites were the only population legally permitted to own or manage corporations in South Africa. During this era, there were laws and policies intended to create barriers to entry for black monopolies, widen the wealth inequality gap, and diminish competition in the markets of pre-democratic South Africa. [108] The majority black population were not only dispossessed, engulfed by poverty, and subject to unequal and unfair treatment. Still, they were left lagging in

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[106] *Overview of competition amendment bill.* 2018.At 2.

[107] *Global wealth report*. 2023.

[108] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.At 7

terms of business ownership post-apartheid and colonialism. Hence, the then liberation movement, the ANC, sought to implement policies and legislation that would break up these conglomerates and spread ownership to include the black population.

Depicting the poverty level in South Africa, Business Tech recorded that a staggering 55.5% of the total population lives *below* the upper-bound poverty line, (which would amount to earning R 1277 a month). [109] In its website news article, The International Monetary Fund (IMF) held that "the top 20% of the (South African) population holds over 60% of income" (compared to the median of forty-seven per cent in similar emerging markets).[110] This is despite the minority population of white South Africans. In the 2019 national census, the white population amounted to a low 7.9 per cent, while the majority black population amounted to 80.7 per cent of the total population.[111]

In South Africa, poverty is attributed to the native black South Africans, who, according to McConnell et al., 2015 made up 99% of the poorest.[112] In 2021, black South Africans constituted 48.6 million (81% of the total population). [113] According to StatsSa, black South Africans are most vulnerable to being poor. As a result, poverty and unemployment levels are consistently highest among black South Africans. [114] Race

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[109] , Here's how much money South Africa's richest 1% controls compared to the rest of the country. 2020a. Available: https://businesstech.co.za/news/wealth/367372/heres-how-much-money-south-africas-richest-1-controls-compared-to-the-rest-of-the-country/. Available: https://businesstech.co.za/news/wealth/367372/heres-how-much-money-south-africas-richest-1-controls-compared-to-the-rest-of-the-country/.

[110]Six charts explain South Africa's inequality. 2020. Available: https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality. Available: https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality, ibid.

[111] *See Mid-year population estimates.* 2021.(This depicts the census collected by Statistics South Africa in the 2019 midyear population estimates).

[112] Rensburg, J.v., McConnell, C. & Brue, S. 2015. *Economics, southern african edition.* McGraw-Hill Education. At 255.

[113] *Mid-year population estimates.* 2021. At 17.

[114] Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities.

in South Africa is a predictor of poverty. [115] Black South Africans still face the highest risk of poverty. Nearly half of the population in South Africa is said to be chronically poor. The legacy of apartheid is the driver of such a significant challenge of chronic poverty because the racial segregation resulted in high inequality, unemployment and poverty in the previously marginalised black population.

By providing these statics, I am making the point that while the white population is a minority, they still hold the lion's share. It seems like the Act has not effectively dismantled the white monopoly—wealth inequality created by our colonial past. This affirms that inequality results from engineered conduct through policies and politics, and we ought to utilise the same policies to redress such inequality aggressively. [116]

The lack of access or equality of opportunity for the previously marginalised black industrialists may have led to intergenerational inequality, which has the effect of handicapping and creating drawbacks for the incumbents. [117] Intergenerational inequality is the "intergenerational transmission of income, wealth, employment, social mobility and socio-economic conditions". [118] Thus, an inheritance of inequality needs to be cured directly at its source by either removing the obstacles identified or

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[115] Ibid.(" Race remains a strong predictor of poverty in South Africa, with black Africans being at the highest risk of being poo."). At xxii. ("In 2015, 47 per cent of the households headed by black South Africans were poor. This was very high compared to 23 per cent for those in households headed by a person of mixed race (coloured), a little more than one percent for the population in households headed by an Indian/Asian South African, and less than one percent among those in households headed by white South Africans.") At 13.

[116] Stiglitz, J. 2014. The Price of inequality: how today's divided society endagers our future. *Sustainable Humanity, Sustainable Nature: Our Responsibility*. Vatican City, 2014."Inequality is not inevitable: it is a result of policies and politics. There are policies that would simultaneously reduce inequality, heal some of the divides in our societies, and strengthen our economies"). At 1.

[117] WorldBank. 2000. *South Africa: constraints to growth and employment evidence of the small, medium and micro enterprise firm survey*. At vii (However, the race of the SMME owners appears to capture a unique feature of the South African business environment, reflecting the handicaps that categories of entrepreneurs have regardless of size, age or location. Black-owned SMMEs appear the most disadvantaged - typically, they experience all drawbacks of micro and post-apartheid firms but to a greater extent and possess few of their advantages).

[118] Lianos, I. 2018. *The poverty of competition law: the long story.* Centre for Law, Economics and Society. ("Some, for instance, argue that inter-generational inequality, which refers to the inter-generational transmission of income, wealth, employment, social mobility and socio- economic conditions seems to have increased in recent years, at least in developed economies").

compensating through transferring the resources to previously marginalised black South Africans.

The racial discourse around generational poverty and the lack of successful black-owned firms may be attributed to the black industrialist's laziness. Alternatively, the blame is attributed to a lack of motivation to be economically sufficient but with a desire to burden the state's social welfare benefits. In the discourses, such poverty and lack of market access are attributed to our ineffective policy in crystalising the developmental agenda.[119] Unfortunately, millions of the majority black population in South Africa live below the poverty line and are susceptible to anti-competitive conduct from white-owned conglomerates. The Act can potentially level the playing field for black South Africans through affirmative action methods. However, the Act has been ineffective.

Inclusive economic growth (market access or diminishing of barriers to entry) is stifled when the economy is as highly concentrated as post-democratic South Africa is. Highly concentrated markets stifle innovation, so it would be in our best interest to ensure a robust and effective regime to increase such innovation. One of our NDP goals is to open up opportunities for black-owned firms and small businesses while promoting inclusive growth. [120] Even though the NDP is not a binding source, it confirms the importance of ensuring that we use competition regulation to bring these goals to fruition. [121]

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[119]Here's how much money South Africa's richest 1% controls compared to the rest of the country. 2020b. *Business Tech*, Kendall, M. 2020. *Hood feminism: notes from the women that a movement forgot.* New York: Penguin Random House. At 242. ("Poverty is an apocalypse in slow motion, inexorable and generational. Sometimes a personal apocalypse, sometimes one that ruins a whole community. It isn't a single event of biblical proportions, but it is a series of encounters with one or more of the fabled Four Horsemen. When politicians talk about the working class and the rust belt, we can hear that they understand the consequences of long-term poverty. They can grasp that it isn't a moral failing or a personal failing, but instead the consequences of bad policy and limited opportunity colliding over time.")

[120] The goals include ensuring policy instruments that are intended to encourage the private sector to change ownership patterns See *National development plan 2030: executive summary.* n.d. at 34.

[121] Ibid at 32.

The South African competition policy can be used as an instrument to respond to the problem of inequality the country faces. However, for such policy to be effective, Gal argues that government policy should focus on the root cause of inequality, "not stopping or distorting the competitive process". [122] This thesis will show how it supports dealing with the root cause and not just stopping the competitive process.

The Preamble and section 2 of the Competition Act promise to ensure a legislative instrument that eliminates barriers to entry for small black-owned firms to be effective market participants in our economy. However, ownership seems to continue to be skewed and the objectives of the Act not being met in the foundational way."The incumbents continue to experience barriers to entry despite the efforts that the government and lawmakers have in place.

The Department of Trade, Industry and Competition (dtic) has a myriad of programs and policies that are intended to streamline market access and remove barriers to entry for both small firms that are black-owned and black women-owned. The Competition Act is at the helm of ensuring that barriers to entry are removed to have these firms become effective market participants. The public interest objectives in the Competition Act contain some transformative objectives set to ensure inclusive growth and market access for black women-owned firms. However, it seems not to have improved the well-being of black women-owned firms by guaranteeing inclusive growth of these incumbents. The markets remain highly concentrated, and competition is almost non-existent.

3.3 The market concentration problem and skewed ownership trends

[122] Gal, M. 2002. Reality bites (or bits): the political economy of antitrust enforcement. *International Antitrust Law and Policy.* Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=901756.For a similar argument,Porter, M. 1999. Michael Porter on competition. *The Antitrust Bulletin.* 44(4):841-880. DOI:10.1177/0003603x9904400405. see ("(I)inequality is more a failure of government policy and institutions than a failure of capitalism. The focus should be on addressing the root causes of inequality, not stopping or distorting the competitive process in the vein hope of achieving equal outcomes.")

Only a few firms have long held large chunks of market share; unfortunately, the gap widens yearly. The Herfindahl-Hirschman Index (HHI) [123] , averaging 2986[124] Private wealth still belongs to the small number of white-owned conglomerates, as this was the design of the discriminatory systems. This begs the following questions: Why has the Act not assisted these HDIs in actively participating in economic activities or opportunities that would lead to a more extensive distribution of private wealth, reflecting the diverse demographics of our rainbow nation? Why has the new government failed to achieve the goal stipulated in the Act's Preamble? Alternatively, is there a way to realise these goals and have a greater spread of ownership, redress past injustices, and curb poverty and market concentration? How can we ensure the newly amended 2018 Act is effective and realises the non-efficiency (and efficiency-based) goals integral to our economic transformation? Lastly, whether competition law and policy are the correct instruments for the above-mentioned developmental agenda. How far can this statute help develop an equal and competitive market? If so?

Sadly, despite myriad policy mechanisms (including competition policy), there are still high levels of economic concentration, lack of transformation and inclusion of HDI into the formal market. Years later, the markets in South Africa are still concentrated in a way that reflects past apartheid and colonial systems, i.e., the Act's purpose of broadening ownership has failed.

It is a common cause that monopolistic markets generally pose a material risk to competition because economic power is concentrated. This inequality makes our consumers vulnerable to high prices, cartels, concerted unlawful practices, price discrimination, buyer power, no choice, and poor-quality products. Not to mention non-

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[123] This used to measure average market shares/ concentration in a sector. An average market share below 1500 means the sector is unconcentrated. Between 1500 and 2500 means sector is moderately concentrated. While an average market share above 2500 means sector is highly concentrated.

[124] Buthelezi, T., Mtani, T. & Mncube, L. 2018. *The extent of market concentration in South Africa's product markets.*

pricing harms like the possibility of threatening constitutional order because of the increased commercial power of the few. Competitive markets are beneficial for the consumer, workers and small businesses. When the market is competitive, there is a lower risk of firm owners using the dominance to abuse the incumbents or entering into price fixing. As previously articulated, the South African market has always been highly concentrated. The rationale may be attributed to the legacy of colonialism and apartheid regime that excluded black industrialists from market access and the right to free trade. The previous dispensations did not prioritise transformation, equality and fairness. Additionally, there was no legislation or body to guard against anticompetitive restraint of trade effectively. [125]

Above, it was mentioned that one of the purposes of the Act is to ensure that markets are deconcentrated and there is an increase in ownership stakes of firms owned by HDIs. Few (predominantly white-owned) firms have long held considerable market share stakes; unfortunately, the gap widens yearly. It is alarming that in South Africa, the HHI in most sectors is above 2,500 [126] , with the average being 2,986. [127] In 2022, President Ramaphosa also concedes that the country continues to grapple with a concentrated market and ownership patterns). [128] One question is why we continue to have concentrated markets when our policy directs that we should prioritise de-concentration. The marginalisation of the black population produced a highly

[125] *Explanatory memorandum of the competition bill.* 1998. ("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, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy. That an efficient, competitive economic environment will benefit all South Africans: workers, owners and consumers alike.")

[126] This used to measure average market shares/concentration in a sector. An average market share below 1500 means the sector is unconcentrated. Between 1500 and 2500 means sector is moderately concentrated. While an average market share above 2500 means sector is highly concentrated.

[127] Buthelezi, T., Mtani, T. & Mncube, L. 2018. *The extent of market concentration in South Africa's product markets.*

[128] Ramaphosa, C. 2022. *Inaugural black industrialists and exporters conference.*

concentrated and monopolistic post-apartheid South African market, which is why the effective participation of black-owned SMEs was seen as crucial for our market and upholding the mandate articulated in the Explanatory Memorandum of the 1998 Bill. [129]

The highly concentrated sectors in South Africa include the grocery retail market[130], pharmaceutical, [131] property and healthcare sectors—additionally, mobile network operators, commercial banking market, etc., [132] Our so-called rainbow nation bears the title of being one of the most unequal and concentrated societies in the world. The World Bank records that 20% of the South African population controls 70% of the resources. [133]

In terms of section 7(1)(a) of the Act, a firm is presumed to be dominant if it has more than 45% of the market share. The Competition Commission analysed 2,150 merger reports in South Africa from 2009 to 2016. The Competition Commission found that some 70% of the sectors have dominant firms. [134] This study also found that most of these sectors were highly concentrated in terms of the HHI. It is important to note that market concentration may be a necessary feature of specific sectors; for example, if

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[129] *Explanatory memorandum of the competition bill.* 1998.

[130] *The grocery retail market inquiry final report*. 2019. At 29. ("In this regard, the inquiry maintains its view that the grocery retail sector is characterised by high levels of concentration, with the top five retailers accounting for approximately 64% of the market"). As result of dominance Shoprite Checkers, Pick n Pay and Spar national supermarket chains were found to have abused the market power by instituting exclusive leasing Agreements in various malls. *Grocery retail market inquiry: summary.* 2019.(for a summary of the retail market inquiry by the Competition Commission)

[131] In a briefing before the parliamentary committee, the Department of Trade and Industry disclosed that there were four key players in an approximately R45 billion market. See Pharmaceutical industry: department of health & DTI briefing. 2017. Available: https://pmg.org.za/committee-meeting/24697/. Available: https://pmg.org.za/committee-meeting/24697/.

[132] South Africa has only four dominant banks that enjoy market power: First Rand Bank's subsidiary First National Bank (FNB), Absa, Nedbank and Standard Bank.

[133] Mlaba, K. 2020. 5 shocking facts that show why South Africa Is the 'most unequal country in the world'. Available: https://www.globalcitizen.org/en/content/facts-why-south-africa-most-unequal-country-oxfam/. Available: https://www.globalcitizen.org/en/content/facts-why-south-africa-most-unequal-country-oxfam/.

[134] *Background note on competition amendment bill.* 2017. Pretoria. At 10.

the objective is to realise economies of scale of a specific industry, then a concentrated sector is not necessarily a threat. Economic concentration may be critical in small domestic markets like South Africa. [135]

This thesis affirms that outlawing market concentration may not necessarily lower barriers to entry, and outlawing the same market concentration may introduce inefficient market participants, which would have a negative consequence for the welfare of consumers. [136] Instead, it would provide us with false positives that do more harm than good for our policy objectives.

The initial Competition Act was passed in 1998, four years after the first democratic elections. Twenty years after this post-apartheid competition policy was introduced, Parliament and relevant government agencies felt it needed to return to the drawing board. The government and the relevant agencies realised that the previous legislation did little to promote economic transformation, inclusion and market concentration. Hence, the main focus of introducing the 2018 Bill (now the 2018 Act) was to address these concerns using the then-proposed Bill, more aggressively termed “A New Deal for Economic Transformation and Inclusion”. [137] The 2018 Bill (the Bill) sought to extend the mandate and powers of the competition authorities in South Africa to address the limited transformation and rising market concentration. With twenty years having passed since the 1998 Competition Act, it is incredibly disappointing to learn that competition authorities and the government have struggled to meet the bare minimum of fulfilling the Preamble of the 1998 Act. The Preamble of 1998 promised

[135] Ibid. At 12.

[136] Ibid.

[137] *Overview of competition amendment bill.* 2018. At 4.

that the Act would be an instrument that would ensure " greater ownership by a greater number of South Africans". [138]

In February 2017, in his State of the Nation Address (SONA), former President Jacob Zuma was committed to developing legislative intervention addressing radical economic transformation. [139] Hence, later the same year, the legislative intervention proposed earlier in 2017 came in the form of the 2018 Bill – which was still set on addressing the "racially skewed ownership profiles". [140] The proposed 2018 Bill was set to address skewed ownership profiles by providing market access for black businesses in South Africa. What is peculiar is, according to the government document, the (then) proposed Bill would "maintain the basic architecture of the [1998] Act, but align the operations with the stated purpose, particularly with regards to the public interest". [141]

In 2021, the dtic held that the South African market is said to continue to be heavily concentrated and exclusionary (despite legislative measures like the 1998 and 2018 Act in place). [142] In South Africa, economic concentration results in fewer opportunities for SMEs and black entrepreneurs because the dominant parties create barriers to entry for new entrants (often black businesses). [143] Therefore, it makes sense to target the market access issue for black businesses at the root cause – economic concentration.

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[138]Preamble of Competition Act, 1998.)"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, weak enforcement of anti-competitive trade practices, and unjust restrictions on full and free participation in the economy. That the economy must be open to greater ownership by a greater number of South Africans.")

[139]*Overview of competition amendment bill.* 2018. At 16.

[140]Ibid. At 16.

[141] Ibid.At 19.

[142]Patel, E. 2021. *Competition policy for jobs and industrial development.*. At 1

[143] *Overview of competition amendment bill.* 2018. At 20; *ANC policy guidelines for a democratic South Africa.* 1992, Mncube, L. & Ratshisusu, H. 2021. *Competition policy and black empowerment: South Africa's path to inclusion.* University of the Witswatersrand. At 15.

A study by the Competition Commission (the Commission) for the 2009 – 2016 period held that 70% of the 31 sectors considered had dominant firms. [144] Using the HHI, the Commission found that nine sectors, from pharmaceuticals to transport sectors, were highly concentrated. And since high market concentrations negatively impact the inclusion of previously side-lined black businesses, it is important to generate legislative measures that help authorities detect and address the high concentration levels.

Black South Africans (particularly black women) remain marginalised and excluded from ownership and control of the South African economy. The statistics of overall black and woman ownership provide a glimmer of hope that changes will occur shortly. There is a myriad of policy frameworks, like the Competition Act, that attempt to increase inclusion and market access. However, the levels of black (woman) ownership seem to decrease as the years go by. Black South Africans (particularly black women) remain underrepresented in the formal economy as firm owners. The country's economy remains painfully unrepresentative of the demographics of the 'Rainbow Nation' that is South Africa.

3.4 Paying a high price for inequality: Sacrificing democracy?

We should protect our young democracy from monopolists capturing and disrupting the current democracy that our forefathers fought tirelessly for. Monopolies are notorious for using their private power to disrupt a nation's democracy and freedom of free trade. [145] We have seen how big data has infiltrated the US democratic election process and compromised privacy. [146] Originally, protecting American democracy was

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[144] *Overview of competition amendment bill.* 2018. At 22.

[145] *Competition and the consumer protection in the 21st century.* 2018. Georgetown University Law School. At 164 ("Monopolists use their wealth and power to disrupt and dominate our democracy".)

[146] Ibid. At 167 ("Monopolists use their wealth and power to disrupt and dominate our democracy. Monopolists sell out our national security, making us depend unnecessarily for vital supplies on autocratic regimes, such as China.").

held to be one of the prime purposes of the envisaged anti-monopoly policy.[147] South Africa should be no different.

As a nation, we cannot relinquish the importance of Constitutional values guiding our Act. Our policy should incorporate the constitutional values that seek to advance the desired economic outcomes. [148] The South African competition law considers historical discrimination when engaging with alleged/ concerned anti-competitive conduct and practices. This mitigates past biases—biases like explicit discrimination and denial of black industrialists' participation in the mainstream economy.

Unfortunately, the current wealth inequality and market concentration do not reflect the cornerstone of our Constitution *and* the goals of the Competition Act. The market is concentrated, and dominant firms belong to a few white-owned conglomerates that were formed in the colonial and apartheid dispensation and, as such, pose a sense of threat to our young democracy.

Perhaps competition law and policy should be designed with a backdrop of setting boundaries of private power for private power to not interfere with a democratic society. [149] The reason is that economic inequality is translated into political inequality and leaves room for those vulnerable persons plagued by inequality to have their democracy undermined. Stiglitz further argues that in a country that is plagued by wealth inequality, it is those with more influence who "write the rules of the political game to give them more power and influence, which means that economic inequality

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[147] Ibid.At 164 ("The prime purpose of antimonopoly law is to protect the liberties of the individual citizen and our democracy.").

[148] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62.3(6). At 946 ("Antitrust laws can be used as tools to achieve predetermined social and economic outcomes. Developing countries, therefore, have a choice to make as to the normative baseline that drives their competition policy and enforcement process.")

[149] Deutscher, E. & Makris, S. 2016. Exploring the ordoliberal paradigm: the competition-democracy nexus. *The Competition Law Review.* 11(2). At 181.

gets even more translated into political inequality, and the political inequality gets translated into more economic inequality, in a vicious cycle.[150]

It is imperative to realise the depth of monopolistic and concentrated market's effect on diminishing our growing South African democracy. Hence, the type of strategies we implement for competition policy should be cognisant of the depth of effect. We need to initiate strategies that mitigate such threats to competitive markets and result in economic power that translates to political power that may curtail democracy. It is in our best interest to pass stringent legislation and policies that protect the political interest and democracy from being captured by the elite minority.

The Supreme Court Justice Louis Brandeis held, “We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we cannot have both”. [151] A valid question that could follow this statement is whether there is a direct link between effective competition law and the upholding of democracy. The Ordoliberal school of thought perceived a direct link between competition law and democracy based on “the assumption of interdependence between economic, social and political order”. [152] Whether there is a direct link between competition law in South Africa will be explored further in the thesis.

The global South is still recovering from centuries of colonisation and a racially charged apartheid system. These systems prohibited the black population from various rights like, amongst others, autonomy, freedom of movement, participation in the formal economy, and owning immovable property in most suburban areas. Hence, as the social transformation was ushered in, the black population lagged on economic

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[150] Stiglitz, J. 2014. The Price of inequality: how today’s divided society endagers our future. *Sustainable Humanity, Sustainable Nature: Our Responsibility*. Vatican City, 2014.At 13.

[151] *Investigation of competition in digital markets*. 2020. United States. Available: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf. At 7.

[152] Deutscher, E. & Makris, S. 2016. Exploring the ordoliberal paradigm: the competition-democracy nexus. *The Competition Law Review*. 11(2). At 2.

transformation, resulting in a substantial racial wage gap. [153] It is sufficient to say that we rely on the current constitutional democracy and its policies to mend past injustices and inequality and bring opportunities for HDIs. Several other macroeconomic policies were brought to decrease the gap between black and white South Africans. [154] Post-1994, we saw the transition to social autonomy and liberty on the part of the black population. However, the majority black population is still burdened by the pseudo-economic liberty/economic freedom that democracy and the Constitution bring about. I use the term “pseudo” because, on the face of it, black people are granted the ability to take financial actions. However, the same majority population remains engulfed in a State with increasing and widening wealth inequality. A handful of white families are economically privileged, while most black people remain systematically deprived. The wealth inequality and barriers to entry for black businesses remain despite legislation being passed, like the Competition Act, which is supposed to close any barriers to entry and eradicate wealth inequality.

A part of democracy is being able to vote for the government of your choice. South Africans were able to do so in 1994. A democratic economy is choosing what you make successful, not its monopolistic nature having to choose for you. However, in most sectors in the South African market, the monopolistic nature of the market decides a firm's success. The question is whether economic democracy exists in this country or whether it is those white-owned conglomerates who will continue to remain successful despite questionable efficiency, quality and high prices. Does our market show the demographics of the rainbow nation? And if not, why not? Another valid question is whether we should burden the Competition Act with the upkeeping of the democratic values that underpin the Constitution.

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[153]Erichsen, G. & Wakeford, J. 2001. *Racial wage discrimination in SA before and after the first democratic election.* Development Policy Research Unit: University of Cape Town.

[154] Macro-economic policies like the RDP, Growth, Employment and Redistribution (GEAR), the Accelerated and Shared Growth Initiative, South Africa (ASGISA), the New Growth Plan (NGP) and the National Development Plan (NDP).

3.5 Competition policy as a means to equality in South Africa

Despite desires by the post-apartheid government for the inclusion of previously disadvantaged individuals, the markets are still monopolistic, and the incumbent population is not adequately integrated into the formal market. The liberation movement's desire for an equal society seems to have not culminated on the economic front. Thus, it may seem that the Competition policy introduced to aid black economic equality has not produced the anticipated results.

It is not enough to bring HDIs to the formal economy (inclusion) without an effective and additional mechanism that may yield transformative change. The first would be to understand the current landscape: black women-owned firms have a low life expectancy despite the Act's inclusion mandate. The current attempts of the Act's provisions to ensure black economic empowerment and inclusion on their own are not enough and have not been enough. An extended mechanism may be adopted by acknowledging the role of 'intersectionality. This concept will be explained further in the upcoming chapters.

Based on the Preamble of the 1998 Competition Act, one can conclude that the Act was introduced to respond to such wealth inequality, barriers to entry faced by HDIs and skewed ownership trends that would continue as the country transitions from colonialism and apartheid to a democratic dispensation where equality, dignity and fairness are the cornerstone. The Competition Act notes that its purpose and the Preamble of the 2018 Amendment Act is to maintain a competitive market to ensure the following:

(i) An increase in the ownership stakes and the overall growth of firms owned by previously marginalised individuals
(ii) Economic transformation to deconcentrate certain concentrated industries
(iii) Firms owned by HDIs effectively participate in the market without any impediments

As mentioned, our Competition Act seeks to protect a designated class of businesses from the claws of (often white-owned and established in the apartheid era) dominant firms that seek to abuse or exert barriers for market entry to the designated class. The

small or HDI-owned firms form part of the designated class because their vulnerability warrants protection by the Act.

The Act sought to protect the designated class in a myriad of ways. An example of how the Act is set to protect the designated class is when the dominant firm (acting as a seller) discriminatory prices product so much that such conduct cripples or impedes effective participation of the designated class in the market. Such dominant sellers may meet requirements of prohibited conduct referred to as price discrimination. In section 9(4) of the Competition Act, the minister is responsible for determining the benchmarks that determine factors relevant in determining whether such a firm's conduct warrants price discrimination that impedes the designated group from participating in the market. The dominant seller may be penalised up to ten per cent of their annual turnover (as a first-time offender) and twenty per cent of an annual turnover of the same firm (if the conduct warrants a second offence).

We need a competition policy that contributes to the structural transformation of the local market while adopting a liberal and inclusive approach to equality. The inclusive approach to equality offers a broadened social recognition for HDIs previously excluded from market participation. The real change occurs when such a transformation "addresses the structural conditions that create perpetual inequalities".[155]

Effective market participation removes the chronic poverty that engulfs the black South African population. This poverty can cause constraints on HDI outcomes irrespective of the individual efforts they may exert. [156] Hence, Flynn, in *The Hidden Rules of Race:*

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[155] Albertyn, C. & Goldblatt, B. 1998. Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality. *South African Journal on Human Rights.* 14(2):248 - 276.At 256 ("An inclusive approach to equality would align with a liberal Adea of inclusion into the *status quo* (and may even be achieved through formal equality alone). Inclusion broadens the umbrella of social recognition but does not address the structural conditions that create and perpetuate systemic inequalities.")

[156] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. At 11.

Barriers to an Inclusive Economy, holds that policymakers should simultaneously introduce policies that tackle economic and racial inequality. [157] At face value, it seems like that was the intention and objective of the Competition Act – to tackle financial and racial inequality simultaneously. However, based on the studies mentioned above, we still have unconcentrated economic barriers to entry that impede the effective participation of HDIs, and our economy consists of skewed ownership trends.

The inequality, poverty and unemployment brought about by our concentrated markets do not help the already embarrassingly low HDI ownership stakes levels. The 2019 Broad-Based Black Economic Empowerment (B-BBEE) Commission (the Commission) report held that the average black ownership of large entities in South Africa is 29%. [158] I agree with my earlier criticism that the distribution of wealth in post-colonial and democratic era South Africa continues to be low. The state of national economic transformation continues to be dire, as recent as the 2019 calendar year.

Unfortunately, the Act seems to offer inclusion without being transformative because it aggressively shifts the systematic power relations towards white industrialists. When we restructure the generic competition framework, we will see inclusive equity and transformative change that dismantles the unequal status quo. Alberty (2007) notes that inclusive approaches often recognise or affirm those vulnerable people's disadvantages without shifting the underlying ideas that bring about such inequality. A transformative approach goes a step further. A transformative approach seeks to restructure the underlying general frameworks and norms that give rise to and reinforce the existence of such inequality. Albertyn (2007) makes an example with a claim of unequal treatment based on sexual orientation. An inclusive approach to such unequal treatment would recognise the identity of gay and lesbian persons and 'see' homosexuals as equal to heterosexuals. A transformative approach would go further

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[157] Ibid. At 12

[158] *National status and trends on broad – based black economic empowerment.* 2019. South Africa.At page 11.

and “contemplate a more radical understanding of society in which heterosexual norms are perpetuated”. [159]

In academia and politics, competition law has been called to have a more active role and generate a society that contributes to dismantling wealth inequality. The purpose of the Act in section 2(b)(c)(e)(f) affirms such a proposition. [160] The reason for this unequal wealth distribution is beyond the scope of this thesis and, quite frankly, not my forte; hence, I will not dwell on the economic rationale of wealth inequality. However, one cannot avoid the rationale that is our discriminatory past, such as the racial segregation of black people from taking part in the economic landscape of South Africa. Thus, a racially unequal society with high poverty levels and unemployment skewed towards black South Africans.

For black South African industrialists, generational poverty cannot be solely attributed to personal failure but to bad policy (ineffective policy approaches) and limited opportunity colliding over time. When the bad policy and limited opportunity for HDI-owned firms collide, I doubt that any amount of individual effort may yield the desired outcomes. However, the very same policy committed to eliminating the limited opportunity for HDI-owned firms tells the black industrialists that now, in post-colonial and apartheid South Africa, they are free from segregation and should not fail in yielding the desired outcomes. If the policy does not empower the black industrialists (as we see with South Africa’s rising poverty, unemployment, social welfare dependence, wealth inequality and concentrated markets, the policy will be ineffective

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[159] Ibid.

[160] ″The purpose of this Act is to promote and maintain competition in the Republic to

(b) Provide consumers with competitive prices and product choices;
(c) Promote employment and advance the social and economic welfare of South Africans;
(d) Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(e) Promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons

in seeing real change. Hence, an effective competition policy committed to eliminating poverty, unemployment, and social welfare dependence and limiting market concentration while serving consumer welfare is integral. An intervention that simultaneously stimulates competition and realises socio-economic goals like equality, employment, and less poverty will likely be more impactful for our developmental agenda than a competition policy focusing only on consumer welfare maximisation. [161] On an analysis of the Act, the limitations regarding women will become more apparent.

3.6 Race determines opportunity

With South Africa continuing to be engulfed in a concentrated post-apartheid economy, such market concentration poses more profound socio-economic challenges for HDIs. This issue of market concentration will be dealt with more comprehensively in a further chapter below.

When there is a market concentration problem, the risk of wealth inequality and poverty increases. [162]Poverty then becomes an added incentive for why competition law should decisively respond to the issue of market concentration in South Africa. The 2008-2015 Theil-L measure of inequality, which is used to investigate the possible factors behind inequality, holds that race is one of the main contributors to inequality of opportunity in South Africa. [163]

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[161] *ANC policy guidelines for a democratic South Africa.* 1992, ibid., Deutscher, E. & Makris, S. 2016. Exploring the ordoliberal paradigm: the competition-democracy nexus. *The Competition Law Review.* 11(2), ibid., *Freedom charter of South Africa.* 1955. United Nations Centre Against Apartheid.

[162] Crane, D. 2016. Antitrust and wealth inequality. *Cornell Law Review.* 5(101). At 1178 ("Where wealth and economic power are heavily concentrated in a few closely held, conglomerate, and vertically integrated enterprises; labor mobility is low; capital markets are underdeveloped; exclusive legal privileges for incumbents or formerly state-owned enterprises abound; and trade barriers are high, the introduction of antitrust principles as part of a wider package of liberalization and development reforms would likely contribute to shrinking the gap between rich and poor.")

[163] Ibid at 66.

In Competition Commission v Senwes [164] , Justice Jafta maintained, “Some of its (the Competition Act) objectives are directed at addressing the inequalities and imbalances created by the apartheid order”. This redress is done by including these public interest objectives [165] throughout the Act to rectify the black population's inequality, affirming that South African competition policy was introduced to respond to broad issues related to non-economic objectives. This is as opposed to being boxed by the narrow objective of maximising economic efficiency and consumer welfare.

The racial discrimination has left South African black-owned firms to participate in an uneven playing field. This government's concern was to level the playing field to accommodate former HDIs legally allowed to participate in the markets post-apartheid. The centuries of inequality of opportunity needed to be rectified by the Competition Act. This concern was affirmed by the Tribunal in Nationwide Poles CC and Sasol Oil (Pty) Ltd. The Tribunal maintained, “The Competition Act is, itself, punctuated with references to the legislature’s desire that the statute should promote market access and equality of opportunity particularly, in this field, where small enterprise is concerned.” [166]

The current wealth is believed not to be (unilaterally) merit-based, but because of the racial segregationist past of the market – which makes it a moral obligation to redress the HDIs effectively. Radical reform in our competition law goals and application will do just that. Since the white population enjoyed owning/managing farms or formal industrial enterprises decades before the new democratic dispensation, it is no

[164] Competition Commission of South Africa v Senwes Ltd. 2012. Constitutional Court.

[165]. The phrases “public interests objectives” and “public policy goals”' are used interchangeably throughout this thesis.

[166] *Nationwide Poles v Sasol Oil.* 2005. Competition Tribunal.At 21

surprise that the wealth is skewed towards the population despite constituting a mere ten per cent of the South African population. [167]

3.7 What's gender got to do with competition enforcement: Barriers to black South African woman-owned businesses

In its *Ownership Trends Report*, the Commission highlights the importance of distinguishing between discriminated demographics versus ignoring the effects of intersectionality.[168] The Broad-Based Black Economic Empowerment Act mandates the Commission's 2019 Ownership Trends Report (the 2019 Report). [169] Generally, these kinds of reports are important because they give the Commission indicators of the "state of transformation".[170]

The statistics below reveal that small black-owned firms. particularly black women-owned firms, have been ineffective market participants. Their ownership stake continues to be disproportionally low. The 2019 Report outlined that the percentage of black men-owned firms in the property sector was 42%. In turn, the average number of black women-owned firms in the same property sector was a low 11%. A firm owned by a black woman cannot be judged unilaterally on race (or size of firm). Black women-owned firms face a far more significant burden than just a small business owned by white men/women. Additionally, based on the above, women-owned firms face many more barriers than black men-owned firms. The personal characteristics of the firm owner should not be overlooked. The owner's background, experiences, values, and traits should be considered when evaluating a business. These factors can

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[167] Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities.

[168] *National status and trends on broad – based black economic empowerment.* 2019. South Africa.

[169] *Broad-Based Black Empowerment Act.* 2003.

[170] *National status and trends on broad – based black economic empowerment.* 2019. South Africa.At 16.

significantly influence decision-making, company culture, and overall business outcomes.

The Commission further reported that most firms in most sectors have 0 to 10% black ownership and a much lower rate of black women ownership. [171]This is despite the black majority population comprising 48.6 million (81% of the total population). [172] In contrast, the white population is estimated at 4.7 million (7.8%). [173]

Black males and females account for 80.9 % of the total South African population of 30.8 million. Moreover, black females comprise 51% of that number. However, there is a growing concern about the declining number of black women-owned firms in the business landscape, even though they represent a substantial portion of the population, on par with black males. This trend raises important questions about economic opportunities, gender equity, and the overall health of our society.

It suggests that, despite having a population presence equal to that of black males, black women are not participating in business ownership and entrepreneurship at a level that reflects their demographic significance. In addition, the rate at which this gap is widening is alarming, especially for our emerging constitutional democracy.

It will take 40 years to gain gender equality if we continue with the current pace and mandate – according to the United Nations (UN). [174] The United Nations Sustainable Development Goals (UN SDGs) accept that the economy may be harmed if gender equality and equity are not prioritised. The UN has 193 member countries, including

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[171] Ibid.

[172] *Mid-year population estimates.* 2021.

[173] Ibid. At 17

[174] UN. 2022. *The sustainable development goals report 2022*.

South Africa as a member state. Hence, our National Sustainable Development Goals (National SDGs) also sought to advance gender equality. [175]

In 2017, South Africa's Gender Inequality Index was 0.389, higher than Peru at 0.368. This gender inequality can have effects like limited access to education, development tools and implicit barriers. These implicit barriers will be delved more when the thesis discusses the implicit barriers that black women face in their attempt to be effective market participants in post-colonial and apartheid South Africa.

Advancing gender equality is universally accepted by most countries because of the long oppression inequality that around the globe have experienced. Other people argue that black women's equality has been lagging, specifically in South Africa, where the country has a wide range of policies that seek to mitigate the implicit barriers that the black woman industrialist may face. For example, black woman ownership continues to be lagging despite empowerment funds like the Woman Empowerment Fund (WEF) that claims to "accelerate the provision of funding to businesses owned by black women". [176]It is beyond the scope of this thesis to review whether this type of funding system helped black women industrialists become effective market participants.

The intersection of race and gender should be discussed in market access issues and the ability to participate in a market effectively. Historically, there have been extensive discussions about why developing jurisdictions should abandon the belief that non-efficiency goals have no place in competition enforcement. Not discussed is how mere inclusion of the non-efficiency goals can yield almost no results. South Africa is an example of this. Black female industrialists in South Africa face extensive barriers to effective market participation. The barriers to effective market participation may be

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[175] See Africa, S.S. 2019. *Sustainable development goals: country report 2019*. In comparison with MDG3, SDG 5 is said to aggressively target gender equality and the empowerment of women by expanding the targets.

[176] *Women Empowerment Fund*. Available: https://www.nefcorp.co.za/products-services/women-empowerment-fund/ [Available: https://www.nefcorp.co.za/products-services/women-empowerment-fund/].

attributed to black women's materially subordinate characteristics. The effect of being in the intersection of race and gender plays a role in navigating the economy as an effective competitor. Hence, more tailored support may improve the current ownership trends and de-concentration. [177]

The aim of the below is to show the need to reconsider the long-standing approach to public interest objectives and the assumption that HDIs should be treated equally when trying to achieve redistributive justice. After that, the thesis proposes that we develop an approach that acknowledges the role and impact of intersectionality.

The firm ownership trends by HDIs in South Africa seem to continue to be low, and black women industrialists seem to be lagging in firm ownership. Hence, it might be worthwhile to zoom in on this particular group to ascertain whether it experiences an added burden because of race and gender and whether race and gender prevent this segment of the population from participating in wealth accumulation as industrialists.[178] One wonders whether the centre of intersection of race and gender, where most black women find themselves, heightens barriers to entry for black women business owners. Perhaps the current analysis of the Act limits effective participation for the benefit of HDIs.

The colonial and apartheid racial system was particularly burdensome for the average black woman. Black women under the oppressive systems were subjected to heinous acts like being pressured by their female employees into sexual relationships with white men. [179]

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[177] See Vorobeva, E. 2022. Intersectionality and minority entrepreneurship: at the crossroad of vulnerability and power. In *Disadvantaged Minorities in Business.* Springer International Publishing. 225-235. DOI:10.1007/978-3-030-97079-6_11. At 225.

[178] Sulla, V. & Zikhali, P. 2018. *Overcoming poverty and inequality in South Africa : an assessment of drivers, constraints and opportunities*. Washington, D.C. Available: http://documents.worldbank.org/curated/en/530481521735906534/Overcoming-Poverty-and-Inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities.At xvi

[179] Mahlangu and Another v Minister of Labour and Others. 2020. Constitutional Court. .

The apartheid regime was acknowledged to be a nationalistic administration that brought about extreme poverty and a life of subordination while the white majority had wealth. During the era, gender discrimination was also rife. More particularly to the black women, who were the most exploited and subordinated in all political, social or economic participation. [180] Thus, it may not be far-fetched to investigate how our competition Act and policy may support including black women industrialists in post-democratic South Africa. The competition policy can make processes and outcomes beneficial to black women-owned firms that experience intersectional discrimination. The role of competition law and policy in responding to intersectional discrimination will be returned below.

3.8 The intersectional theory

Professor Kimberle Crenshaw first reflected on the then-tendency of American antidiscrimination law to treat race and gender as "mutually exclusive categories of experience and analysis".[181] Her ground-breaking 1989 paper titled *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics* introduced the world to the concept of intersectionality, which is useful in the analysis of antidiscrimination policy. Her main argument in this paper was that antidiscrimination doctrine should acknowledge the placement of black women in the intersection of race and gender instead of treating race and gender as mutually exclusive analyses. Prof Crenshaw held that the black woman experience is multidimensional in that they are at the intersection of race and gender, i.e., they may experience both racism and sexism. Therefore, a single-axis framework erases the experience of the black woman. In the paper, she asserted that subordination should not be seen as discrimination along a single axis, i.e. race or gender. Some may experience discrimination on several axes, like black women's

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[180] *ANC policy guidelines for a democratic South Africa.* 1992. At 3.

[181] Crenshaw, K. 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum.* 8. At 139.

experience of subordination in both race *and* gender. She states that antidiscrimination policies of that time remedied or focused on the 'privileged' ones who were not multiply-burdened. The overlooking of the intersectional experience of black women was found to have erased the black woman's experience. Prof Crenshaw broadly states that antidiscrimination analysis that does not consider the intersectional experience of black women in America was "missing the mark". [182] In Chapter 6, of this thesis I will review whether the current Competition Law's limiting analysis that overlooks intersectionality is also missing the mark.

The concern is because we have understood that economic emancipation via business ownership is linked to social, economic and political power. This means that our often-celebrated freedom and liberation from colonial and apartheid systems is threatened immensely. Government laws and policies, like the Competition Act, should be used to help black women-owned businesses dominate and compete in the post-apartheid marketplace.

3.9 Targeted universalism as a policy strategy

This thesis reflects what Professor Powell calls the "equity 2.0" policy strategy, the "targeted universalism" strategy. According to Powell, "targeted universalism" is the strategy that bears a deeper understanding of what real equity should entail. In his view, real equity is getting a designated marginalised group to the targeted 'position' of well-being instead of just closing a disparity gap.

I canvass these policy strategies because of the central proposition articulated at the beginning of this thesis – that black women industrialists in post-colonial and apartheid South Africa are lagging when it relates to being owners of firms that hold the position of effective competitors. Statistics in Chapter 2 above show that the economy continues to be burdensome towards black women-owned firms despite including public interest goals in the Competition Act. If we seek a solution, the starting point is

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[182] Ibid. At 140.

to elect a policy strategy that will empower the incumbents and make them effective market participants. Hence, for this thesis, the decision to review 'targeted universalism' as a policy strategy that may advance the effective participation of black women-owned firms.

As previously said, the Competition Act somewhat seeks to equalise HDI-owned firms and SMEs for incumbents to participate in the market effectively. However, the way that the Act goes about doing so is slightly counterproductive. The Competition Act is set up in a way that overlooks the different demographics encapsulated in the protected group, i.e., black men and white women, whether this is intentional or not. The Act does not recognise gender, class, or disability. Such recognition would not be unfamiliar to post-democratic South African policy because various policies and legislation have recognised various demographics that should be equalised and gained from redistributive justice. [183] But the Competition Act seems to group these incumbents. It does not recognise the impact of their different personal characteristics in the quest to achieve redistributive justice, i.e., HDI-owned firms are effective market participants.

Social security and tax policies are traditional systems that respond to inequality, i.e., ex-post intervention. Competition enforcement can also be described as an ex-post intervention to years of racial marginalisation and skewed ownership trends. It might help, as is the goal of the below, to disrupt this mainstream ex-post intervention because it does not deal with the root problem.

The type of policy approaches that are adopted by policymakers is often rooted in either a universal strategy or targeted strategy. The universal strategy seeks to treat everyone on equal footing. For example, policies advancing 'equality' can be seen as universal policy approaches because they support everyone's needs without

[183] BEE and labour policies grant points for black businesses that seek partnership with SOEs while black, female individuals who are disabled would be rated higher than those that are not burdened by such. Evidentially, our social grant policy caps recipients of certain earning and class.

excluding certain groups. The universal strategy does not favour a certain group over the other.

In contrast, the targeted strategy differs because it supports the needs of the group regarded as the most vulnerable. The targeted strategy directs policymakers to ascertain which group is the most and least favoured. Policies that seek to advance equity or affirmative action are examples of a targeted policy strategy. The role of affirmative action is to favour a certain group, i.e., black people (the most favoured group), because they suffered historical marginalisation. This strategy ignores those between the most favoured and least favoured groups. Hence, applying the targeted strategy may cause resentment for the least favoured group and sub-groups. For example, the Competition Act's public interest objective favouring black-owned firms and small businesses can be regarded as a targeted strategy to encourage affirmative action in post-colonial and apartheid South Africa. However, the shortfall of relying on this cut-and-dry targeted strategy is that there is no recognition or focus on the ways that sub-groups within the most favoured group, i.e. black women.

This chapter critically explores the current construction of the Act and whether its goals are consistent with the Act's redistributive justice element, i.e., enhanced ownership trends and an inclusive economy that reflects the country's demographics. This chapter explores whether such redistributive justice can occur without acknowledging the compounded vulnerabilities that a single population group may face, i.e. intersectionality. The focus is limited to the compounded vulnerability due to race and gender. Essentially, the below seeks to determine how we can have a more effective Act to protect and stimulate the growth of small & medium businesses and firms owned & controlled by historically disadvantaged persons.

Inclusion is not enough – previously marginalised persons must be empowered to adopt effective approaches. In Bato Star Fishing v Minister of Environmental Affairs,[184]

[184] *Bato Star Fishing (Pty)Ltd v Minister of Enviromental Affairs and Tourism and others.* 2004. Constitutional Court.

it was held that the Marine Living Resources Act [185] (MLR Act) took a nuanced approach when enforcing the anti-discrimination doctrine encapsulated in the MLR Act. In this case, the MLR Act held that change in ownership is not synonymous with transforming the South African fishing industry. Thus, including previously marginalised licensees is not synonymous with transforming the racially skewed industry. It is essential to take lessons from the case to understand such a concept when we delve into the Competition policy context. Thus, allowing black industrialists to participate in the formal market (inclusion) is not synonymous with effectively deconcentrating and transforming a sector. The next question is what is synonymous with effectively deconcentrated markets.

When transitioning to a democratic State in 1994; a handful of white-owned firms dominated the fishing industry and were a poor representation of the South African demographics. Hence, the objectives and function of the MLR Act, identified in section 2, was to achieve equity by redressing the imbalances of the past and restructuring the fishing industry to one that reflects the South African demographics.[186]

The Competition Act should utilise this approach to realise the same goal of equity and redress. However, continued reliance on the Chicago school will not achieve redistributive justice because non-efficiency-based considerations are often met with hostility by the Chicagoans. This is dealt with in-depth. We must realise that a policy change is not synonymous with transforming or empowering HDI-owned firms. Enacting a policy instrument that seeks to be a custodian of competition and firms' behaviour is not enough to make structural changes that will radically integrate black women's businesses into the formal market. The fact that black industrialists are allowed to own businesses and protected from dominant firms' abuse or anticompetitive conduct doesn't mean that covert conduct by these powerful firms will

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[185] *Marine Living Resources Act,* 1998.

[186] *Bato Star Fishing (Pty)Ltd v Minister of Enviromental Affairs and Tourism and others.* 2004. Constitutional Court.at 58.

not inhibit black businesses from effectively participating in the post-1994 formal market.

By rejecting a nuanced approach to competition policy interpretation, we risk having an ineffective policy that fails to see some blind spots and unrelated pricing concerns. A nuanced approach to competition policy concerns itself with subtle, often overlooked non-pricing concerns or effects that may have material effects despite their subtleness. For example, a nuanced approach to competition in SA considers the subtle but material effect of intersectionality on the effectiveness of the Act's goals.

CHAPTER 4

EXPLORING A NEW CONCEPTUAL FRAMEWORK OR ECONOMIC THEORY

"Whether you can observe a thing or not depends on the theory you use. It is the theory that decides what can be observed." (Albert Einstein, n.d).

4.1 Introduction

Decolonising the competition law policy in the Global South may be integral to its effectiveness. Decolonising may be defined as removing world views or ideologies produced in the global West – copying and pasting. Decolonising the policy means positioning developing nations, alongside the West, as producers of their legislative frameworks, policy alternatives and relevant normative framework theories. For sovereignty, developing nations (much like the West) should have autonomy over the policy alternatives used to interpret their competition laws instead of being subjected to the yoke of Western theories and tools. Perhaps this will help eliminate a myriad of ambiguities caused by ill-fitting alternatives inherited from developed nations. The approach utilised in an antitrust analysis can be attributed to the adopted basic premise. The basic premise of a school of thought may direct the trajectory of what conduct an Act will prohibit or not. Albert Einstein puts it well: "Whether you can observe a thing depends on the theory you use. It is the theory that decides what can be observed."

This chapter evaluates the rationale behind the various schools of thought and competition goals that several jurisdictions must deploy to enforce their substantive laws. This is to understand better the type of school that may coincide with the public interest goals the Competition Act seeks to fulfil. The reader should remember that the review is limited to Harvard, Chicago, Brandeisian and Ordoliberalism schools. The schools are not an exhaustive canvass of the theories that can be adopted during competition enforcement. Due to practical reasons, this thesis is unable to encompass other schools. The schools mentioned below are explored to understand whether the

adopted theories are relevant for an effective competition policy that advances the desires of the post-apartheid government. [187]

It is worth understanding the relevant school(s) of thought that fit the goals the Act's preamble seeks to advance. Alternatively, whether there are certain schools of thought that our specific jurisdiction should abandon or adopt.

It would be helpful to consider and analyse the basic premises that guide the interpretation of substantive laws that will hopefully lead us to the so-called "promised land". That promised land may embody the fruition of equality, diversity, efficiency or equity envisioned by the new government, the liberation movement and its allies. Different basic premises are adopted and serve as guides in antitrust analysis. Before deciding on the kinds of substantive laws that should govern competition laws or what goals to aim for, believe that the adoption and interpretation of fundamental theories articulate the priorities or real objectives of the jurisdiction's competition policy.

The essential features of the various schools of thought will be an appropriate starting point in ensuring whether the enacted laws and policies will yield the desired result. Basic premises stem from various schools/philosophies of thought that lawmakers are often influenced by when enacting and interpreting the competition law.

The enforcement of competition in South Africa applies a measure of affirmative action that is set to offer economic empowerment for the previously disadvantaged black population. [188] The competition policy is used as a means in the fight for economic equality, inclusion and fairness. At the forefront is competition law enforcement that

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[187] Hybrid means that the competition policy is informed by the desire to maximise consumer welfare and efficiency while being inclined to be informed by a broader developmental agenda that seeks to advance socio-economic goals like poverty, unemployment, wealth inequality and equity.

[188] Fox, E.M. 2000. Equality, discrimination, and competition Law: lessons from and for South Africa and Indonesia. *Harvard International Law Journal.* 41:579. At 587("The South African competition law applies a limited measure of affirmative action. The availability of exemption for certain agreements and mergers could imply that South Africans are sometimes willing to pay a supra competitive cartel price for goods and services as a cost of advancing the critical effort to bring more of the historically excluded population into the economic mainstream").

contributes to our developmental agenda of curing inequality, market concentration and redressing the wrongs of the past versus short-term pricing concerns that developed nations choose to focus on through their mainstream antitrust policy unilaterally. [189] Oddly, even with the application of affirmative action measures, market structures seem to reflect the demographics of apartheid South Africa, where black-owned firms that ought to serve as effective competitors are almost non-existent. Global markets are still highly concentrated, with high consumer prices, poor consumer choice, producers being price makers, and consumers being price takers.

Highlighting the importance of settling on the goals to guide substantive laws before framing effective and coherent rules, Justice CONSUMER famously said as follows:

> Policy cannot be made rational until we are able to give a firm answer to one question: What is the goal of the law – everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in values arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules? [190]

Fox argues that South Africa should use its competitive advantage in designing (and re-designing) a suitable regime as a young and developing nation. OBJ We ought to design a regime that considers our most critical social goals like poverty alleviation, market inequality, social justice, redress and eliminating the market power that is in the hands of few participants, stripping away consumer choice. We should utilise that advantage to design and innovate our competition laws to fit our needs instead of being suffocated by regressive century-old laws of the Western world like the US,

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[189] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62. At 949 ("Dveloping countries should enforce their antitrust laws with the realization of long-term growth and overall productivity in mind. This should also be coupled with redistribution to assure that their often-impoverished consumers are not paying the costly price of allowing firms and industries to grow. These intertwined objectives shall assure that developing countries' antitrust policies are used as part of a development plan with more to achieve than is possible with simple static goals.")

[190] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. At 50. Ibid.at 50.

which had more of a ‘trust’ issue, creating monopolies in most industries as they transitioned towards the industrial revolution.

This does not negate the importance of studying the West’s jurisprudence and legacy to understand what policy alternatives or normative frameworks we ought to adopt. If any, at all. The point of departure, as Bork articulates, would be to study the normative frameworks and goals that have shaped the substantive rules of the West. That is what this thesis attempts to do.

If the conclusion is that the 1998 Act did not meet its intended objective, nor did it assist in the problem of bottleneck distortions that result from high market barriers. How can we ensure more vigorous enforcement of competition regime that may remedy such a problem? What we may need for an effective competition regime is to change the ‘rules of the game’. Changing the game's rules means that a change in the evaluation standard determines what conduct is anticompetitive or overlooked as unharmful when courts interpret conduct or merger analysis. The election of the school of thought will determine the goals and interpretation attached to provisions. The below will provide full explanations of the schools that provide direction of interpretation thereof.

In response to Bork’s question of what the goal of the law is? We must assess our needs and design substantive laws with the ‘goals’ in mind. After that, we review whether there is a gap between the intended goals (based on our needs) and the substantive laws promulgated. This exercise will ensure that our competition laws coincide with our needs and will be effectively enforced. Otherwise, we run the risk of having ineffective competition laws.

The competition goals may be grouped into efficiency-based and non-efficiency-based goals. Section 2 of the Competition Act highlights a few goals (the purpose of the Act) that guide the Act's enforcement.[191]

In 2007, the International Competition Network (ICN) published a report where thirty-three agencies responded to the objectives of unilateral conduct laws. [192] The report held that South Africa seems to regard enhancing an effective competitive process as both a goal and a vehicle to achieve other socio-economic goals that will help the nation's broader developmental agenda. The broader developmental agenda includes poverty alleviation, employment, equality, etc. [193] While other jurisdictions like Australia, Jamaica, the United Kingdom, Singapore, etc., seem to regard the exclusive purpose of competition law to enhance the competitive process. [194]This is a step in the right direction for South Africa's competitive advantage to build an effective competition law and policy.

Developing countries, like South Africa, must ensure that the laws do not pose a gap between the actual and desired outcomes. [195] This is to avoid the risk of ineffective substantive rules to have proper normative baselines that facilitate effective competition enforcement and policy in the Global South. We under-appreciate the importance of putting the appropriate thought into designing an appropriate normative framework and goals. Paradoxically, we are quick to focus on the kinds of laws we ought to include in our Acts.

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[191] The goals are considered as an end result itself. See Stucke, M. 2012. Reconsidering antitrust's goals. *Boston College Law Review.* 53. At 596.

[192] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62. At 1005.

[193] Other countries that have the same perspective are Canada, European Union, Hungary, Ireland, Italy, Jersey, Korea, Latvia, Netherlands, New Zealand, Romania, Slovak Republic, South Africa, Sweden and the United States.

[194] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62. At 1005.

[195] Ibid. at 946 (Their objectives can shape enforcement policy and priorities and alert policymakers to gaps between actual and desired outcomes in current enforcement.)

Developing countries do not have the privilege of using competition laws to encourage or preserve static efficiency goals but must hone regimes that focus on non-efficiency goals. [196] We cannot ignore the need to use competition laws as a tool to maintain a broader developmental objective. A developmental objective seeks to achieve dynamic efficiency and non-efficiency goals like eradicating poverty barriers to entry, promoting equality, encouraging redistribution, and facilitating small businesses' growth. Hence, the objectives should support developmental objectives and socio-economic priorities.

Once the correct schools/philosophies guide our policy, the competition laws may be effective enough to achieve the broader development agenda. However, reliance on ill-fitting schools/philosophies may block the realisation of intended goals because the adopted philosophies cannot achieve the Act's goal(s).

The objective of the post-apartheid draft competition legislation encapsulated the intention to promote broad developmental goals. The explanatory memorandum of the Competition Act 89 of 1998 reflected such intention. [197] Hence, the explanatory memorandum held that the Act, amongst others, promotes efficiency, market access for small businesses, and diversification of ownership to the favour of black South Africans.[198] Decades later, the intended limited measure of affirmative action and redress seems to have not been fruitful. Perhaps we need to reflect on the Philosophies/schools to discern whether the elected philosophies represent the Purpose of the Act.

In the West, the argument of the US Congress's true intention when passing the 1890 Sherman Act has been a point of contention for many years. The question is what competition goals would result in ineffective enforcement of the US antitrust laws. The objectives of antitrust laws may be articulated in two opposing theories – the Chicago

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[196] The term "non-efficiency goals" in this context refers to those goals that fall outside the ambit of productive, dynamic and allocative efficiency.

[197] *Explanatory memorandum of the competition bill.* 1998.

[198] Ibid.

and Harvard schools. University of Chicago scholars developed what is known as the Chicago theory. The Chicago theory believes the goal is to protect consumer welfare. Simultaneously, Harvard argues that the laws are intended to protect the consumer and a myriad of other goals like competitors, labour force, other entrepreneurs, environment, affirmative action, etc. The Chicagoans argued that government interference was unnecessary because markets were self-sufficient.[199] The legitimate goal of antitrust law is maximising consumers' welfare, evidenced by low consumer prices. The US normative framework is usually the blueprint of most laws and policy outcomes of competition considerations. Perhaps conducting a thought analysis: What would result from using the Chicago, Harvard or Brandeisian approach in competition analysis? Which approach, when used, will solve more problems than it creates? One might be tempted to utilise that approach or theory.

Before the Sherman Act's[200] passing and replacement of the agricultural economy, the US macroeconomic conditions were dire. [201] The conditions presented a gap in income inequality and the gradual concentration of markets. Firms that were competitors entered into combinations of agreements that affected market concentration, increasing consumer price and product output. Low entry barriers could not mitigate

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[199] There are authors who feel that it is no longer worth talking about or contrasting these different schools when analysing antitrust policies. I disagree because I think that these schools offer foundational views that we need to consult when we attempt to deviate from mainstream competition policy that is inclined to adopt the Chicago school. We need to understand the origins of the antitrust legislation. For an in depth-description of the Chicago school See Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127. The author believes that distinctions between the Chicago and Harvard schools have diminished. Also see Hovenkamp, H. & Morton, F.S. 2020. Framing the chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 168(7). For a brief summary of the Chicago school See Hovenkamp, H. 1995. Law and economics in the United States: a brief historical survey. *Cambridge Journal of Economics.* 95(19), Hovenkamp, H. 2008. The design of antitrust rules. In *The Antitrust Enterprise*, Kitch, E. 1983. The fire of truth: a remembrance of law and economics at Chicago. *The Journal of Law & Economics.* 26(1), ibid., Kitch, E.W. Ibid.The Fire of Truth: A Remembrance of Law and Economics at Chicago.

[200] *The Sherman Antitrust Act,* 1890.

[201] *See Collins, W. 2013. Trusts and the origins of antitrust legislation. Fordham Law Review. 81(5).*who offers a note on the origins of the antitrust legislations which was set to criminalize concerted practices that sought to control prices in the US market. He shows transition from a not-so-aggressive early enforcement of antitrust legislation to the current aggressive nature enforcement by extending its mandate beyond concerns of horizontal combinations set to control production and halt lower prices for consumers (also called price-fixing cartels).

such conduct because these combinations seem to have intended consumers to be at their mercy as price takers versus price makers.

The antitrust policy and Sherman Act were introduced in response to forming Trusts. Trusts were enveloped in various integral industries like railways, oil, telecommunications, etc. This led to dire conditions, while the few Trust members owned super-profitable oligopolies and displaced the smaller competitors, thereby decreasing competition, increasing market concentration and heightening the risk of reduced product innovation and quality. In the 1890 congressional sitting, Senator Sherman argued for the passing of the (then) antitrust Bill. Before Congress, he argued that the Bill's object was to dismantle trusts and conduct that sought to perpetuate the "restraint of trade and production" because such behaviour was "against public policy, null and void". [202] Sherman held that the first section of the proposed Bill declared that all unlawful agreements/trusts made to prevent free competition and increase consumer prices were against public policy. [203]

Determining which philosophical influence will guide competition policy is crucial: Will it be guided by the narrow Chicago school or the broad Harvard school? Alternatively, a hybrid framework is better suited for developing economies with colonial pasts. Developing countries have different needs than developed economies, where the two schools of thought were developed. Below is an exploration of both schools that guide competition. As such, the exploration includes the advantages and disadvantages of both these schools – in the context of developing nations like South Africa.

It is imperative to accept that depending on the public policy promised by various administrations, these goals will reflect the administration in office and the economic realities of that era. [204]The process of picking from a wide array of goals to guide the

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[202] Sherman, J. 1890. *Congressional record.* At 2456

[203] Ibid.

[204] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62. At 948.

competition process is political economy theorising. Waked in *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* notes that selecting goals to guide competition policies is a political choice in various jurisdictions' histories. In the US, the direction of antitrust changes depending on the running administration. Same as in South Africa, there was a shift in competition enforcement in the Zuma administration versus the Mbeki administrations.

4.2 Chicago school of thought

The Chicago school gained influence around the 1970s in the US. This school of thought supports the idea that markets are self-regulatory and government intervention should be minimal.

The Chicago school authors are more sceptical of relying on antitrust or competition law as a regulatory mechanism to alter or modify robust markets. [205] Instead, they advocate for a non-interventionist approach which opposes government interference.[206] The former US Supreme Court Justice Robert Bork was one of the prominent advocates of the Chicago school. In his highly successful book, *The Antitrust Paradox* [207] , Justice Bork held that the legitimate goal to guide antitrust laws is maximising 'consumer and producer welfare'. This doctrine shaped antitrust precedence in the US.[208] Justice Bork believed that Congress intended to draft the antitrust legislation to protect consumers from the high prices inherited from the harm of the 'trust movement' that encapsulated in the US Gilead years. [209] In terms of

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[205] Areeda, P. & Hovenkamp, H. 2020. *Antitrust law: an analysis of antitrust principles and their application.* 5th. Wolters Kluwer Legal & Regulatory U.S. At 152.

[206] Hovenkamp, H. & Morton, F.S. 2020. Framing the chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 168(7).At 1843.

[207] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster.At 7.

[208] *Brown Shoe Co Inc. v United States.* 1962. United States Supreme Court. At 320 ("Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.").

[209] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. At 7.

Justice Bork's sentiment, for conduct or an agreement to meet the requirements of being anti-competitive, firstly, such behaviour would have to be evidenced by high consumer prices. Secondly, the pro-competitive gain from a conduct or agreement must outweigh the anti-competitive effect.

4.2.1 A non-interventionist philosophy

As mentioned, the Chicago school may be described as deeply distrusting government regulatory interference, such as antitrust enforcement, because such interference is considered unnecessary for achieving competitive markets.[210] The Chicagoans held that government intervention should be sparingly done as this would render inefficient businesses dominant, harming the consumer welfare objective. The stance of the Chicago school is that market intervention is unnecessary because the market forces will naturally erode market power, resulting in various restrictive practices.[211]The Chicagoans believe that legitimate government intervention occurs when market participants enter into cartels which harm consumer welfare. [212]

According to the school, markets are self-correcting, and this *laissez-faire* theory associated with the school argues that a market has the natural ability to rectify 'episodic' market power. Consequently, through antitrust laws, government intervention was considered unnecessary and did more harm than good. [OBJ] Somewhat of a strong proponent of the non-interventionist philosophy is Professor Waelbroek, where proponents of the school lament the distrust of government intervention outside of cartels that harm consumer welfare. Waelbroek argues that 'price discrimination' is an illogical rule that interferes with the market. [OBJ] Furthermore, Waelbrook notes that

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[210] Hovenkamp, H. & Morton, F.S. 2020. Framing the chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 168(7), ibid.At 1848.

[211] vanderVijver, T. 2019. Law & ordo: exploring what lessons ordoliberalism holds for african competition Law regimes. *World Competition Law and Economics Review.* 42(3).At 1.

[212] Stucke, M. & Steinbaum, M. 2019. The effective competition standard: a new standard of antitrust. *University of Chicago Law Review.* (367). At 8. ("Under Robert Bork's consumer welfare standard, antitrust enforcement, outside of cartel prosecutions, declined during the fourth cycle in the late 1970s–mid-2010s")

differential prices to various customers is a business practice that should be allowed to help the market, not hurt. [213] argues that because market power is so prevalent in African countries, markets cannot be left to their own devices to erode market power and address the resulting competition issues automatically. [214]

4.2.2 The narrow focus on price effects

The early US antitrust legislation followed an extremely narrow lens that antitrust statutes were adopted to prohibit horizontal combinations in restraint of trade, i.e., price fixing cartels.[215] Rather than prohibiting price-fixing cartels, the 1800s statutes did not have an expanded substantive prohibition where restraint of trade included public interest objectives. Notably, statutes bothered themselves with those horizontal combinations with the intention or power to control market prices. Over the years, as nations fully transitioned from Gregorian to an industrial economy, the extent of prohibited conduct was broadened.

The Chicago school's view is that the proper lens for viewing antitrust problems is through price theory. [216] Hence, when measuring the legality of conduct or Agreement, the focus is on consumer price effects as to whether such conduct has the effect of

[214] Ibid. At 1. See also on the reflection of how supporters of laissez-fair system is unsustainable because government intervention cannot be avoided when dealing with issues of economic interests that affect people. The paper mentions how the government is mandated to intervene by means of imposing taxes to, for example, fund education. Essentially, this paper, argues that it is impossible to not have an intervening government as the laissez-fair system argues for. Hale, R. 1923. Coercion and distribution in a supposedly non-Coercive state. *Political Science Quarterly.* 38(3):470-494. Available: http://www.jstor.org/stable/2142367 [2023/02/24/].

[215] Collins, W. 2013. Trusts and the origins of antitrust legislation. *Fordham Law Review.* 81(5).t 2342.

[216] Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127.at 932 ("The Chicago school has largely prevailed with respect to its basic point: that the proper lens for viewing antitrust problems is price theory.")

raising the price to the detriment of the consumer's welfare.[217] A testament to the focus on price effects, which resulted in rising consumer prices and reduced output, was often held to be void. However, competition authorities affirmed or approved conduct that did not pose a risk to prices, barriers to entry and output.[218] If a plaintiff could not prove that the conduct limited output in the market or the defendant held they had a good business reason, such as choosing to deal with whom he likes – authorities regarded the conduct as lawful.

In the article *Trusts and the Origins of Antitrust Legislation,* Collins contends that in years following the Sherman Act's passage, there was "not a single identifiable case…that challenged…a firm because it was Big". [219] Irrespective of whether the big firm threatened or displaced its smaller competitors. If a firm did not increase consumer price, any other harm like predatory pricing was under-appreciated – thus fostering unwarranted market power. An example is tech social media platform and messenger *Meta*'s acquisitions of both Instagram and WhatsApp social media platforms and messengers. [220] Online platforms like Meta do not overtly charge their online consumers a monetary price because these platforms are usually purchased 'for free' on the respective operating system's Application Store (App Store). Simultaneously, the online platforms are "monetised through people's attention or with their data". [221]Thus, per the Chicago school, one would depend on higher pricing as evidence to prove potential anticipative abuse of market power.

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[217] Wu, T. 2018. *The curse of bigness : antitrust in the new gilded age.* New York: Columbia Global Reports.at 131

[218] Collins, W. 2013. Trusts and the origins of antitrust legislation. *Fordham Law Review.* 81(5).*supra* at 2303.

[219] Collins, W.D. Ibid.Trusts and the Origins of Antitrust Legislation.at 2280.

[220] Sundaram, V. 2021. Can Biden really crack down on tech monopolies? Available: https://techcrunch.com/2021/12/19/can-biden-really-crack-down-on-tech-monopolies/. Available: https://techcrunch.com/2021/12/19/can-biden-really-crack-down-on-tech-monopolies/.

[221] *Investigation of competition in digital markets*. 2020. United States. Available: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf. At 51.

4.2.3 A dominant firm is an efficient firm

The Chicago school-influenced enforcers believed that antitrust enforcement should promote its true purpose of 'economic efficiency' for 'consumer welfare' to be maximised. According to Chicagoan scholars, markets are immune to interference and do not need surveillance –thus, pursuing non-efficiency-based objectives like fairness, equality or poverty alleviation would undermine this efficiency. [222]

4.2.4 Consumer (and Total)welfare maximisation

As mentioned above, the Chicago school viewed antitrust enforcement's true purpose as promoting economic efficiency, which Stucke held was conflated with consumer welfare.[223] The meaning of 'consumer welfare' has long been a point of contention. The consumer welfare standard may be described as a technical metric most jurisdictions use to overturn – with the US at the forefront of utilising it. The Chicago school is a proponent of the consumer welfare standard being the matrix used to analyse conduct or agreements in antitrust. In Reazin v Blue Shield of Kansas [224] , the court held that it analyses whether, from a consumer's perspective, such conduct causes consumer injury – and such analysis shall *not* go beyond the scope of the consumer perspective. Because of the court's judgement in Reazin, the narrow scope that competition should unilaterally maximise consumer welfare is, at face value, in contrast with the preamble of the Competition Act. [225] The Act, rightly so, directs there to the balancing exercise of ensuring the welfare of several stakeholders whether the Act has effectively exercised the balancing act that it claims is one of the issues to be explored by this thesis.

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[222]Fox, E. 2018. Competition policy at the intersection of equity and efficiency. *The Antitrust Bulletin.* 63(1):3-6. DOI:10.1177/0003603x18756130. At 1.

[223] Stucke, M. & Steinbaum, M. 2019. The effective competition standard: a new standard of antitrust. *University of Chicago Law Review.* (367). At 7.

[224] Reazin v Blue Cross Blue Shield of Kansas. 1990. United States Court of Appeal.

[225] *Competition Act,* 1998.

Justice Robert Bork, in his highly successful book, *The Antitrust Paradox,* [226] argues that the antitrust laws legitimate guiding principle is total welfare. Total welfare is often described as a value that laser focuses on the (short-term) effects of price and output. [227]

4.2.5 Increased and unwarranted burden to plaintiffs

Hovenkamp [228] claims that the Chicago school tools offered an extremely stringent burden of proof on the plaintiff. However, when the defendants were expected to prove efficiency gains, the tools of the Chicago school accepted the efficiency claim without serious examination as the burden of proof. [229] Furthermore, according to Hovenkamp, the beneficiaries of such Chicago schools are the defendant firms with market power at the expense of consumers and the labour market. One would assume that such an additional burden for the plaintiff makes it difficult for consumers and plaintiffs to rely on antitrust laws to protect the competitive aspect of the market. Furthermore, it is argued that the courts have elevated the burden of proof on the government and other antitrust plaintiffs to such an extent that the Sherman[230] and Clayton Antitrust Acts have become unenforceable for many anti-competitive practices.[231]

4.2.6 Remarks on the Chicago school

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[226] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster.at 7. Ibid.at 7.

[227] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.supra note 1 at 716.

[228] Hovenkamp, H. & Morton, F.S. 2020. Framing the chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 168(7).At 1878 (" In the face of contrary evidence, the Chicago school provided a set of tools that required stringent proof burdens if only to prove the obvious, while accepting efficiency claims without serious examination. Those who stood to gain from this were firms with market power, at the expense of consumers and labor.")

[229] Ibid.

[230] Sherman, J. 1890. *Congressional record.*

[231] Stucke, M. & Steinbaum, M. 2019. The effective competition standard: a new standard of antitrust. *University of Chicago Law Review.* (367).at 1

As mentioned above, Former US Supreme Court Justice Bork believed in the Chicagoan foundational value that the legitimate goal of antitrust laws is maximising 'total welfare'. The Chicago school proposes that welfare maximisation be the exclusive goal or guiding principle. [232]

Recently, there seem to be increased arguments against the effectiveness of the consumer welfare standard – even for developed nations like the US. It is argued that competition is diminishing, harming consumers, workers, and innovation – a far cry from what the standard claims to protect. Maurice and Marshall claim that US antitrust law is distorted beyond recognition by the legal standard of consumer welfare, illustrated in recent Supreme Court decisions.[233] To tackle the lack of effectiveness of the current consumer welfare standard, they propose a new measure that will restore the primary aim of antitrust law, namely, the deconcentrating of significant power.

Some argue that the narrow focus on price effects has led to under-appreciating specific business models that harm consumers, such as data harvesting for selling to third parties.[234] Demonstrating harm solely attributable to a breach of consumer privacy becomes challenging when the primary measurement is a low consumer price. The result is highly concentrated markets are shielded by not engaging in increased product prices. Currently, e-commerce/platforms use data harvesting as a means to an end (to attain market power). This is evident within the big data realm, i.e., GAFA (Google, Amazon, Facebook, Apple). Hence, antitrust academics and lawyers support the regime's reform in response to the 21st-century industries and market structures that do not use pricing methods to gain market power. The data harvested is used to

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[232] The Chicago school narrowed its focus to an economic focus and away from what Stiglitz referrers to "broader societal consequences of concentrations of power" See Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute.At 4.

[233] Stucke, M. 2012. Reconsidering antitrust's goals. *Boston College Law Review.* 53.

[234] *See Investigation of competition in digital markets. 2020. United States. Available: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.*

diversify interest and control various markets outside platforms like advertising to third parties.

One purpose of our Competition Act is the dedication to economic transformation through affirmative action for previously marginalised black industrialists. A laissez-faire Chicago school theory may stifle such objectives. The exceptional case of South Africa concerning the norm should not be ignored. The colonial past and perpetual poverty that is a burden to the previously marginalised population presents an exceptional case that ought to justify the deviation from the norm of being guided exclusively by consumer welfare maximisation. The norm of strict reliance on economic evidence in the assessments of competition matters would do more harm than good.

In the formulation process of a competition regime, the objectives of the Act should merge with the evaluation standard. If the objectives of the Act follow a broad nature encompassing non-economic goals, the evaluation standard should reflect that. The US has long followed a narrow view [235]designed in such a way that the objective of the Sherman Act was concerned with economic goals. This efficiency-based objective can only be helpful because consumer welfare will be the appropriate standard to measure whether or not the financial objective is met. An ill-fitting system may have various effects (material effects or not). However, I tentatively believe that in such a case, the effects would be material for South African consumers and those previously marginalised who deserve redistributive justice in the form of radical economic transformation. In making this point, I hypothesise whether the Chicagoan school and its consumer welfare standard is the appropriate standard/metric for evaluating compliance and metrics that would serve both South African efficiency-based and non-efficiency-based goals. Unfortunately, even developed countries replicate this

[235] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. ibid.(Judge Bork's 1978 book held the argument that competition ought to be concerned with consumer welfare, as markets are self-correcting. The most efficient firms would be successful. The objective of the Act should be the economic goals. Therefore, their enforcers need not be concerned with social or political objectives.)

standard as the fundamental goal of competition law. Despite that, it might conflict with other non-efficiency-based goals that are often part of the multiple goals.

The reason SA competition authorities should rely cautiously (if at all) on Justice Bork's outdated and ill-fitting opinion is based on the total welfare standard's narrow reliance on price and choice as an indicator of whether consumer and producer welfare has been maximised. The strict guidance of total welfare has resulted in extremely concentrated industries where the dominant firms collude, price fix, and merge to increase their power further. Unfortunately, merger reviews are approved despite the 'red flags related to increased market power/monopoly, which are adverse to other equally important public interest goals. No interventionalist approach is favoured because 'the market does not need it to perform well. However, the impact of competition enforcement in South Africa includes affirmative action, which relies on intentional government intervention. The regulatory interference in the form of competition enforcement in post-apartheid South Africa also advances public interest objectives like ensuring black economic empowerment.

The Chicago school's view is that when competition law seeks to pursue other non-efficiency-based goals, that undermines efficiency. [236] Remember that post-colonial and apartheid South Africa hindered firms owned by HDIs from participating in the national marketplace. These market barriers result in higher prices for the consumer and end up stifling technological innovation and dynamic efficiency in general.[237] Evidence shows that the barriers are still incredibly high. [238] A firm with dominance or market power is not synonymous with an efficient firm. Nor does it mean market power and dominance were gained organically and warranted – the apartheid and discriminatory colonial laws directed at black industrialists have, to an extent, cultivated in gaining market power. Therefore, pursuing other goals for public interest

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[236] Fox, E. 2018. Competition policy at the intersection of equity and efficiency. *The Antitrust Bulletin.* 63(1):3-6. DOI:10.1177/0003603x18756130.at 1.

[237] Ibid at 2- 4.

[238] Ibid.

may not diminish competition. The affirmative action of ensuring the effective participation of these incumbents is in line with our constitutional values. In making this point, I challenge the belief that non-economic goals like fairness/equity should be excluded from competition consideration in post-apartheid and colonial South Africa.

Professor Waelbroek argues that price discrimination is an illogical rule interfering with the market. [239] Furthermore, Waelbroek notes that differential prices to various customers are a business practice that should be allowed to help the market, not hurt. [240] The rule of reason introduced by the then Chief Justice in the Standard Oil case would be utilised to determine the reliance on the rule of reason as a criterion to guide whether price discrimination is anti-competitive or not would be adequate to mitigate any pro-competitive effect of the differential pricing. [241] Further, in response, one would suggest that the explicit legal rules of the apartheid order, which banned black South African industrialists from free trade, were grave regulatory market interference by the government. Thus, to cure that market interference or engineering, the banning of such behaviour – more especially towards the historically disadvantaged as a means to rectify the illogical colonial and apartheid rules.

Tjarda [242] argues that because market power is so prevalent in African countries, markets cannot be left to their own devices to erode market power and address the resulting competition issues automatically.[243] I agree that we ought to strike a balance

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[239] *See* Waelbroeck, M. 1995. Price discrimination and rebate policies under EU competition law. *Fordham Corporate Law Institute.* 147. At 148.

[240] Fox, E.M. 2000. Equality, discrimination, and competition Law: lessons from and for South Africa and Indonesia. *Harvard International Law Journal.* 41:579.at 588.

[241] *The Standard Oil Company of New Jersey et al v The United States.* 1911. Supreme Court of the United States.at 66 ("If the criterion by which it is to be determined in all cases whether every contract, combination, etc., is a restraint of trade within the intendment of the law, is the direct or indirect effect of the acts involved, then of course the rule of reason becomes the guide, and the construction which we have given the statute, instead of being refuted by the cases relied upon, is by those cases demonstrated to be correct.")

[242] vanderVijver, T. 2019. Law & ordo: exploring what lessons ordoliberalism holds for african competition Law regimes. *World Competition Law and Economics Review.* 42(3).

[243] Ibid at 1

when the government interferes in the market to protect the integrity/ or efficiency of the market and not handicap those efficient firms. The concern would be not to abandon those HDIs in our embrace of integrity and efficiency. An important question, which is the rationale of this exploration, is how we balance promoting economic reform for HDIs and upholding efficiency for our consumers.

4.2.7 The application of the Chicago school in South Africa

Market ideologies have had a significant influence over competition policy, an influence that persists to this day. While the influence of the Chicago school may not be as direct in South Africa, its principles have nonetheless influenced competition law cases, albeit in a less pronounced manner compared to the United States. Crucially, both the consumer and total welfare overlook distributional consequences, which is essential to my thesis advocating for an intersectional approach. This approach emphasises the broader consequences of concentration of power, a facet ignored by consumer or total welfare.

The Chicago School seems to overlook that higher profits may arise from a better way of exploiting consumers, better ways of exerting price discrimination or taking part in more nuanced ways of increasing market power.[244] The policies of colonial and apartheid order excluded black industrialists, which allowed white-owned firms to thrive. In post-colonial and apartheid South Africa, it is difficult to agree with the hypothesis that dominance is always the fruit of an efficient firm. This hypothesis ignores the black industrialists' strife from decades of exclusion from the formal market and the privilege that the past discriminatory laws afforded white industrialists. In making this point, this Thesis is challenging the belief that all dominant firms are

[244] Stiglitz, J. 2018. America has a market power problem. *Competition and Consumer Protection in the 21st Century*. Columbia University, 2018.

efficient firms. Therefore, there is no need for government intervention in the form of competition law enforcement.

We have seen how the unjust laws of the past had restricted the full and free participation of black industrialists, resulting in the concentration of current markets in a racially skewed way. That said, the Purpose of the 1998 Competition Act recognised the importance of efficient market participants.[245]Therefore, this is not to say that we ought to undermine the importance of ensuring efficient market participants because the Act has multiple goals. Firms have been known to exert better price discrimination or participate in more nuanced ways to increase market power.

As mentioned above, the Chicago school's primary focus is price effects. If the conduct does not increase consumer prices, then such behaviour is not considered anticompetitive. In South Africa, such an embrace of a narrow focus on price effects is depicted in the MIHE/Takealot merger consideration. [246] In this merger consideration, the Tribunal overlooked the long-term harm that the approval of such a merger may cause. The Tribunal agreed and found plausible the rationale that post-merger MIHE will help Takealot improve its business. Nowhere in the 'reasons for decision' document does MIHE show that the pre-merger target firm was struggling and sought to use the acquiring firm's funds to resuscitate the target firm. It is well-known that Big Tech has monopolised the industry by acquiring and merging firms to increase and retain their power.

I argue that the approval of the MIH/Takealot[247] reflects the influence of the Chicago School. Despite my contention in this thesis that overlooking broader societal issues like distribution may lead to such approvals, as seen in MIH/Takealot case, it is worth

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[245] *Competition Act,* 1998. At s 2 (a) ("The purpose of *this Act* is to promote and maintain competition in the Republic in order –

(a) to promote the efficiency, adaptability and development of the economy")

[246] *MIH Ecommerce Pty Ltd and Takealot (RF) Pty Ltd.* 2017. Competition Tribunal.

[247] Ibid.

noting that the key factors in this case that turned the tide were market definition and foreclosure issues. The failure of authorities to consider the distributional impact in this ruiling highlights my argument that the principles of the Chicago School persist as an ongoing concern in our competition law jurisprudence. In essence, revaluating competition policy, particularly in the South African context, requires moving beyond the confines of the Chicago School assumptions and consideration of broader societal impacts while acknowledging the complexities of market dynamics.

Without conditions, the Competition Tribunal's approval of the merger between Shell SA and Tepco[248] indicates the reliance on the non-interventionalist Chicago school. When evaluating the merger, the Tribunal held that the exit of Tepco seems to be non-significant because Tepco is a small and failing player. The exit of a black-owned firm in the petroleum industry does not seem to hold weight because it is failing and small as if the Act's preamble does not seek to protect small business and firms owned by HDIs participate in the market. What is most surprising is that the Tribunal held that "the role played by the competition authorities in defending those aspects of public interest listed in the Act, at most, secondary to other statutory and regulatory instruments". [249] Additionally, it held that the competition authorities, however well-intentioned, are well-advised not to pursue their public interest mandate in an overzealous manner less they damage precisely those interests that they ostensibly seek to protect. [250]

An increased and unwarranted burden to plaintiffs is how leading antitrust scholars have described the Chicago school philosophy. It is integral for the South African courts and other stakeholders to balance the burden that the plaintiff may face. We should adopt, per se, alleged conduct instead of 'rule of reason' when needed. The reason is that we do not want to subject ourselves to a chilling effect when it comes to

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[248] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd.* 2002. Competition Tribunal.

[249] Ibid. at 14

[250] Ibid.

enforcement of the Act. Much more is at stake in realising the non-efficiency-based goals integral to the South African competition law and policy.

If we (South African competition regime) exclusively rely on consumer welfare standards, we constrain our goals to economic efficiency-based or almost-efficiency-based goals. The consumer welfare standard is a guiding principle focusing on price and output's short-term effects. When the effects of price and output guide us, we may overlook the public interest objectives that should be aggressively prioritised per the Act's Preamble. If we rely on Bork's sentiments above, that would (and has) cripple the goals of reducing market concentration, transforming our industries and providing market access for HDIs.

The standard way of thinking about the consumer welfare standard is to focus on the short-term effects on price and output in a specific market.[251] In terms of the consumer welfare standard, welfare will be minimised when there is an increased price or decrease in output. Anything in between that will be irrelevance and overlooked by policymakers.

A reform from obsessing about price may help deconcentrate essential industries like the South African platform market, which belongs to South Africa's largest e-commerce retailer, Takealot Group. Its majority ownership is by Naspers (which has diversified its business structure from eCommerce to news outlet supply through magazines and newspapers). [252]The upcoming chapters will provide an in-depth review of Nasper's monopolisation of access to information (using Media 24).

Considering the historical context articulated above and the public policy goals in the Act, the relevance of CWS may be ineffective. Perhaps developing a theory or

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[251] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.at 716.

[252] *See* Tarrant, H. 2018. Naspers bags all of Takealot. Available: https://techcentral.co.za/naspers bags-all-of-takealot/200299/#:~:text=Naspers%20has%20acquired%20Tiger%20Global,financial%20year%2C%20published%20on%20Friday. Available: https://techcentral.co.za/naspers bags-all-of-takealot/200299/#:~:text=Naspers%20has%20acquired%20Tiger%20Global,financial%20year%2C%20published%20on%20Friday.

standard of evaluation that is fit for the South African context will be useful and benefit priority incumbents. A guiding standard that meets the objectives of ensuring the effective participation for firms owned by HDIs and SMEs.

The Chicago school claims that competition law aims to protect competition and *not* competitors. [253] As a developing nation, we have different problems than the West, and indeed, it makes sense that our regimes are less narrow-focused. Our competition laws and philosophical influences incorrectly mirror Western antitrust laws. [254] In this context, a narrow focus means being purely influenced by the non-interventionist philosophies that regard consumer welfare as the legitimate goal of antitrust laws.

It is a common cause that other countries, including South Africa, have replicated the US competition regime's goal of maximising competition. Western competition regimes have been the blueprint of our framework and philosophy. However, a developing economy with a historical context like South Africa may render some philosophies that influence the West's antitrust laws to contradict our constitutional values and sustainable goals.

The proponents of the Chicago School maintain that markets are naturally competitive, often disregard the broader reach of market power, which typically arises due to limited or absent intervention. Stiglitz in 'Towards a Broader View of Competition Policy' goes as far as saying that the adoption of the Chicago School has led to limited scope and

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[253] *Brown Shoe Co Inc. v United States.* 1962. United States Supreme Court. at 320 ("legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."). See Reazin v Blue Cross Blue Shield of Kansas. 1990. United States Court of Appeal. At 8. ("Additionally, we must bear in mind that the purpose of the antitrust laws is the promotion of consumer welfare. We consider (the defendant's) refusal to deal in light of its effect on consumers, not on competitors".)

[254] See vanderVijver, T. 2019. Law & ordo: exploring what lessons ordoliberalism holds for african competition Law regimes. *World Competition Law and Economics Review.* 42(3).(in this article, Tjarda argues that most African countries' competition regimes are influenced by the West. I agree because the South African regime's approach has many similarities and since it is not uncommon to have our legislation one that is a Western export. However ,Professor Fox also argues that developing countries (much like south Africa) ought to not rely on the Western export but use the comparative advantage that they have in carving their own road).see Fox, E. 2018. Competition policy at the intersection of equity and efficiency. *The Antitrust Bulletin.* 63(1):3-6. DOI:10.1177/0003603x18756130.3-6

effectiveness of competition policy since the school believes that non-intervention is how a market ought to function.[255] The Chicago school holds a sceptical view of government intervention in markets as it advocates for minimal regulation, favouring interventions that do not excessively restrict market participants. These perspectives align with the total welfare standard, another tenant of to the (post) Chicago school, which advocates for minimal intervention. This necessitates this thesis argument which considers that overlooking intersectionality may serve as barrier to towards competitiveness in post-colonial and apartheid South Africa.

The concentration of economic power is closely linked with political power. In Stiglitz words " An agglomeration of economic power results in an agglomeration of political power which is said to reinforce the agglomeration of economic power".[256] Under the Chicago School, competition policy shifts away from considering broader societal consequences. Instead, competition policy is primarily concerned with whether market power exists and existence of the potential efficiency gains from anticompetitive conduct. This is due to the clear question that judiciary is given to examine i.e whether there was evidence in a particular market , of market power? Was there evidence that firms were acting in an anticompetitive way, unfairly using their market power? And if there was offsetting efficiency enhancing benefits from the anticompetitive conduct

Furthermore, the Chicago School introduced presumptions that hinder the consideration of predatory practices. Under the Chicago School there is an assumption that because firms are efficiency-enhancing and that there is no rational firm that would sell below cost in order to drive out the other; and even if a firm adopts predatory strategies like below cost pricing, that conduct is more efficient than

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[255] Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute."Earlier sections of this paper have emphasized the importance of broadening the scope of competition policy from the narrow remit to which the Chicago school attempted to condemn it." At 15.

[256] Ibid.

anticompetitive.[257]This perspective also neglects the reality that competition does not naturally emerge in the absence of cartels.[258]

Additionally, the Chicago school disregards concerns about distribution, as it prioritises total welfare instead. However, inequality and distribution are crucial considerations, especially for developing countries with a colonial history like South Africa.

The significance of distribution cannot be overstated, especially because there is increasing evidence that significant portions of inequality stem from market power. While open competitive markets offer opportunities, the mainstream consumer welfare standard overlooks the value of freedom to participate in markets and disregards the broader societal costs of market power. Anticompetitive practices, which may purport to be efficiency enhancing, can inadvertently restrict distribution channels and access to markets.

It is imperative that competition authorities broaden their focus beyond merly scrutinizing mergers that reduce competition, or explicit agreements that lead to cartel or cartel-like behaviour. They should scrutinize actions likely to prevent, lessen, or distort competition, such as those that facilitate raising prices by changing elasticities of demand for price setters—e.g. vertical restraints [259], create entry barriers; or increase rivals' cost.[260]

While the influence of the Chicago school may not be as evident in South Africa, its principles have nonetheless left a mark on competition jurisprudence, albeit in a less pronounced manner compared to the United States. The Chicago school advocates

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[257] Coate, M.B. & Kleit, A.N. 1990. *Exclusion, Collusion, and Confusion: The limits of raising rivals' costs.* at 1

[258] Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute.18

[259] Patrick Rey & Joseph Stiglitz, 1994. "**The Role of Exclusive Territories in Producers' Competition**," NBER Working Papers 4618, National Bureau of Economic Research, Inc.

[260] Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute. at page 7.

for the inclusion of an efficiency defence when enforcing competition law, arguing that conduct which enhances overall economic efficiency should be exempt from scrutiny. South African competition law provisions recognise this efficiency defence when assessing the competitive effect of anti-competitive conduct.

Emphasising the importance of a rigorous economic analysis, the Chicago school urges the use of empirical evidence or economic models to assess competitive impact when considering conduct. When competition authorities and courts excessively focus on economic analysis in analysing these complex competition issues, it reflects and aligns with the principles of the Chicago school.

4.2.8 Concluding Remarks on the Chicagoan School

I need to highlight that the point in this part of the thesis is argument regarding whether South African jurisprudence has carved out a sufficiently coherent framework that gives weight to other alternative perspectives and frameworks like intersectionality. It is crucial not to overly emphasise that South African competition law is solely grounded in the Chicago School. From my perspective, there exists e jurisprudence that moves away from this Chicagoan restrictive approach. For instance, the *Computicket* [261]case moves away from the more restrictive approach of *South African Airways*[262] case. What is problematic, and I aim to address in this thesis, is that the lack of clarity within on our jurisprudence and legislation regarding where Chicago school influence ends and where the interventionalist approach begins. Thus, it is valid to argue that prior the 2019 Amendment Act, there was a significant emphasis on basing most cases on Chicago and neo-Chicago principles.[263]

It is further crucial to highlight that South African competition enforcement remains somewhat influenced by the Chicagoan view, particularly evident in the evidentiary

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[261] *Computicket Pty Ltd v Competition Commission of South Africa.* 2019. Competition Appeal Court.

[262] *Competition Commission v South African Airways Pty Ltd.* 2005. Competition Tribunal.

[263] Neo-Chicago is defined “as one sensitive to the identified failings of the Chicago School yet faithful to its core tenets”

burden placed on the plaintiff in merger considerations and price discrimination enforcement. [264]For instance, price discrimination in Section 9 of the Competition Act, as exemplified in the *Nationwide Poles*[265] case, the burden of proof rested on the plaintiff purchaser . Nationwide poles , a small business purchaser, was required by section 9 to demonstrate that volume-based discounting would have adverse effect on small businesses within their respective markets.[266]

The Chicago school is often criticised for its negative impact on antitrust measures in numerous ways. One significant critique lies in the extensive evidentiary burden placed on plaintiffs in antitrust cases, leading to weaker enforcement and greater market concentration.[267]The evidentiary burden to a plaintiff to challenge a potential hunter competitor may merger is incredibly burdensome. In Glick in 'Chicago School Economists Got it Wrong' provides an illustrative example: if a company like Google purchases a start-up that is said could syphon off its search engine business in the future, the authorities would need to prove that the target company would have entered the market in the future, absent the merger, and that could have to deconcentrate the market. [268]

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[264] See Parramore, L. 2021. Chicago School Economists Got it Wrong. Strong Antitrust Policy Boosts the Economy. Available: https://www.ineteconomics.org/perspectives/blog/chicago-school-economists-got-it-wrong-strong-antitrust-policy-boosts-the-economy. Available: https://www.ineteconomics.org/perspectives/blog/chicago-school-economists-got-it-wrong-strong-antitrust-policy-boosts-the-economy. on the discussion on how competition/enforcement that is influenced by Chicago school manifests by placing evidentiary burden on the plaintiff in merger considerations and also price discrimination enforcement.

[265] *Nationwide Poles v Sasol Oil.* 2005. Competition Tribunal.

[266] See 5.8.1 for an in-depth review on *Nationwide Poles cc v Sasol Oil* reliance on Chicagoan approach below as directed by the wording of section 9 of the Competition Act.

[267] Parramore, L. 2021. Chicago School Economists Got it Wrong. Strong Antitrust Policy Boosts the Economy. Available: https://www.ineteconomics.org/perspectives/blog/chicago-school-economists-got-it-wrong-strong-antitrust-policy-boosts-the-economy. Available: https://www.ineteconomics.org/perspectives/blog/chicago-school-economists-got-it-wrong-strong-antitrust-policy-boosts-the-economy.

[268] Ibid.

The second way in which the Chicago school perspective can stifle competition or show its influence is by heightening the evidentiary requirements for regulating price discrimination. The Chicago school further increases the burden of proof for price discrimination regulation. In the article, Glick makes an example of *FTC v Morton Salt*[269] where the plaintiff was required to prove injury to itself instead of to its entire market.

Despite South Africa's incorporation of public interest goals, this thesis contends that the landscape is influenced by the principles of the Chicago School. This influence is evident in the structure and provisions of the Act, particularly those related to mergers and the abuse of dominance. The Chicago school provides a framework for authorities and the courts to consider three questions: (a) is there evidence of market power in a particular market? (b) did the firms with market power in a defined market acting in an anticompetitive way by abusing their market power? (c) if anticompetitive behaviour is identified as per *(b),* are there offsetting efficiency- enhancing benefits? [270]These questions align with considerations encapsulated in sections 4, 5, 8, 12A of the Competition Act.[271] Thus, despite South Africa's merger considerations incorporating

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[269] *Federal Trade Commission v Morton Salt.* 1948. Supreme Court of the United States.

[270] Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute. At 5

[271] See *Competition Act,* 1998., *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

4. Restrictive horizontal practices prohibited

(1)An *agreement* between, or *concerted practice* by, *firms*, or a decision by an association of *firms*,

is prohibited if it is between parties in a *horizontal relationship* and if –

(Words preceding paragraph (a) of section 4(1) substituted by section 3(a) of Act 39 of 2000)

(a) it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement*, concerted practice, or decision can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect; or

5. Restrictive vertical practices prohibited

public interest factors, they are fundamentally shaped by the principles of the Chicago School.

In South Africa, this public interest test remains to be primarily reserved for merger considerations and does not extend to behaviours that could materially hinder or distort competition, such as vertical restraints as outlined on section 5 of the Act. Section 5 of the Act allows defendants to prove that conduct in question is efficiency enhancing, but the Act does not extend the same opportunity (like in merger considerations in s 12A), to the plaintiff to prove 'public interest test'. This framework reinforces the perception that the Chicago School tends to focus solely on unnatural actions like cartels, since the School asserts that competition is the natural state of an economy.[272]

Thus,, it is recommended to incorporate a public interest test that extends beyond mergers to encompass a range of conduct. Broadening the scope of the public interest test will ensure that not only mergers but also other forms of conduct are evaluated

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(b) (1) An *agreement* between parties in a *vertical relationship* is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the *agreement* can prove that any technological, efficiency or other pro-competitive, gain resulting from that *agreement* outweighs that effect.

8. Abuse of dominance prohibited
It is prohibited for a dominant *firm* to –
(a) charge an *excessive price* to the detriment of consumers;
(b) refuse to give a competitor access to an *essential facility* when it is economically feasible to do so;
(c) in an *exclusionary act*, other than an act listed in paragraph (d), if the anti-competitive effect of
(a) that act outweighs its technological, efficiency or other pro-competitive gain; or

12A. Consideration of mergers
(1) Whenever required to consider a merger, the Competition Commission or Competition Tribunal must initially determine whether or not the merger is likely to substantially prevent or lessen competition, by assessing the factors set out in subsection (2), and –
(a) if it appears that the merger is likely to substantially prevent or lessen competition, then determine –
(i) whether or not the merger is likely to result in any technological, efficiency or other pro- competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

[272] Stiglitz, J. 2017. *Towards a Broader View of Competition Policy.* Roosevelt Institute. At 4.

based on their potential benefit to the public. This is in complete contrast to the influence of the Chicago school, which not only restricts intervention but also emphasises on economic analysis and total welfare (consumer and producer welfare)**.** In a country with a history tainted by colonialism and oppression, the distributional impact cannot be overlooked. In fact, competition authorities are obligated to adopt a proactive approach in attempting to rectify these imbalances.

4.3 Harvard school of thought

The second theory belongs to the Harvard school, introduced by liberal legal scholars and economists from Harvard University. The Harvard school of thought held that efficiency should not be the exclusive objective of competition law and policy. The Harvard school embraces that multiple non-efficiency goals like gaining equity are justifiable. Hovenkamp states that Harvard writers often prefer the 'rule of reason' approach when considering antitrust violations. The disadvantage of relying on the rule of reason approach is that it makes it difficult to prove the occurrence of violation. [273]

Furthermore, the Harvard school writers dispute the claim that markets may sometimes be self-regulative (as the Chicago school claims), which means that competition law and policy or other government intervention might be required. Unlike the Chicago school, the Harvard school is less pessimistic about government intervention because it believes markets are not self-corrective when needed. Sometimes, we need government intervention to regulate markets to one that honours free trade.

The Chicago school writers' fundamental view was that government intervention was integral in protecting the competitive aspect of a robust market because firms may

[273] Areeda, P. & Hovenkamp, H. 2020. *Antitrust law: an analysis of antitrust principles and their application.* 5th. Wolters Kluwer Legal & Regulatory U.S.at 152.

gain unwarranted market power. The Harvard school writers suggest that Congress's general concern was not to protect a single interest (consumer welfare) but to protect various interests that sought to hamper competition. In this broader perspective, multiple interests were considered, such as public policy goals, affirmative action, innovation, product quality, equality, employment, and diminishing the inequality gaps.

4.3.1 Variety of goals

The fundamental premise of the Chicago school is that antitrust should look beyond pricing fixing and large horizontal mergers. The Harvard school finds merit in prioritising many goals relevant to the nation's economy and structure, especially during the 1930s to the late golden years of antitrust enforcement in the US. This era began when the nation transitioned from the depression era to building and realising President Franklin D. Roosevelt's aggressive New Deal. The link between the New Deal and constitutional democracy will be explained below.

The Harvard school believes that the goals of competition cannot be reduced to a single goal. The School is dedicated to maximising multiple values rather than strict CWS. The thought of abandoning consumer welfare is in line with the Harvard school theorists who do not believe Bork's sentiments that the legitimate role of antitrust legislation was never to protect rivals but only to protect consumers.

Abandoning the strict approach may extend the competition law scope and reduce highly concentrated market power. When the competition regime extends its scope, it appreciates and protects non-efficiency goals versus the unilateral pricing concerns. The US railway, steel, oil, and telecommunication trusts were regarded as the Pharaoh that held various stakeholders hostage. In response to the hostage, Harvard scholars contended that antitrust laws should not be confined to a single goal. As mentioned above, the Sherman Act's backdrop responded to the risk of harm these sector-specific trusts brought. These Trusts quickly gained market power and decreased market concentration while raising prices. They most impotently increased barriers to entry for other competitors who fell outside the ambit of the Trust.

Thus, the consumer could not be a legitimate stakeholder to be protected because Trusts blocked several socio-political goals like diminishing market barriers and unwarranted market power while closing the inequality gap. In the US, the harm was seen to extend beyond pricing concerns, but with the squeezing out of small businesses in agriculture.

4.3.2 Interventionalist philosophy

The Harvard school held that markets might sometimes not be self-regulative as much as the Chicago theory falsely believes. As a result, government intervention through competition law and policy is considered to be the appropriate response. Stiglitz agrees with the Harvard school theorists' perspective, which argued that higher profits could arise from a better way of exploiting consumers, better ways of exerting price discrimination or taking part in more nuanced ways of increasing market power, rather than the Chicagoans theorists' point of view, including public policy goals in antitrust regulation results in the by-product of supporting inefficient small businesses, which, in turn, is detrimental to (their beloved) consumer welfare.

4.3.3 The significance of market concentration

Richard Posner, a jurist from the University of Chicago, contends that there is an essential contentious area between the two schools: disagreement on the significance of market concentration and the explanation thereof. [274]The Harvard school alleges that there is wisdom in reducing market power or deconcentrating industries. The rationale was that they argued that persistently concentrated markets warrant a risk of increased market barriers to entry. The explanation is that there is a correlation

[274]Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127.at 945

between market concentration and increased entry barriers, diminishing normal competition. [275]

The Harvard school argued that the increase in entry barriers is because persistently concentrated industries make it difficult for other firms to access and match their supra-competitive prices.

4.3.4 The (non) application of the Harvard school in South Africa

Economic efficiency should not be the only objective because other non-economic goals like fairness and economic equity are justifiable. That is what the Chicagoan theorists believed. In a developing country like South Africa, our competition laws have the potential to provide a dignified life and lift people out of severe poverty.[276] Thus, one might be more optimistic by the reliance on the principles of the Harvard school to cater to public interest goals that can develop our poverty-stricken country.

The South African competition regime claims to have the same market fairness and equality concerns. However, the way the competition regime is structured and enforced contradicts these concerns. Africa is the second-largest economy in Africa.

The goals of the US differ from the European Union's and the South African markets. One of the values that underpin the South African Constitution is equality. It makes sense not to abandon this value and replace it with the consumer welfare value. This would contradict the fact that the Constitution is supreme, and all laws should not contradict it. Ignoring the relevant values would be in contravention of the Constitution and democracy.

275Ibid.at 944. ("The Harvard reply is that there is an alternative explanation for persistent concentration in particular industries: barriers to entry").

[276] Fox, E. 2018. Competition policy at the intersection of equity and efficiency. *The Antitrust Bulletin.* 63(1):3-6. DOI:10.1177/0003603x18756130.at 6.

In his article, *The Chicago school of Antitrust Analysis*, Posner refutes the contention that correlating increased market concentration barriers is far-fetched.[277] Posner argues that either cost reduction or innovation by the oligopolist may cause concentrated markets. Posner argues that " that market in question simply does not have room for any more firms (economics of scale)", – which are reasons that do not warrant government intervention in changing market structure. [278]

As mentioned above, US antitrust enforcement was booming during the 1930s to 1970s. During this boom era, President D. Roosevelt intended to disperse economic and political power from the few to create a greater spread of ownership. The then government was "mindful of the threat big business posed to the democratic order". [279] President Roosevelt supported the model of protecting democracy by dispersing economic and political power. In other words, President Roosevelt acknowledged the danger of market concentration. Perhaps if our South African government adopts the same intention, our competition enforcement may effectively disperse economic and political power.

The populist agenda requires that small firms in their infancy or (currently) inefficient be protected by legal decree to preserve livelihood and market access. This populist agenda maybe helpful in providing market access for vulnerable market participants and for fulfilling public interest objectives. The small firms are beneficiaries of the populist agenda as it is set on protecting them by legal decree to preserve their livelihood and market access. [280]

Similarly, populist goals are said to carry unnecessary burdens to the courts. The burden is accumulated by the courts, who act as proxies of the populist agenda. In

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[277] Ibid.

[278] Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127.at 945.

[279] Stucke, M. 2012. Reconsidering antitrust's goals. *Boston College Law Review.* 53.

[280] Areeda, P. & Hovenkamp, H. 2020. *Antitrust law: an analysis of antitrust principles and their application.* 5th. Wolters Kluwer Legal & Regulatory U.S. at 115.

fulfilling this agenda, courts will weigh conflicting interests and decide which interests weigh higher on a case-by-case analysis.[281] Placing public interest goals in the competition landscape is believed to create confusion. This exercise may be burdensome for courts with spiked backlogs from pre-COVID-19. Populist concerns or populism is a "political term that stands for a set of poorly defined goals and masks considerable conflicts among various interest groups, all claiming to be populist. As a caveat, I would argue that the immaterial distinction between American proxies of the populist agenda (small business) is that they may not be victims of a previous or oppressive system like the HDIs who rely on the populist agenda for market access. The rationale for adopting a populist agenda in South Africa is distinct as it is set to redress the previous marginalisation by legal decree to exclude black industrialists from market access.

Additionally, the populist agenda is lambasted for involving courts in political decisions. This exercise is said to have unfairly burdened the judiciary in acting in "a regulatory or supervisory role for which they are ill-equipped".[282] Plausible statutory interpretation is difficult to ascertain, and courts are expected to make incoherent political decisions. This unacceptable burden on courts requires courts to carry out responsibilities that "cannot satisfy satisfactory carryout".[283]

4.4 The Neo-Brandeisian movement

"We must make our choice. We may have democracy or wealth concentrated in the hands of a few, but we cannot have both".[284] Justice Louis Brandeis.

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[281] Ibid. at 115.

[282] Ibid. at 115.

[283] Ibid.

[284] *Investigation of competition in digital markets*. 2020. United States. Available: https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf. At 7.

4.4.1 Background

As the name suggests, Justice Brandeis, who served in the US Supreme Court between 1916 and 1939, is this school's forefather. The Brandeisian school argues that antitrust legislation must be used as a tool for citizens to control and 'check' on private power .[285] This school believed that the antitrust legislation must be used to curb rising monopoly power because, if not, the US might risk having those few dominant firms be above the law and using the law to entrench their dominance further. In essence, the Neo-Brandeisian school believed that concentrated economic concentration power translates to political power that may be used to undermine democracy and the integrity of the public government. Many senators believed that market power may be linked with inequality and other ills.

During former US President Wilson's tenure, it was argued that the Sherman Act had many loopholes. The alleged loopholes invited a reconstruction of the singular welfare maximisation value to one favouring multiple value systems. The numerous value system identified the goal of antitrust law as protecting democracy, small farmers, the competitive agenda of markets, etc. The multiple value system disagreed with the notion that the legitimate goal of antitrust legislation was to maximise consumer welfare. However, the multiple value system was held to have "created too much leeway and unpredictability" and lack of clarity, making effective legislation enforcement difficult. [286]

In response to this unpredictability was the introduction of economic democracy, which was at the nexus between (abuse of) monopoly power and a weakened constitutional democracy. Hence, there were advocates of a broadened antitrust analysis scope that

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[285] Khan, L. 2018. The new brandeis movement: America's antimonopoly debate. *Journal of European Competition Law & Practice.* 9(3). At 131.

[286]Wu, T. 2018. *The curse of bigness : antitrust in the new gilded age.* New York: Columbia Global Reports.at 131. (Wu notes that Judge Doug Ginsburg complained that"(c)ourts were freely choosing among multiple, incommensurable, and often conflicting values". The response was then said to be the Brandeisian movement that held. That the goal of antitrust should be to protect the competitive process versus the value of consumer welfare).

upheld the values of democracy. Proponents of this economic democracy advocated looking at antitrust analysis from a view that a link between the abuse of monopoly power and a weakening democracy. The dominant big businesses should be those that organically grow by virtue of the support they receive from the consumers, in contrast to businesses that are not innovative but gain business through means unrelated to merit, like abuse of monopoly power. The Brandeisian school gained prominence for its progressive elements that widened the scope and reach of antitrust law.

Khan, in *The New Brandeis Movement: America's Antimonopoly Debate,* [287] for instance, affirms how this school believed that concentrated private power might be abused to assert and entrench dominance. Thus, overlooking the rising market power may capture political and non-political processes like, but not limited to, lobbying, funding research, financing elections and establishing systematic influence that the dominant firm can leverage. The few dominant firms may capture these processes to gain favourable policies that further entrench their dominance. [288]

This new progressive school disputed the Chicago school theory that the legitimate purpose of antitrust law was the maximisation of consumer welfare. The Neo-Brandeisian school was critical of the Chicago school because it believed that antitrust had "lost its goal" by relying on Justice Bork's implausible analysis of the legislative history and analysis thereof. [289]

In the Chicago Board of Trade v United States,[290] Judge Brandeis held that the test for legality of conduct should not be consumer welfare maximisation. Thus, it has been argued that competition law is designed to safeguard industrial liberty and, instead of

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[287] Ibid.

[288] Khan, L. 2018. The new brandeis movement: America's antimonopoly debate. *Journal of European Competition Law & Practice.* 9(3).

[289] Orbach, B. 2013. How antitrust lost its goal. *Fordham Law Review.* 81(5):2253 - 2256, ibid.

[290] *Chicago Board of Trade v United States.* 1917. District Court of the United States. at 231.

merely testing for legality, courts should evaluate whether behavior promotes, suppresses, or destroys competition. [291] Below is a review of the basic principles of this Neo-Brandeisian school.

4.4.2 The principles of the Brandeisian school

The Brandeisian approach strongly connects the role of competition law and democracy.[292] According to the approach, monopoly and market concentration were(and still are) connected to the very nature of democracy. Bigness, monopoly and market concentration, just like democracy, determined the kind of State that citizens will be subjected to. This broadened approach to competition seeks to use competition law to control private power to avoid "the curse of bigness" with the effect of overpowering political constitutional democracy.

The philosophical underpinning of the Brandeisian school is similar to the *Madisonian* government structures.[293] The *Madisonian* government system believes in the fair distribution of power between three branches of government – executive, legislation and judiciary.

While the Chicago school regards the presence of bigness as evidence of efficiency, innovation and success that is meritorious. This may be true. The Brandeisian structuralists view such bigness as a threat to democracy and feel that big businesses need to be tamed because no matter how innovative a firm may be, there is always abuse for the vulnerable population.

In *The Curse of Bigness*, former Justice Brandeis maintained that "there are no natural monopolies in the industrial world".[294]Justice Brandeis notes that industries that were

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[291] Ibid.

[292] Khan, L. 2018. The new brandeis movement: America's antimonopoly debate. *Journal of European Competition Law & Practice.* 9(3).

[293] Ibid. At 131.

[294] Dembitz, B., Fraenkel, O.a. & Clarence, L. 1965. *The curse of bigness; miscellaneous papers of Louis D. Brandeis.* Port Washington, N.Y: Kennikat Press.

powerful monopolies were the most unnatural in the past. Justice Brandeis further makes mention of the Oil and Steel trusts as examples of the most unnatural monopolies. Some proponents of the laissez-faire fundamentals believed that markets worked better without government intervention. The rationale for believing in natural monopolies and the laissez-faire fundamentals was because anything contrary was against CWS.

4.4.3 Concluding remarks about the Brandeisian school

In summary, the Brandeisian school favoured the multiple value system and disagreed with the notion that the legitimate goal of antitrust legislation was to maximise consumer welfare. The Brandeisian school of thought, too, like Ordoliberals, draws a strong connection between the role of competition law and democracy.[295] According to the school, monopoly and market concentration were(and still are) connected to the very nature of democracy, and the welfarist approach might be illegitimate guidance.

Brandeis conceded that while competition laws *do* maximise consumers' welfare, this value should not be the only standard used to judge whether there is evidence of harm to competition. [296]He reasoned that there are blind spots that may be missed if one solely relies on consumer welfare maximising as the test for legality. [297]I agree with the claim that there have been times when consumer welfare maximisation has led us astray and left us with super-dominant conglomerates. This is evidenced by the severely concentrated South African market. However, in the same breath, we cannot throw away the bath water with the baby and reject the welfarist theory that competition legislation should maximise consumer welfare.

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[295] Khan, L. 2018. The new brandeis movement: America's antimonopoly debate. *Journal of European Competition Law & Practice.* 9(3).

[296] Ibid.at 805.

[297] See Dembitz, B., Fraenkel, O.a. & Clarence, L. 1965. *The curse of bigness; miscellaneous papers of Louis D. Brandeis.* Port Washington, N.Y: Kennikat Press.

According to the Brandeisian approach, monopoly and market concentration were (and still are) connected to the very nature of democracy.

4.4.4 The (non) application of the Brandeisian school in South Africa

As mentioned in the preceding chapters, a vibrant and effective competition policy was on the agenda of the first democratic government, as seen in the ANC's Political Guidelines for a Democratic South Africa. This gives the impression that the Brandeisian core principles and the core Madisonian traditions aim at a democratic distribution of power and opportunity in the political economy. One of the goals of the ANC's reform was to remedy the problematic and detrimental imbalance of economic power. This reform gives the impression that the new democratic government affirmed that concentrated economic power cannot be part of a fully functional democratic South Africa in terms of the Brandeisian school.

4.5 Ordoliberalism

The Ordoliberal school believes in the philosophy that there is a direct link between competition and democracy. This is because the school has the assumption that there is an "interdependence between economic, social and political order". The Ordoliberal school is one of the proponents of the abovementioned argument that private and political power are interrelated, and the need for an aggressive laissez-faire government intervention is becoming critical. [298] Although laissez-faire capitalism was practised in Nazi Germany, the country was unable to restrain the private power wielded by certain dominant market participants. The powerful participants could use the economic private power in the political sphere.

This led to the Ordoliberal school of thought, concluding that laissez-faire capitalism leads to concentrated unlimited economic power. Because economic, social and political power are interdependent, the few who hold unlimited power also hold social

[298] Deutscher, E. & Makris, S. 2016. Exploring the ordoliberal paradigm: the competition-democracy nexus. *The Competition Law Review*. 11(2).at 181

and political power. Thus, when social, political, and economic power rests on few influential market participants without effective legislation to control such powers, democracy may be undermined to the detriment of public interest. [299]

The US social and economic advances of the New Deal policies aimed to provide "worker protection and organising rights, job creation, wage increases", etc. [300] It is important to explore whether such New Deal policies had contributed to dismantling the effects of past racially exclusionary policies in the African American communities. Flynn, in *The Hidden Rules of Race: Barriers to an Inclusive Economy,* held that the influence of the Ordoliberal Philosophy, through New Deal policies, was not extended to the African American industrialists who sought to be effective market participants. Exploring and understanding the rationale of why the New Deal, like antitrust policies of that era, will help determine whether the Ordoliberal philosophy may be appropriate for post-democracy South Africa. This is to ascertain whether our Competition Act would benefit from being influenced by the Ordoliberal philosophy that influenced New Deal antitrust policies in the US.

The historical experience of the rise of totalitarianism in Germany was the case study that Deutscher and Makris relied on in their article entitled *Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus.* [301] During this era, when the Nazi administration was in control, Germany did not rely on laissez-faire capitalism, where government intervention through competition law enforcement was welcomed. As a result, free market did not exist, as there was excessive market concentration due to market not being competitive. Resultingly, those few people who benefited from this

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[299] Ibid.

[300] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. At 23.

[301] Deutscher, E. & Makris, S. 2016. Exploring the ordoliberal paradigm: the competition-democracy nexus. *The Competition Law Review.* 11(2). At 186.

market did not 'answer' to competition law enforcement to create "boundaries of economic power" and ensure "equality of opportunity". [302]

4.5.1 Nexus between economic, social and political power

Various competition law questions arise from the argument that there is a nexus between private power, economic and political power and which antitrust/competition laws can help regulate to legitimise the competitiveness of markets. The nexus between economic, social, and political power is a central concern in Ordoliberalism where there is a recognition of the potential for economic power concentration and market failures. Ordoliberals believe that a competitive market is essential for economic efficiency and individual freedom. They emphasise the need to prevent the abuse of economic power by firms, particularly monopolies or oligopolies, which can undermine competition and harm consumers. To address this, ordoliberalism advocates for a strong framework of competition policy and antitrust regulations. This is seen as a way to limit the excessive economic power that can influence markets and policy decisions.

Ordoliberalism recognises that economic power can translate into social power. When certain economic entities become too dominant, they may also exert influence over social and cultural spheres. This influence can shape societal norms, values and institutions. Ordoliberals advocate for social policies that ensure a more equitable distribution of economic benefits, helping to mitigate social power imbalances that can emerge from economic disparities.

Economic power can significantly influence political power by enabling certain actors or firms to lobby for policies that favour their interests. Ordoliberals are concerned about the potential capture of political institutions by economic elites. To counter this, they emphasise the importance of a well-functioning democracy, rule of law and a

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[302] Ibid. At 181.

strong regulatory framework. In this way, Ordoliberalism seeks to maintain a balance of power between the economic and political spheres to prevent undue influence.

One of the questions is whether competition enforcement should adopt laws that are cognisance of this link between private and political power. Some jurisdictions criticise the Ordoliberalism school of thought for various reasons, including that the school is inefficient compared to the popular welfarist approach.

It is essential to explore whether there is a link between private, social and economic power that may curtail fair competition and public interest objectives. The modern economy can be characterised by increased monopoly and concentration of market power due to the distinct structure of digital markets. Monopoly power and concentrated markets grant powerful market participants the opportunity to attain and use their private power-turned-political power to encroach on constitutional democracy in myriad ways, possibly.

We need to understand whether private power in a concentrated South African market can afford one a political power that is against the public interest. This review is to help determine whether the South African Competition Act should be expected to contribute to the enforcement against the risk of increased private power. Alternatively, we must consider whether such an expectation falls within the scope of the Act. If we anticipate the Act to protect constitutional democracy actively, we must clarify the boundaries within which this legislation is expected to achieve its objectives. The exploration will rely on the argument by the Ordoliberal school of thought. We will take some valuable lessons from the US, especially in the era of the New Deal where former President Roosevelt found credence in the argument that antitrust legislation may respond to dispersing private power to protect the democracy and public interest of the US.

Many nations (like the US in the case of the American New Deal policies) have found credence in the argument that private monopoly power can be easily exchanged for political power. When monopolisation of industries is rife, concentrated private power may be used to gain political power. Resultingly, the constitutional foundation of a democratic State is threatened by private power gains, which can be exchanged for political power to use and abuse as one sees fit. Competition laws and policies are

then called to respond to increased concentration, monopolisation and private power in a few hands. The response is proposed to be effective and decisive regulation over private power monopolising certain industries and encroaching on the political sphere – to the detriment of the public interest.

In the early US 19th century, there was an emergence of concentration of economic power that was in the hands of the (white) elite population. This economic power was overlooked for a while because it was seen not to pose a risk to anyone, let alone from an antitrust perspective. As time progressed and administrations changed, there was a certain belief that private economic power had the power to shape the political sphere. As a result, former US President Roosevelt introduced what he coined as the New Deal policies.

4.5.2 The New Deal

both the New Deal policy and ordoliberalism address the nexus between economic, social, and political power by implementing policies aimed at regulating economic activity, providing social safety nets and maintaining a balance of power between economic and political institutions. However, they do so within different historical and policy contexts. Between 1929 and 1939, the US experienced the Great Depression, where many Americans were left unemployed and in deep poverty as productivity weakened. Shortly after the declaration of the Great Depression in 1932, President Franklin D. Roosevelt was elected as the President of the US. Franklin, his administration and policymakers had to respond decisively and try to prevent future occurrences of such. Tackling lack of competition or abuse of power was one of the ways that was seen to make a change and do something about in this era. Hence, during the 1930s to around the 1970s, the New Deal antitrust policy was introduced to prioritise aggressive antitrust policy enforcement in the US. President Roosevelt's New Deal antitrust policy sought to overthrow the problem of economic and income inequality problem brought about, amongst others, by introducing trusts during the then-Great Depression.

During this boom of antitrust enforcement, the administration was committed to dispersing economic and political power to create a greater spread of ownership. At

the time, the government was “mindful of the threat that big business posed to the democratic order” [303] and set to ensure a “democracy of opportunity for all Americans”. [304] The supporters of the New Deal policy believed that America was becoming a society comprising a “moneyed aristocracy or a ruling class—an oligarchy, not a republic”. [305] Hence, these same supporters suggested that the government, legislature, and judicial system should work to ensure that concentrated economic power does not infringe on the American constitutional democracy for the firms to get or retain economic and market power. [306]

The introduction of the New Deal responded to the monopolistic market conditions that caused deep wealth inequality. The rationale for the New Deal was to disperse economic or private power to mitigate a threat to democracy, economic transformation, diversity and inclusion that may arise because of concentrated private power. The US is not the only jurisdiction that found credence in protecting democracy through aggressive legislation to ensure stable and free markets. As mentioned, apartheid South Africa passed various legislations, namely the Undue Restraint of Trade Act 59 of 1949 and the Regulation of Monopolistic Conditions Act of 1955, to measure against the monopoly problem that threatened the market. The enactment of the legislation proved that the government found credence in subscribing to a laissez-faire capitalism that, as the Ordoliberals claim above, protects public interests from being encroached upon by private-power-turned-to-political-power of super-dominant powerful firms.

4.6 Final remarks

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[303] Stucke, M. & Steinbaum, M. 2019. The effective competition standard: a new standard of antitrust. *University of Chicago Law Review.* (367).At 4.

[304] Fishkin, J. & Forbath, W. 2022. *The anti-oligarchy constitution : reconstructing the economic foundations of american democracy.* Harvard University Press. At 23.

[305] Ibid. At 3.

[306] Ibid. At 3.

The above reviews four schools of influence that have guided and underpinned antitrust law and the rest of the world. First was the laissez-faire Chicago school that follows the strict and traditional route of relying on increased price and decreased production as a sign that anti-competitive conduct or effect is present. The second one was the Harvard school of thought whereby economists and lawyers believe that we should go back to using the old and robust school that is highly effective. The Harvard school favours a broader scope than just increased price and decreased production as indicators of harm. Third was the Brandeisian school, which focuses on laws regulating democracy, or at least attempts to do so. The last school was Ordoliberalism, which advocates for a social market economy emphasising competition, regulatory policies to prevent monopolies, and a strong framework of social welfare and safety nets to address economic disparities and maintain a balance between economic and political power.

South Africa's objectives diverge from those of other nations, making it evident that the narrowly focused Chicago school of thought may not align well with our system. Additionally, the South African context differs from that of the United States, where the primary concern is trusts rather than transformative industrialisation. While the Chicago school's principles may not align perfectly with South Africa's goals, there can be areas of common interest and policy convergence where both countries seek to address issues related to competition, market efficiency and economic fairness in their own ways. [307]

Nevertheless, a competition regime modelled in line with the Chicagoan non-interventionist philosophies views markets as self-regulating and not needing government intervention. Therefore, relying on the Chicago school theory may result in an ineffective South African competition regime that may not serve our post-

[307] See Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127.

apartheid democratic state. A developing state seeks social and economic reform. This is not to say that the suggestions of the Chicagoans should be all dismissed.

I believe the Harvard theory should also be taken with a grain of salt – if we seek to redress the past's wrongs and reform society and economy. Harvard University is renowned for its association with various economic and policy theories, some of which may prioritise certain economic principles, such as market efficiency and deregulation. However, when dealing with a society that has a history marked by injustices, inequalities and structural issues, applying these theories without careful consideration may not be sufficient to address the deep-rooted problems.

I advocate for a balanced and critical approach to economic theories like the Harvard theory, emphasising the importance of tailoring policies to the specific historical and social context when seeking to address past wrongs and bring about meaningful social and economic reform.

While the Brandeisian school and Ordoliberalism offer valuable insights in certain contexts, they may not be well-suited to South Africa's unique historical, developmental, and sociopolitical challenges. South Africa's historical and economic context differs from those of the countries where these schools of thought arose. In addition, South Africa's developmental goals, its need to balance economic and social objectives, the necessity for global economic integration and the country's complex sociopolitical dynamics require a tailored and multifaceted approach to economic and social policy.

The pre-1994 and pervasively heinous apartheid legal order excluded black industrialists from various market participation, which resulted in concentrated markets primarily owned (and still relatively) by white minority industrialists. [308] Since the white population enjoyed owning farms or industrial enterprises decades before the new

[308] It is common cause that the apartheid system's racial discrimination was executed by the passing of laws that not only denied Black South Africans freedom of movement, autonomy, equality, human rights and access to significant education (as opposed to Bantu Education) but equal opportunity to participate in the formal economy.

democratic dispensation, it is no surprise that wealth is skewed towards the white South African population despite being a minority. The point is that the current wealth is not (unilaterally) merit-based but because of the market's racial segregationist past. Maher notes that perfect (and fair) competition becomes blocked when some potentially active competitors are susceptible to market barriers. These market barriers result in higher prices for the consumer and end up stifling technological innovation and dynamic efficiency in general. [309]

[309] Ibid at 2- 4. I would add that productive and allocative efficiency may be stifled too.

CHAPTER 5

THE ROLE OF THE MAINSTREAM CONSUMER WELFARE STANDARD IN POST-COLONIAL AND APARTHEID SOUTH AFRICA

5.1 Introduction

The CWS is an economic and legal framework used to evaluate antitrust and competition policies. It focuses on assessing whether business practices, mergers and other economic activities benefit or harm consumer welfare, primarily through effects on prices, quality and product choice. The primary objective is to protect and promote the interests of consumers. This standard assumes that when consumers benefit in terms of lower prices, improved product quality, or increased choice, the overall welfare of society is enhanced. In addition, the CWS places a strong emphasis on competitive markets as the best means incentivise businesses to innovate, reduce costs and pass on those benefits to consumers.

Critics argue that the CWS may not adequately address other societal goals, such as income inequality, worker welfare and small business interests. Therefore, recent debates have called for reforming or replacing the CWS. This means changing the substantive element, normative frameworks and goals that influence the interpretation of the provisions of the Act.

Perhaps another wrinkle in our fairness-driven competition legislation is the adoption and overreliance on the strict mainstream consumer welfare standard. Central to the argument of this thesis is that the current overreliance on mainstream CWS will weaken the effective implementation of any distributive justice we seek to uphold through public interest objectives.

This 2018 Amendment Act, in contrast to the 1998 Act, follows the flexible Harvard school approach that disputes the notion that competition should be concerned with competition and *not* competitors. This begs the question of whether continued reliance on a strict CWS will render effective enforcement of the 2018 amendments that ensure firms owned by HDIs are not susceptible to barriers to entry or abusive conduct that

will prohibit their growth into effective competitors. For example, barriers to entry that mascaraed as normal quantity-based discounts but are discriminatory. This will be dealt with in depth below, through the Nationwide Poles cc. and Sasol *Oil* case. [310]

As a developing nation with a discriminatory past, South Africa rightfully includes public interest competition goals in their competition enforcement mandate. The public interest goals are set to facilitate redistributive justice for the historically disadvantaged. The distributive justice that South African competition law is concerned with includes but is not limited to equity, removing barriers to entry for HDIs, reducing inequality and poverty among HDIs and spreading ownership in concentrated industries. Over the years, the objectives have been reconceptualised and broadened several times, but the overreliance on the CWS approach continues. Instead of changing the substantive objectives, we should target the correct approach and ensure that the yardstick/approach will not contradict the same distributive justice we seek to achieve through the public interest objectives encapsulated in the Competition Act.

Other scholars still believe the CWS is the correct standard for regulating or enforcing competition law. The CWS has been described as feeding into the Bork and Posner static conception of competition law because of its unilateral focus price effects.[311] Concerning the argument that the CWS is ineffective because of such emphasis on price effects, Dr Moss, President of the American Antitrust Institute, believes that mainstream CWS is still the correct standard and invoking any other tool that looks

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[310] *Sasol Oil (Pty) Ltd v Nationwide Poles cc.* 2005. Competition Appeal Court.

[311] Stucke, M. 2012. Reconsidering antitrust's goals. *Boston College Law Review.* 53.At 563. “Their economic goal was consistent with their largely static conception of competition, strong belief in the rationality of market participants, scepticism over the likelihood and extent of market failures, and doubts about the government’s institutional capacities.”

beyond price effects "will present significant administrative and technical issues". [312] Dr Moss still recognises and believes that the CWS is still the best tool for assessing anti-competitive harm in the market.

Based on the current climate of the South African economy, market concentration being rife, poverty rates and widening inequality gap, we may conclude that the neoliberal philosophy underpinning the CWS has not effectively changed these plights. [313] Perhaps our economy is still heavily concentrated with high barriers to entry for HDIs because we also cling and rely on neoliberal philosophies that advocate for a free market policy approach, i.e., the CWS. The continued preservation of the mainstream consumer welfare approach that has worked (debatable) for the developed US nation arguably conflicts with our public interest objectives. Alternatively, we need not abandon the whole consumer welfare standard but instead broaden its scope to significantly impact distributive justice for the black population (as envisioned by the Competition Act).

Below, we will sketch the development and shifts of the CWS with a focus on where it began – the US. The rationale for such a review is to understand to what extent South Africa was influenced by the same mainstream CWS that started in the US. This is to determine the way forward for our legislation's normative framework.

5.2 Development of the CWS in the US

[312] Lopez-Galdos, M. 2017. The consumer welfare standard debated at the senate: consensus, after all? Available: https://www.project-disco.org/competition/121417-the-consumer-welfare-standard-debated-at-the-senate-consensus-after-all/. Available: https://www.project-disco.org/competition/121417-the-consumer-welfare-standard-debated-at-the-senate-consensus-after-all/.

[313] Africa, S.S. 2019. *Sustainable development goals: country report 2019*, Buthelezi, T., Mtani, T. & Mncube, L. 2018. *The extent of market concentration in South Africa's product markets*, *Mid-year population estimates.* 2021, *National Empowerment Fund Intergrated Report*. 2021, *National status and trends on broad – based black economic empowerment.* 2019. South Africa, ibid., Ramaphosa, P. 2022. *Remarks by President Cyril Ramaphosa at the opening of the inaugural Black Industrialists and Exporters Conference*, UN. 2022. *The sustainable development goals report 2022*.

The CWS has been universally understood to be the valid normative approach to interpreting competition laws. In its most basic form, the CWS is a technical metric used by most jurisdictions to analyse conduct – the US is at the forefront of utilising the standard. The CWS analyses whether, from a consumer perspective, conduct should be interpreted as likely to cause injury towards consumers – such analysis shall *not* go beyond the scope of the consumer perspective.

The CWS has been crowned as the yardstick that enforcers and judiciary use to determine whether conduct in restraint of trade is prohibited or a standard business practice. The relevance of CWS has gone through massive paradigm shifts over the years, even to the extent that it is questioned by the current FTC Chair, Lina Khan. Below, we will trace these shifts.

The CWS may be described as a narrow-focused yardstick that holds that agreements or conduct should be in restraint of trade should the consumer price be compromised to the detriment of consumers. In terms of the Federal Trade Act,[314] such injury should not be "outweighed by countervailing benefits to consumers or competition". [315]

Section 1 of the Sherman Antitrust Act of 1890 stated that conduct, Agreements and formation of trust in restraint of trade are "declared illegal". [316] The courts were granted a mandate to determine whether an unlawful act or practice occurred. Hence, the courts relied on the normative approach, consumer welfare standard (CWS), to make such a determination.

As mentioned above chapter, a key aspect of the Chicago school of thought is that the goal of competition law is solely to protect consumer welfare. [317] The Chicagoans relied on the line from Brown Shoe where the Supreme Court said, "It is competition

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[314] *Federal Trade Commission Act,* 1914.

[315] Section 45(n) of ibid.

[316] Section 1 of *The Sherman Antitrust Act,* 1890.

[317] Robert Bork heavily discussed this standard in Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. Robert Bork heavily discussed this standard in ibid.

and not competitors, which the (Sherman) Act protects". [318] The Chicagoans argued the line affirmed the court's stance that there is no need to regard non-efficiency-based goals like promoting effective participation of small competitors in a market, conserving the environment, redistributive justice, etc. If anything, the focus on the above non-efficiency-based goals, in their opinion, would harm efficiency. [319] Hovenkamp (a vocal proponent of the consumer welfare standard) argued that consumer welfare should be asserted as the central goal of antitrust and should ignore the 'non-efficiency' goals that the Harvard school promotes. [320] Proponents of the CWS argue that it is "an economic decision, not a political decision", and a political decision of any nature has no place in assessing whether or not consumer welfare has been threatened. [321]

During the last few decades, the consumer welfare standard has been an essential concept at the centre of attention and debate. Some argued that the consumer welfare standard perpetuated monopoly and wealth inequality because when the CWS was booming in the US, fairness and inequality "lost favour". [322] It seems that during the CWS era, preserving equality was not a priority because doing so would harm efficient firms. [323] Hence, one of the significant issues surrounding the relevance of CWS is the argument that consumer welfare is narrow and does not help fulfil public interest goals because the non-efficiency-based goals fall outside the scope of 'making the market work'. Some authors even believe that CWS is not equipped to respond to modern digital markets, which will be delved into below.

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[318] *Brown Shoe Co Inc. v United States.* 1962. United States Supreme Court.at 344

[319] Ibid.

[320] Townley, C. 2009. *Article 81 and public policy.* Portland: Hart.at 14.

[321] Ibid.

[322]Fox, E.M. 2000. Equality, discrimination, and competition Law: lessons from and for South Africa and Indonesia. *Harvard International Law Journal.* 41:579. At 582

[323] Ibid.

When one traces back the CWS as a goal of antitrust across jurisdictions, Justice Bork's sentiments in the antitrust paradox seem to have given life to this standard. [324] Bork held that Senator Sherman intended to ensure that competition exists for the welfare of consumers and not competitors. Furthermore, Sherman held that the US Congress intended to draft the antitrust legislation to unilaterally protect consumers from high prices, not to protect competitors. This narrow approach solely focused on anti-competitive conduct that would cause the consumers to pay a high price or be harmed. This means that if pricing was not high, conduct aligned with its goal of protecting consumer welfare (surplus) and was practising sound competition because the conduct was economically efficient. [325] Section 1(b)[326] of the Competition Act states that the purpose of the Act is consumer surplus. The CWS should not be confused with what economists call (TWS). TWS is concerned with welfare or the surplus of consumers and producers instead of unilaterally focusing on consumers. The debate and confusion surrounding whether authorities and presiding officers should apply the consumer welfare standard or the Total Welfare Standard (TWS) arose during the 2000 large merger between Trident Steel and Dorybyl. [327] Section 2(c)[328] inclusion seems to protect total welfare. Section 2(f)[329] of the Act has a social equity focus. The CWS is used in modern antitrust enforcement to evaluate mergers

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[324] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster, Bork, R.H. 1979. *The Antitrust Paradox: A Policy at war with itself.* Simon & Schuster.

[325] *See* Wu, T. 2018. *The curse of bigness : antitrust in the new gilded age.* New York: Columbia Global Reports, ibid. (In the book Wu suggests that Robert Bork's narrow view of antitrust goals was implausible, and that the consumer welfare goal has incapacitated the law.)

[326] Section 1 (b) *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .to provide consumers with competitive prices and product choices;

[327] *Large merger between Trident Steel (Proprietary) Limited ("Trident Steel") and Dorbyl Limited ("Dorbyl") for the acquisition of three operations of Baldwins Steel, a division of Dorbyl Limited.* 2000.At page 18

[328] Section 1 (c) : to promote employment and advance the social and economic welfare of South Africans

[329] Section 1(f): to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

and below will evaluate whether the CWS in merger consideration is why our markets are concentrated and have skewed ownership.

The US antitrust policy has long adopted a narrow view [330] because the objective of the Sherman Act was unilaterally concerned with economic goals. The objective of economic goals will be met because the CWS will be the appropriate standard to measure whether or not the economic objective is met. An ill-fitting standard as a yardstick for legality may have various effects (material effects or not); however, I tentatively believe that in such a case, the effects are material.

In making this point, this segment of the thesis seeks to review whether the current narrow consumer welfare standard is the appropriate standard/metric for evaluating compliance with our broad competition law and policy. Instead, perhaps we need to rely on a standard of evaluation that fits the broader developmental agenda South Africa seeks to meet by 2030. [331]

5.3 Neoliberal model of Competition Law

Elizabeth Martinez and Arnoldo Garcia [332] state the following:

> Neo-liberalism is a set of economic policies that have become widespread over the last 25 years. Although the word is rarely heard in the US, you can see the effects of neo-liberalism here as the rich grow richer and the poor grow poorer...Around the world, neo-liberalism has been imposed by powerful financial institutions like the International Monetary Fund (IMF), the World Bank and the Inter-American Development Bank....the capitalist crisis over the last 25 years, with its shrinking profit rates, inspired the corporate elite to revive economic liberalism. That's what makes it 'neo' or new.

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[330] Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. ibid.(This is evident in Judge Bork's 1978 book that held the (flawed) argument that competition ought to be concerned with consumer welfare, as markets are self-correcting. The most efficient firms would be successful. The objective of the Act should be the economic goals. Therefore, their enforcers need not be concerned with social or political objectives.)

[331] The 2030 Plan which, amongst others, aims to eliminate poverty and reduce inequality and growing an inclusive economy.

[332]Martinez, E. & Garcia, A. 1997. What is neoliberalism?a brief definition for activists. Available: https://www.corpwatch.org/article/what-neoliberalism. Available: https://www.corpwatch.org/article/what-neoliberalism.

The current mainstream CWS is heavily influenced by the neoliberal ideology, which respects and canvasses the autonomy of industrialists without government intervention. The neoliberal social and moral ideology favours increased private property rights, free market and free trade policies. Leading nations from the West, like the US, adopted the neoliberal ideology and received some economic prosperity, which later exacerbated wealth inequality trends to the detriment of the Americans. This is affirmed by the current state of affairs, where one may believe that adopting neoliberalism produced extraordinary social, wealth, political and income inequality. These neoliberal policies have led to the population of countries being disempowered and having poor well-being while few market participants had disproportional wealth. South Africa is one of the regions where neoliberalism was adopted and favoured; however, she bore the brunt of the effects of the ideology of vast wealth inequality.

Neoliberalism is described as "an economic theory that believes that the way to advance human well-being is to encourage individual entrepreneurial freedom and create institutions that assert strong [policies] of private property rights, free market and free trade". [333] The role of the State in a neoliberal market is to oversee the function of such private property rights, free market and trade. Still, it must "take a hands-off approach to all other rulemaking" [334] that is centred around the objectives or policies.

A neoliberal market rewards merit and punishes inefficiency. This ideology believes that it is the most efficient firm that will gain market power and will gain such power because of merit. The ideology cannot reconcile with the proposition that such benefits "can be achieved through concerted practices or agreements." [335] It is considered

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[333] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846.at 4.

[334] Ibid.

[335] Monbiot, G. 2016. Neoliberalism – the ideology at the root of all our problems. Available: https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot. Available: https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot.

problematic for a firm to manipulate its position to enjoy the advantages of a dominant market, reaping the same benefits as an efficient firm. Contrary to its legislative objectives, this undermines the Act's intended role as an instrument for rectifying inequality and promoting inclusivity.

The neoliberal model focuses on CWS in the competition law context. Economists claim that the consumer welfare standard focuses on consumer surplus, the " ability of consumers to benefit from lower prices and higher output". [336] This model ignores the necessity of public policy concerns like redistributive justice, eradication of inequality, poverty and skewed ownership trends that grapple with post-apartheid South Africa. Instead, the model believes competition law should follow a narrow approach to protecting economic efficiency, the competitive process and consumer welfare. It is the most efficient business that will gain economic prosperity. Those deserving businesses with market power alone should have it, and any interference with that efficiency will result in the market suffering. Authors believe that the neoliberal ideology exacerbates systematic inequality/structural racism because the already privileged will gain market power, excluding small businesses. Those already wealthy market participants will benefit from the perfect market structure.

Structural racism in South Africa remains ripe and lacks effective policy solutions. Black South Africans' lives have been filled with unjust rules, which need to be reviewed and replaced with effective policy solutions. However, even with the current policy solutions meant to dismantle such inequality and racism, it seems little effective enforcement has occurred. The rich (white) continue to gain generational wealth, while the poorest (black) get poorer and poorer. [337] Pegging on an ideology reinforcing the same structural racism is counterproductive, and it is understandable why such

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[336] Lianos, I. 2018. *The poverty of competition law: the long story.* Centre for Law, Economics and Society.At 19

[337] Allison, S. 2015. Black economic empowerment has failed': Piketty on South African inequality. Available: https://www.theguardian.com/world/2015/oct/06/piketty-south-africa-inequality-nelson-mandela-lecture. Available: https://www.theguardian.com/world/2015/oct/06/piketty-south-africa-inequality-nelson-mandela-lecture.

legislation that seeks to assert vital neoliberal goals would be ineffective. Most developing nations are advised by global financial institutions that regard the ideal market structure to affirm the neoliberal policies. [338]This is despite critics of neoliberal policies who argue that the economic theory reinforces structural racism and racial rules within the market. Therefore, it is ineffective for developing countries with a rife colonial past determined to 'rebuild' their nations.

In 1971, the future US Supreme Justice Powell sent a memo to the then US Chamber of Commerce titled 'Attack on American Free Enterprise System'. [339]With the memo, he called on businesses to organise, plan and understand the importance of political power to businesses economic interest". This memo established various think tanks that focused on promoting what is deemed conservative academics promoting neoliberal economic centres or Chicagoan agenda. Banyam Applebaum from the New York Times wrote about the tremendous financial support of scholars who agreed that America's free enterprise system was under attack. [340] In his piece, he outed George Stigler as one of the scholars who received a financial gain from a $25000 position at the University of Chicago with a large research endowment by Charles Walgreen. [341] Elizabeth Popp-Berman, a sociologist, held that big business felt threatened by antitrust enforcement, and the then big business supported scholars because they were defending against progressive policies brought about by the New Deal. [342]

5.3.1 George Stigler and Richard Posner's1980 memo

In 1980, Stigler and Posner sent a memo to Martin Anderson, an economist on President Reagan's transition team. The memo is believed to be an immersion of CWS in competition law. The memo is believed to have been pivotal in 40-plus years of

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[338] Ibid at 996.

[339] Powell, L. 1971. Attack on american free enterprise system. *Snail Darter Documents.* 79.

[340] Ibid

[341] Ibid

[342] Ibid

antitrust enforcement. [343] Stigler and Posner's memo held that markets should benefit from the doubt. Before the CWS immersion, America was barriers to high income and profits. In the 1930s -1970s, the New Deal resulted in increased tax regulations that put high barriers to higher income and profits for corporations. The New Deal was not favourable to the rich 1%. However, it was a pivotal moment when high government intervention, through various regulations, aimed to curb the inequality gap that had engulfed the US at the time.

5.3.2 The influence of neoliberal free market policies

In US v General Dynamics Corpo,[344] the court allowed mergers that will have a high market share post-merger. The rationale was that the neoliberalist philosophy held that because there continues to be ease of entry in a market or substantial efficiencies, such a merger did not threaten consumer welfare. The government's reliance on market share increase post-merger was rejected. One wonders if there were reliance on the New Deal or populist philosophies, the court would have reached the same conclusion.

What is confusing is that, in the South African context, we have seen many times where the increase in market share has been welcomed as a threat to consumer welfare. In trying to determine whether abuse of dominance has occurred, the Competition Act relies on the percentage of market share as an indicator of dominance, which may lead to abuse of other market participants.

In Continental T.V. Inc v GTE Sylvania Inc. [345], Justice Powell ruled that non-price vertical restraints warranted only the rule of reason analysis and not per se. The New York Times writer Applebaum believes that giving businesses the benefit of the doubt,

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[343] Bush, D. & Glick, M. 2022. *The "conspiracy" of consumer welfare theory*. Available: https://www.promarket.org/2022/08/12/the-conspiracy-of-consumer-welfare-theory/ [Available: https://www.promarket.org/2022/08/12/the-conspiracy-of-consumer-welfare-theory/].

[344] United States v. General Dynamics Corp. 1974. United States Supreme Court.

[345] Continental T. V., Inc., et al. v. GTE Sylvania Inc. 1977. United States Court of Appeals.

like in this matter, holding vertical exclusive customer and territory restrictions, is difficult to prohibit.

Additionally, the result of neoliberal policies in the US is said to have been higher income for the top 1% by 1980 post-neoliberal policy. The economic performance of the neoliberal free market policy deteriorated, e.g., GDP, labour productivity, real wage, unemployment spiked.

In recent years, there have been major developments and shifting of the ideology and doctrinal influences. In the last decade, many scholars have criticised the Chicago school that brought about CWS. In turn, these scholars support abandoning the strict CWS approach in the US. One wonders to what extent South Africa can continue to rely on the CWS when ascertaining whether conduct, agreement or a merger is in contrast with public interest objectives.

5.4 Navigating multi-sided platforms

"[O]ne of Mr. Rockefeller's most impressive characteristics is patience."

—Ida Tarbell, A History of the Standard Oil Company. [346]

Another area in reliance on CWS that may threaten the effective fulfilment of public interest objectives is the digital economy context. The Act is responsible for fulfilling the public interest objective of enhanced market access for HDIs to this growing economy in South Africa. However, continued reliance on the CWS may fail in this objective.

We live in the digital age, which may be described as an oligopolistic industry. Fortunately (or unfortunately), this age of modern digital economies is gaining traction in most jurisdictions, including developing nations. Today, most developing markets (South Africa included) are transitioning from total brick-and-mortar to digital economy.

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[346] Tarbell, I. 1905. *John D. Rockefeller: a character study.*

Utilising digital platforms is the way of life and is regarded as efficient by many consumers, but this industry is described as oligopolistic. The COVID-19 pandemic streamlined the transition for developing economies because most were forced to rely on the digital economy to purchase necessities and access information. Rather than relying on the traditional method of going to shopping malls to purchase basic goods, most South Africans were using e-commerce. Additionally, during the 2020 COVID-19 pandemic, more South Africans relied on audio-visual broadcasting and digital platforms as a source of information access versus relying on newspapers. This increasing power is articulated in multi-sided platforms growing market power in the modern economy.

There is a lower representation (compared to the relatively untransformed traditional brick-and-mortar market) of HDIs in ownership or participation as business users of multi-sided platforms (MSPs). [347] The HDIs face much more barriers to participation than a typical SME that is not owned by an underrepresented owner who lacks business networks, capital and user support from large businesses.

An MSP platform may be described as a digital marketplace connecting sellers and buyers, i.e., enabling interactions between seller and buyer—an example of well-known international MSPs is Amazon Marketplace, Uber, Uber Eats, etc. The local MSPs consist of Mr Delivery, Taxify, Takealot, etc. In 2022, the South African Competition Commission (the Commission) issued an inquiry titled *Online Intermediation Platform Market Inquiry* [348] because there was reason to believe that the features of MSPs could restrict competition and effective participation of SMEs and firms owned by HDIs to the detriment of public interest. The Commission found that the lack of transformation in the traditional market has translated into fewer

[347] *Online intermediation platforms market inquiry*. 2022. At 3 and 40.

[348] Ibid.

business users of MSPs in South Africa. It argued that such barriers to participation for HDIs would "threaten a new and deeper level of exclusion for South Africa". [349]

This thesis focuses on the features of these platform markets that may block the effective participation of HDIs, restrict competition and limit consumer choice. The below seeks to review whether the CWS continues to be an effective tool to ensure that features of the platform market do not block effective market participation of HDIs to the detriment of competition, prices and consumer choice.

One cannot argue that MSPs foster (and have fostered) incredible innovation. However, research shows that once the MSP enjoys market power, that may stifle innovation in the long run, even if it cannot be apparent in the short term. Research states that the ecosystem enjoyed by MSPs may be why such platforms gain market power. Hence, Khan recommended that competition laws look at firms' structure – this means investigating whether a firm's structure poses a risk of harm. The harm she articulates is in the form of conflicts of interests or whether the firm's structure may create cross-leverage advantages across distinct lines of business.".[350]

The market power of MSPs raises concerns of anti-competitive conduct, reduction of innovation and abuse of consumer welfare, to which effective government intervention is needed to mitigate the excessive power in various ways. Some authors have written and provided recommendations on dealing with powerful multi-sided platforms. In those recommendations, the reliance on the CWS is no longer regarded as an effective antitrust intervention that the government should utilise.[351]Now, we question whether this transition to MSPs in South Africa warrants the shifting from the CWS to

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[349] Ibid.

[350] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.at 717("Applying this idea involves, for example, assessing whether a company's structure creates certain anticompetitive conflicts of interest; whether it can cross-leverage market advantages across distinct lines of business; and whether the structure of the market incentivizes and permits predatory conduct.")

[351] Parker, G., Petropoulos, G. & Alstyne, M.V. 2020. *Digital platforms and antitrust.*

another standard that will (if the current standard fails) effectively respond to issues of anti-competitive conduct that may harm HDIs.

Aside from issues of public interests or non-efficiency goals, the CWS is seen as outdated for utilisation in any field of competition enforcement, but especially in the regulation of competition in the digital platform industries. One of the leading people who argue that the CWS overlooks a myriad of harms and thus ill-fitting in modern US times – is FTC Chair Lina Khan.

What is distinctive about the digital market/MSPs is that they may prefer to prioritise gaining market power over short-term profit making (pursuing growth over short-term profit].[352] In her article, *Amazon's Antitrust Paradox*, Khan argues that most MSPs prioritise attaining market power over short-term profit making. Remember, CWS focus on detecting short-term price effects (e.g. product price increase).[353] In terms of the consumer welfare standard, welfare will be minimised when there is an increased price or decrease in output. Anything in between that will be irrelevance and overlooked by policymakers. The CWS may fail at detecting harm since MSPs are not increasing product prices. Khan (rightly so) describes the CWS as a framework that primarily measures harm by detecting " short-term price effects" and that the focus on these short-term price effects may result in under-appreciating a multitude of risks associated with MSPs conduct and structure.

Again, in her note, Khan makes an example of non-pricing harm in the form of 'vertical integration', which the CWS under-appreciates. The CWS may under-appreciate 'predatory pricing' harm, leaving us (South Africa) with increased market power and barriers to entry for HDIs who depend on the platform to act as essential intermediaries. [354] In essence, Khan argued that the current CWS framework was unequipped to respond to the modern digital economy in the US, and there needs to

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[352] Include the rebate manner and buying infant firms, big data of destroy competitors and consumer privacy.

[353] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.at 716.

[354] Ibid.at 710.

be a reform. The rationale was that business strategies employed by digital platforms such as Amazon pose anti-competitive threats that the consumer welfare approach fails to recognise or under-appreciate. [355]

5.4.1 Dual role and risk of predatory pricing

MSPs can be described as being both platform suppliers and competitors. Using Amazon's business structure as an example, Khan argues that an MSP structure where the platform performs as both a supplier of a platform and, at times, a competitor may pose a risk of conflict of interest. The two lines of being both supplier and competitor may grant MSPs like UberEats and Amazon advantages that they may use to easily attain market power by squeezing out competitors who rely on their platform. Khan believes that the reliance on the CWS in the US overlooks the risk of predatory pricing and dual role. Perhaps the conduct and Agreements concluded in the highly concentrated market of platforms like Mr Delivery in South Africa may need surveillance by considering how the structure of such platforms may pose a risk to the competition and other public interest objectives that the Competition Act prioritises.

Suppose we abandon Khan's suggestion and rely on mainstream CWS. In that case, we may risk having extensive digital platforms that conduct a myriad of predatory behaviour, collusion and abuse of the conflict of interest that comes with the structure of the digital platforms.

5.4.2 Adopting a two-step process and unbundling

Dina Waked in *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices* [356] suggests that developing countries should adopt what she coins as the 'two-step process' to design effective competition enforcement. Waked notes that the policymaker should first seek goals that can guide the enforcement

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[355] Ibid.at 803

[356] Waked, D. 2015. Antitrust goals in developing countries: policy alternatives and normative choices. *Seattle University Law Review.* 38:62.At 947.

product. Secondly, the policymaker should assess the market structure accompanying the policy framework. If the South African developing modern economy adopted the two-step process, this would mean that our parliament, acting together with the administration, would decide the appropriate goals that would guide the law or policy instrument. When armed with appropriate goals, perhaps the judiciary or relevant assessment body would be responsible for properly assessing the market structure and making a judgment that will accompany and contribute towards the policy framework's intended goals.

However, this thesis suggests that perhaps one needs to understand the market structure before identifying the goals that may influence substantive rules. When there is a clear understanding of the market structure, we may elect goals that are fit for the specific market structure. This suggestion is the inverse of the 'two-step' process.

Lina Khan, in *Amazon's Antitrust Paradox*, argues that the CWS is unequipped to remedy the market power that engulfs the modern economy. [357] The current competition laws have not kept up with the economic structure's material changes. Stiglitz said it best in the 2018 *Competition and Consumer Protection in the 21st Century* conference at Columbia University: "If standard competitive analysis tools don't show that there is a problem, it suggests that something may be wrong with the tools". [358]

Allocative efficiency is the goal of the Chicago school that supports the promotion of consumer welfare maximisation. There are three standards related to economic efficiency. [359] One of the standards related to economic efficiency is consumer surplus (welfare). Consumer surplus is described as the surplus of an individual consumer, attained by the difference between consumers' product valuation (the price a

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[357] Khan, L. 2016. Amazon's antitrust paradox. *The Yale Law Journal.* 126(3):710 - 805.at 710.

[358] Stiglitz, J. 2018. America has a market power problem. *Competition and Consumer Protection in the 21st Century*. Columbia University, 2018.

[359] Three welfare standards are related to economic efficiency: consumer welfare (surplus), producer welfare and total welfare.

consumer is willing to pay for a product) and the price paid for the product. [360] When pegging onto consumer welfare, that implies the goal is to advance consumer surplus maximisation while ignoring producer and total welfare.

Our competition laws should be wary of being bound by the consumer welfare standard. I do not think we should abandon the CWS but follow a hybrid approach of being harm-focused and appreciate non-pricing concerns because "antitrust was never about (unilaterally)promoting consumer welfare, but promoting social, political and economic benefits from an effective competitive process (brought by the creation of Trusts)."[361]

In a recent interview with CPI Antitrust Chronicle, Professor Eleanor Fox contends that the consumer was never the limiting value of antitrust law.[362] Furthermore, one needs to 'unbundle' this standard to uncover the antitrust objective. Only after unbundling CWS can consideration be made for non-efficiency-based goals such as jobs and harnessing effective participation of small businesses owned by HDIs. [363]

5.5 Can we rely on the CWS?

I have alluded above that reliance on the CWS is said to be misguided in responding to monopsony harm. The CWS is not interested in long-run dynamics or solutions but in short-term lower prices. However, an effort to reform and rethink the competition law and policy is understanding the profound effects of continued reliance on the narrow CWS on the labour force. The Preamble of the 1998 Act includes workers as

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[360] Townley, C. 2009. *Article 81 and public policy.* Portland: Hart.at 15

[361] *See* Orbach, B. 2013. How antitrust lost its goal. *Fordham Law Review.* 81(5):2253 - 2256.

[362] See CPI talks with Eleanor M. Fox. 2019. Available: https://www.competitionpolicyinternational.com/cpi-talks-eleanor-fox/. Available: https://www.competitionpolicyinternational.com/cpi-talks-eleanor-fox/.

[363] Ibid. at 3.

one of the stakeholders it seeks to protect.[364] When firms attain monopsony power, despite its workers indivertibly productive and efficient, the fruits of that labour often are directed to firm owners, shareholders and executives. The fruits of high efficiency rarely go to consumers (by firms offering low product prices) or to the workers by offering higher wages or better working conditions. In monopsonic labour markets, the depressed wages are usually for the benefit of employers to gain more profit. In monopsonic labour markets, employers have significant control over the wage rates and employment conditions because workers have limited alternative job opportunities within that specific market. This can reduce wages and bargaining power for workers in such markets. [365]

The US authorities have recently decided to indict firms with a supply-side monopoly. Increased monopsony power has affected workers' wages and working conditions and dishonoured what Senator Brown calls 'the dignity of work'. Considering how we have seen the modern market operate, how do we, as developing South Africa in a post-apartheid economy, ensure that firms with monopsony power do not manipulate workers? Reforming the traditional and mainstream consumer welfare may reduce monopsony power and help vulnerable workers. The senior senator from Minnesota, Amy Klobuchar, in her book *Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age,* believes that US antitrust officials have made a big mistake of

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[364] *Competition Act,* 1998. "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.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans."

[365]OECD. 2022. *OECD employment outlook 2022*. Available: https://www.oecd-ilibrary.org/content/publication/1bb305a6-en [doi:https://doi.org/10.1787/1bb305a6-en]." Employers in monopolistic labour markets are likely to depress employment and pay lower wages in order to reap higher profits"

ignoring how corporate consolidation that results in industry concentration may negatively affect labour markets. Modern industries tend to look like somewhat of a monopsony.

A monopsony may be defined as a market with only one buyer (an inverse of monopoly where a market has one seller).[366] Most industries in the modern age tend to be concentrated, with few firms acting as employers. Unfortunately, the fewer firms in an industry, the more those firms can control the cost of labour. When firms have monopsony power and the ability to control the cost of labour, it is fertile ground for those companies to coordinate with their rivals by fixing the cost of labour –to the detriment of the labour market. The coordinated actions these firms with monopsony power may adopt can be in covert ways, like in the form of 'No poaching Agreements'. For example, in 2006, the US Department of Justice (the DOJ) filed a lawsuit against hospitals in Arizona [367] , alleging that the hospitals conspired to decrease the nurses' wages. A network of hospitals belonged to the Arizona Hospital and Healthcare Association. Member hospitals shared sensitive information related to workers' wages to fix the wages and benefits of workers in the Arizona region.

Back in 2010, software engineers in Silicon Valley filed suit against powerful tech companies for alleged conduct of entering into no hire agreements of software engineers who were employed by rivals. The powerful tech companies included Adobe, Apple, Google, Intel, Intuit, Pixar and Lucasfilm. They were alleged to have entered into anti-poaching agreements that led to depressing the wages and working conditions of Silicon Valley software engineers. Steve Jobs, the former Apple CEO, was alleged to have gone as far as publicly threatening that it would be 'war' if their rivals continued to cold-call software engineers in the employ of Apple to jump ship. Ultimately, the powerful tech companies agreed to settle for the alleged conspiracy for

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[366] See Robinson, J. 1969. *The economics of omperfect competition.* Palgrave Macmillan London. The first person to introduce the term 'monopsony' has been attributed to Robinson.

[367] See *United States of America and the State of Arizona v Arizona Hospital and Healthcare Association and AzHHA Service Corporation.* 2007. United States District Court of Arizona.

$20 million [368] and $415 million [369]. However, Senator Klobuchar argued that had lawmakers not overlooked corporate consolidation, it would have resulted in industry concentration. It may have negatively affected labour market antitrust. Senator Klobuchar believes that the amount of damages that winning plaintiffs under antitrust laws would have gained in damages could have been around $9 billion. [370] But, the Senator believes that the US government has long ignored the belief that there is a need for antitrust enforcement in the labour market.

In *Antitrust and Labor Market Power*, Azar et al. argued that the narrow consumer welfare standard might be inappropriate to provide economic evidence that employers provide a velar financial and legal analysis to prove that market power exists in the labour market. For this reason, Azar et al. propose that policymakers should clearly state the various elements that may help analyse whether market power exists. An employer may be assumed to have market power if they control 50 per cent of employment in the labour market, can limit wages below what would be charged in a competitive market, can wage discrimination, or can impose unfair non-wage related contractual terms like non-compete agreements.

The post-apartheid economy in South Africa is highly concentrated, with a small number of firms continuing to hold market power and accounting for the bulk of the sales. [371] Research has shown that market concentration impacts labour markets and income distribution. [372] This monopsonic power may be abused to the detriment of the vulnerable South African labour force. The Herfindahl-Hirschman Index in most

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[368] Intuit, Lucasfilm and Pixar settled for this amount.

[369] Adobe,Apple, Google and Intel settled for this amount.

[370] Klobuchar, A. 2021. *Antitrust: taking on monopoly power from the gilded age to the digital age.* Alfred A. Knopf. At 195.

[371] *Background note on competition amendment bill.* 2017. Pretoria.

[372] *The impact of the technological revolution on labour markets and income distribution*. 2017. United Nations. Available: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2017_Aug_Frontier-Issues-1.pdf [Available: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/2017_Aug_Frontier-Issues-1.pdf].

sectors is above 2500 [373]. In terms of s7(1)*(a)* of the Competition Act[374], a firm is presumed to be dominant if it has more than 45 per cent of the market share. Most employers in South Africa have monopsony and market power to offer uncompetitive wages and conditions of employment.

One of the shortcomings of the reliance on the narrow CWS is that it limits the scope of the competition policy. For instance, if we sought to use competition policy to protect the vulnerable labour force by targeting monopsony harm, the CWS may not be far-reaching enough to realise this goal.

In terms of the Preamble of the Act, the 2018 Amendment Act indicates that one of its purposes is to protect and promote employment and employment security.[375]Protecting employment and employment security includes protecting workers' bargaining power and any harm from monopsony firms which may hinder

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[373] The Herfindahl-Hirschman Index is used to measure average market shares/ concentration in a sector. An average market share below 1500 means sector is unconcentrated. Between 1500 and 2500 means sector is moderately concentrated. While an average market share above 2500 means sector is highly concentrated. See Buthelezi, T., Mtani, T. & Mncube, L. 2018. *The extent of market concentration in South Africa's product markets.*

[374]*Competition Act,* 1998.

[375] See Preamble of *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

*"*To amend the Competition Act, 1998, so as to introduce provisions that clarify and improve the determination of prohibited practices relating to restrictive horizontal and vertical practices, abuse of dominance and price discrimination and to strengthen the penalty regime; to introduce greater flexibility in the granting of exemptions which promote transformation and growth; to strengthen the role of market inquiries and merger processes in the promotion of competition and economic transformation through addressing the structures and de-concentration of markets; to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons while at the same time protecting and promoting employment, employment security and worker ownership; to facilitate the effective participation of the National Executive within proceedings contemplated in the Act, including making provision for the National Executive intervention in respect of mergers that affect the national security interests of the Republic; to mandate the Competition Commission to act in accordance with the results of a market inquiry; to amend the process by which market inquiries are initiated and promote greater efficiency regarding the conduct of market inquiries; to clarify and foster greater certainty regarding the determination of confidential information and access to confidential information; to provide the Competition Commission with the powers to conduct impact studies on prior decisions; to promote the administrative efficiency of the Competition Commission and Competition Tribunal; and to provide for matters connected therewith."

their employment security. This indicates that the legislature intends to protect workers' rights in South Africa. Until recently, US antitrust enforcement paid little attention to monopsony (or oligopsony) claims and alleged harm in the various labour markets.

5.6 Consumer Welfare Standard and merger considerations in South Africa

In light of the development of the CWS in the US sketched above, the question now is what extent SA has been influenced by the developments that have taken place in the US. Below, we will review public interest case law that relied on the mainstream CWS in contrast with public interest case law, where the courts deviated from relying on a non-CWS.

The below further shows how competition authorities have treated the goals of black economic empowerment, economic equality and fairness when tasked with merger analysis in post-democratic South Africa.

The developing nations have found resonance with the standard because it (among others) fed into the neoliberal beliefs of wealth creation. The goal of the CWS is influenced by the neoliberal perspective that the countries' goals are to maximise private property ownership and individual entrepreneurship. This is even though antitrust for the developed nations is an end. In contrast, competition enforcement is often a means to an end for developing nations, i.e., of various public interest goals. As a developing nation with a discriminatory past, South Africa has these public interest competition goals: removing barriers to entry for HDIs, reducing inequality, advancing distributive justice, and promoting spread of ownership and control in concentrated industries. Therefore, based on the difference between the neoliberal perspective that informs the CWS, adopting influence truly doesn’t resonate with these public interest objectives.

The objectives of the Act should match with the approach or standard of evaluation that will give effect to the Purpose and objectives of the Competition Act (the Act). If the objective of the Act encompasses a broad range of public policy goals, the

evaluation standard should align with that scope. However, in the case of CWS, it does not follow such a comprehensive approach.

5.6.1 Spree and Superbalist's large merger consideration

In 2017, an extensive merger consideration between MIH E-commerce (MIHE) and online retailer Takealot (RF) occurred, eliminating one competitor in the e-commerce industry – Spree. The merger of the two large online retail market participants, i.e., Spree and Superbalist, occurred via MIHE. MIHE acquired majority shares at Takealot (RF). Takealot is an online retailer that sells various consumer goods through its website, Takealot.com. [376]

It might be worth noting that the parties in this merger (direct or through subsidiaries), Superbalist, Takealot and the target firm Spree, all operate in the South African online retail market. Post-merger, the three would be majority-owned by the same titan – Naspers-related firms.

Naspers traces its inception to the apartheid era when racial discrimination and exclusion of black industrialists was prevalent. Post-apartheid Naspers is still powerful, if not more. One of the many subsidiaries of Naspers is Media 24. Media 24's portfolio includes the online retailer Spree and effective industry competitor Spree, which sells clothing, shoes and accessories.

Naspers claimed that the rationale for this significant and large merger was to provide funding for Takealot so that it may reach higher heights. Takealot/Superbalist, at the time, was a leader in the e-commerce market in South Africa. The IT resources and logistics needed to run an e-commerce platform "that reaches a profitability level" were appreciated by the acquiring firm Naspers/MIHE. [377] The acquiring company MIHE also claimed that no jobs would be lost and thus there were no public interests that would trigger disproval of the merger. Furthermore, Naspers' subsidiary MIHE wanted

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[376] MIH Ecommerce Pty Ltd and Takealot (RF) Pty Ltd. 2017. Competition Tribunal. At para 11.

[377] Ibid.at para 15

to increase their shareholding in Takealot (and Superbalist) from 47% to 58% (essentially downplaying the impact of such an increase in shareholding as immaterial).

Authorities are empowered by section 12A(3)[378]of the Competition Act 1998. This section empowers authorities that a merger may be disapproved on public interest grounds regardless of whether such a merger is pro-competitive.

Post-merger, we saw a shrink in market participants in the South African online retail industry because through this merger, online shopping platform Superbalist merged with major competitor Spree leaving just one other major competitor Zando. The issue is not that there is a limit to the number of market participants. However, it is a cause for concern when firms with reasonable market power merge – in this case, Superbalist/Spree/Takealot. Granted, the parties claimed that the efficiency gains attributed to this merger were merger specific. The below will show how the reliance on the consumer welfare standard has led to harmful mergers being overlooked as non-harmful.

The merger approval can be attributed to the Chicagoans' consumer welfare maximisation being prioritised to the (almost) exclusion of the other inherent and equally important public interests. The increased monopoly power that would culminate from such merger approval seemed to have been glanced over because a

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[378] (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

(a) a particular industrial sector or region;

(b) employment;

(c) the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged

persons, to become competitive; and

(d) the ability of national industries to compete in international markets.

price increase would not occur for e-commerce platform market (despite powerful market participants being decreased by the merger).

It is a common cause that, in terms of the Competition Act, a merger can reduce competition in an industry. Still, to the effect of a pro-competitive gain like efficiency or cost reduction, such a merger can be approved. In this case, Spree and Superbalist had considerable market power in the online shopping sector. However, it seems that factors that resulted in merger approval were reliance on CWS and determining the relevant market to motor retailers. These two factors helped the merging parties' case as it made them seem like they did not have considerable market power, nor could the merger harm consumer welfare. The Tribunal approved the merger despite the high possibility of disrupting the competitive aspect of the (then growing) South African online shopping market. Years later, the conglomerate Naspers (via MIHE), through its merger with Takealot/Superbalist, has resulted in not only the removal of an effective competitor, Spree (also owned by another of Naspers' subsidiaries Media 24), but an effective competitor, Zando.

Consequently, the e-commerce market is highly concentrated, with both big platforms within Naspers's portfolio as dominant firms. Perhaps Superbalist/Takealot's market power is attributed to low consumer price and efficiency but also because of monopolistic and monopsony power and collusion or gatekeeping other upcoming firms owned by HDIs in the online retail market from accessing such a lucrative industry. The Chicagoans held that government intervention should be sparingly done as this would render inefficient businesses dominant, harming the consumer welfare objective. The school believes that government intervention is a deterrence because

the market forces will naturally erode market power, resulting in various restrictive practices. [379]

In the context of the MIHE/Takealot merger, this would imply that competition authorities are not involved in ensuring that a rule of reason approach is applied. Tjarda argues that because market power is so prevalent in African countries, markets cannot be left to their own devices to erode market power and address the resulting competition issues automatically. [380]

More importantly, it's imperative to review whether the CWS is fitting enough to ensure we do not have approval for mergers that, on the face, might seem harmless by not raising prices and still being harmful in the long term because of merger-specific market concentration.

5.6.2 The Confines of the Chicago School: Shell South Africa (Pty) Ltd and Tepco Petroleum merger and Media 24 predatory pricing

The approval without conditions of the merger of Shell South Africa and Tepco Petroleum by the Competition Tribunal clearly depicts how the interpretation of Competition law can cripple the empowerment and betterment of HDIs. In this case, the interpretation that the Tribunal offered resembled the laissez-faire theory, which dispels government intervention that does not seem to harm consumer welfare. The Tribunal's reliance on this interpretation of the Act resulted in overlooking the predatory merger that Tepco may have been exposed to and the market structure that incentivises and permits predatory conduct.

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[379] vanderVijver, T. 2019. Law & ordo: exploring what lessons ordoliberalism holds for african competition Law regimes. *World Competition Law and Economics Review.* 42(3).at 1. ("Market power is often so strongly entrenched in African countries, that market forces alone are unlikely to do the trick by themselves. In addition, orthodox economic thinking may not be able to embrace the wider policy objectives that African jurisdictions wish to set, nor give tangible suggestions on how to set up consistent economic policies or deal with the interaction between political and market power.")

[380] Ibid.at 1.

The transaction was the sale of a black empowerment petroleum firm, Tepco Petroleum (Pty) Ltd (Tepco Petroleum), a subsidiary of Thebe Investment Corporation (Pty) Ltd (Thebe) by Shell South Africa (SSA). [381] Tepco Petroleum was South Africa's first black-controlled petroleum firm in 1994 and was partly financed by the black empowerment investment holding company – Thebe. According to the parties, Tepco 's principal business activity is the marketing and distributing of petroleum products. [382] Shell SA is a unit of the oil major Royal Dutch Shell incorporated in England and Wales, which is involved in oil and gas activities worldwide [383] – the main business of SSA in South Africa manufacturing and selling petroleum products. [384]

Before the merger, SSA would be restructured into two companies – Shell South Africa Energy (Pty) Ltd [385] and Shell South Africa Marketing (Pty) Ltd which would be responsible for retail marketing, marketing distribution network, commercial fuels, liquified petroleum gas, aviation, marine, lubricants and bitumen. [386]

Thebe concluded a deal to acquire a 25% stake in Shell's downstream marketing business (Shell South Africa Marketing). Shell SA Marketing would retain the Tepco brand and develop it in the market for as long as it remains viable and profitable. Additionally, according to the parties, Tepco would be managed by the then-management of Tepco (predominantly black). However, Shell SA Marketing would appoint three directors to the board of directors (including the chairman and managing director), and Thebe would only have one director on the board. Ultimately, Tepco Petroleum would be a wholly owned Shell South Africa Marketing subsidiary.

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[381] *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd.* 2002. Competition Tribunal.

[382] Ibid. at 3.

[383] Ibid. at 3.

[384] Ibid.

[385] *Shell South Africa Energy (Pty) Ltd* would be responsible for the refinery, chemicals, renewables, gas and power, exploration and production business See ibid. at 2.

[386] Shell SA would change its name to *Shell South Africa Marketing(Pty) Ltd* ibid.

Reports were that the transaction was “a huge milestone and in line with government objectives of securing 25% black ownership in all sectors of the local fuel industry in the next eight years”.[387]

In my opinion, the merger was predatory by an oil conglomerate with a revenue bigger than South Africa’s GDP. The transaction would absolve Tepco Petroleum in Shell SA Marketing, which would not increase the ownership stakes of black persons. Additionally, the Tribunal approving such a merger without any conditions is a testament to the danger of developing nations relying on the narrow CWS. I think that this merger approval, influenced by the Chicago school, sees no value in paying attention to transactions like Shell SA and Tepco, that may thrive off buying vulnerable smaller companies (or start-ups) to monopolise an industry and raise prices (in the long run). It is no coincidence that developed nations like the US have and are paying attention to consolidations that are predatory and monopolising integral industries that happen to be high volume, low margin, and capital intensive, where structural barriers to entry are rife. In this transaction, at most, Thebe post-merger would own 25% of the newly formed Shell SA Marketing, which, in my opinion, is not enough incentive to eliminate a black-owned firm in the highly concentrated petroleum market in South Africa. The unconditional approval of this merger, without regard for the spread of ownership in the petroleum industry, was probably the catalyst of the jurisprudence relating to competition and black economic empowerment.

One wonders whether a joint purchasing agreement would not have assisted the alleged financially burdened Tepco Petroleum, which was said to be on the verge of liquidation. Perhaps the Tribunal could have reflected on whether the black-owned firm could yield the same result by entering into a joint purchasing and marketing agreement. The joint agreement would have perhaps increased the efficiency of Tepco Petroleum through the economies of scale in purchasing and marketing.

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[387]News24. 2002. Shell deal boosts tepco operations. Available: https://www.news24.com/fin24/shell-deal-boosts-tepco-operations-20020416. Available: https://www.news24.com/fin24/shell-deal-boosts-tepco-operations-20020416.

The above-mentioned strategies advocated by the Chicago school remain evident as illustrated in the Media 24 predatory pricing case.[388]With the Chicago school's presumption that predatory conduct is not important, it insists that only straightforward/vanilla conduct such as mergers warrant consideration, placing a strong emphasis on economic analysis at the potential detriment of the public's interest. This scenario is evident in the 2018 predatory pricing case involving Media 24. Upon appeal, the competition appeal court overturned the tribunal's ruling based on two primary grounds. Firstly, the competition appeal court determined that proving predatory pricing requires specific evidence of exclusionary conduct rather than evidence of intent behind such conduct. Secondly, the competition appeal court deemed the average total cost threshold employed by the tribunal to be inappropriate.

The initial complaint was lodged by Gold Net News, a competitor of Media 24, with the Competition Commission. Between 1999 and 2009, Media 24 owned two newspapers in the small town of Welkom, Vista and Forum. Media 24 held a dominant position in the market, while Gold Net News accounted for approximately a quarter of the market share. Both Vista and Forum distributed their newspapers for free in the Welkom area and generated revenue through advertising sales.

From 2004 and 2009 , Media 24 significantly reduced the advertising rates for Forum. Gold Net News contended that these reduced rates fell below Forum's cost. As a result, in January 2009, Gold Net News exited from the market, followed by Media 24's closure of Forum nine months later. Resultantly, Vista became the sole remaining newspaper in the small-town newspaper market of Welkom.

Following an investigation, the competition commission referred the complaint regarding alleged predatory pricing to the tribunal. This case highlights the grip that Chicago school strategies continue to have in South Africa as recent as 2019. The

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[388] *Media 24 (Pty) Limited v Competition Commission of South Africa.* 2018. Competition Appeal Court. *Competition Commission of South Africa v Media 24 (Pty) Limited*

[2019] ZACC 26. 2019. Supreme Court of Appeal.

provision on predatory pricing lacks an extension to consider public interest and instead relies on economic analysis and/or the demonstration of pro-competitive efficiency.

5.6.3 Section 12A(3)(c): The ability to become competitive

The Act affirms that it is not enough for HDIs to get market access and participate within markets. Instead, the 2018 Act extends the scope in that merger consideration (and enforcement of the Competition Act in general) should support the ability of HDIs to be effective competitors [389]. Previously, the Act sought to ensure HDIs could enter, participate, and expand within the South African market.

In merger consideration, authorities need to determine whether a merger does not limit competition and erodes HDIs' ability to be an effective competitor. In the Anglo-American merger consideration, the Tribunal stated that a narrow interpretation of section 12A(3) was contrary to the ordinary language of the provision. [390]Using the Takealot/Superbalist merger above, authorities need to be cognisant that the merger was not impeding the ability of an HDI-owned firm (or SME) to be an effective competitor in the e-commerce market. Of course, we need to determine whether any merger-specific pro-competitive gains outweigh the lessening of competition.[391]The

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[389] The tribunal stated that it must be evaluated whether a merger will harm the public interest objective's encapsulated in s12A(3) of the Competition Act. See *Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation.* 2003. Competition Tribunal. At para 137. *Walmart Stores Inc v Massmart Holdings Ltd.* 2011. Competition Tribunal. *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd.* 2002. Competition Tribunal. at para 37 "It is important to emphasize that in terms of the Act our assessment of the public interest impact of the transaction may lead to the prohibition of (or the imposition of conditions on) a pro-competitive merger. Or it may result in us approving an anti-competitive merger. Hence, in balancing public interest and competition we are obliged to consider whether a merger that passes muster on the competition evaluation nevertheless falls to be prohibited because of its negative impact on any of the specified public interest factors including, in terms of Section 12A(3) (c), 'the effect that the merger will have on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive'.

[390] *Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation.* 2003. Competition Tribunal. para 156

[391] S12A (1)*Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

spirit of the CWS is not in line with the public interest of empowering HDIs when one is tasked to review a merger. For this reason, the CWS may bring about mergers to monopoly, i.e., predatory mergers.

Mergers to monopoly may be a means to block the ability of HDIs from becoming competitive market participants. In terms of the Chicago model, enforcers should focus only on those large mergers that may tend to be done to monopolise an industry or raise prices. The Harvard school approach sees value in paying attention to predatory conduct like buying start-ups to evade the attention of enforcers who seem to be looking for large mergers that will monopolise an industry.

The CWS may expose the South African market to predatory mergers that, in the long run, create extremely high barriers to entry of HDIs and their ability to become effective market participants, thus being counteractive to the public interest purpose of limiting barriers to entry for firms owned by HDIs (and SMEs), so that they may be effective competitors. The repercussions of this exposure to predatory mergers are far-reaching, especially in high volume, low margin and capital-intensive markets important for advancing and protecting democracy, i.e., health, media, oil, agro-processing industry, etc.

5.7 The Consumer Welfare Standard in media consolidations

The media continues to be integral to a country's democracy, and therefore, its concentration is problematic for issues beyond the scope of this thesis. The Media Development and Diversity Agency (MDDA)[392] published a report showing that most print media outlets in South Africa were owned by four corporations: Naspers (holding company of Media 24), Caxton CTP, Independent Newspapers and Avusa. Naspers was formed in 1912 and is a conglomerate that crossed to post-democratic South Africa. Its subsidiary is Media24, and in 2016, it was said to publish over 50 newspaper titles including the Daily Sun tabloid, South Africa's highest-selling daily. In the

[392] *Report on the transformation of print media in South Africa*. 2013. Media Development and Diversity Agency.

audio-visual/ radio space, there are the top three firms in the market: the state-owned South African Broadcast Corporation (SABC) has long held the monopoly. Then, following is PRIMEDIA[393]Kagiso Media. [394]

Radio is still one of the most accessible mediums, with 94 % of South African adults accessing such medium. [395]The dominant players in the audio-visual media industry are the government public service broadcaster SABC through the 18 public radio stations, three TV stations and Multichoice. The governmental Telkom dominates telecom, with Vodacom, MTN, and Cell C rivals in mobile communications. [396]

The media industry is one of the most important sectors in a country. When the media industry is also concentrated, it is problematic for the freedom of access to information. Senator Klobuchar argues that a concentrated "news gathering scene and news outlets will never produce a healthy political environment." [397] However, the South African media industry outlets industry is one of those industries that is not de-concentrated, nor do HDIs have an increased stake in the ownership of media outlets.

This chapter proposes that the 2018 Competition Act (working together with the various complementary policy instruments) should not only examine the obstacles that block the diversity of news outlets but also respond to the obstacles that media consolidation has posed for HDIs, specifically black woman-owned media outlets.

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[394] George, A. & Petrus, P. 2016. Media ownership and concentration in South Africa. In *Who Owns the World's Media?* New York: Oxford University Press. DOI:10.1093/acprof:oso/9780199987238.003.0031. At 17.

[395] Rabe, L. 2020. *A Luta Continua : a history of media freedom in South Africa.* Stellenbosch: SUN PReSS. At 303.

[396] George, A. & Petrus, P. 2016. Media ownership and concentration in South Africa. In *Who Owns the World's Media?* New York: Oxford University Press. DOI:10.1093/acprof:oso/9780199987238.003.0031.

[397] Klobuchar, A. 2021. *Antitrust: taking on monopoly power from the gilded age to the digital age.* Alfred A. Knopf. At 198.

The former chair of the FTC, Robert Pitofsky [398], argues that media consolidation goes beyond raising the wholesale price of products. The consolidation of media, he states, has the grave implication of possibly undermining democratic values enshrined in the US First Amendment. [399]The implication of the approval of anti-competitive media consolidations that the CWS may overlook is also said to go as far as threatening constitutional values like access to information. The below will review how the US has responded to the implications of approving harmful media consolidation (because of the CWS).

The rationale of relying on comparative analysis with the US is because American regulatory bodies, policies and case law precedence have explored how media consolidation harms not only competition, democracy and constitutional values but poses a barrier to public interest obligations like diversity of media company ownership. South Africa can learn from the mistakes and correctness of approaching media consolidation. When media consolidation occurs, non-pricing effects may culminate from such mergers, such as reduced programme quality, limited programme choice for consumers, diversification effects, and barriers to market access for black woman-owned media companies. Media consolidation impedes the right to a free press, a condition for a democratic society. One of the ways that will be explored below is how (if any) media consolidation threatens democracy and what role (if any) can competition enforcement respond to such threat (if any harm exists). Most importantly, what role does the consumer welfare standard not play in responding to this kind of threat to democracy?

Media consolidation is defined as the "concentration of the ownership of news sources into hands of fewer and fewer corporations". [400] When a few media firms control news or the press, there will be control over what people consume or hear about. This

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[398] Klein, A. 2000. A hard look at media mergers. *The Washington Post*.

[399] The First Amendment protects freedom of speech, freedom of assembly and freedom of the press.

[400] Klobuchar, A. 2021. *Antitrust: taking on monopoly power from the gilded age to the digital age.* Alfred A. Knopf. At 199.

section will review the CWS's role in ensuring that the South African market is not a victim of media consolidations that lead to market concentration in media outlet ownership.

As mentioned above, the different schools of thought are bound by distinct philosophies. As a result, the different schools may approach merger review differently. Hence, it is important to rely on a legitimate school of thought that will effectively regulate competition and realise the intended public interest objectives.

Former President Nelson Mandela also affirmed the important role that the free press has in the lifeblood of a democracy and the importance that the free press must be free from referred to the role of a free press in a democracy: A critical, independent and investigative press is the lifeblood of any democracy. Mandela said that the press must be free from interference:

> It is only such a free press that can have the capacity to relentlessly expose excesses and corruption on the part of the government, state officials and other institutions that hold power.[401]

The ANC has affirmed and reaffirmed that a free and diverse media is fundamental to the quest for any transformation and upholding constitutional democracy.[402] Additionally, the ANC has noted that much work still needs to be done to transform media into a diverse and non-racially skewed industry resembling apartheid media. However, South Africa continues failing to challenge the "legacy of the media apartheid discourse". [403]

The Chicago competition law and policy model might approve a media merger without conditions if it believes the merging parties' claim of lower consumer price and

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[401] Aluta Rabe, L. 2020. *A Luta Continua : a history of media freedom in South Africa.* Stellenbosch: SUN PReSS. At 274.

[402] *Media transformation, ownership and diversity*. 2009. Available: https://www.anc1912.org.za/wp-content/uploads/2021/03/NGC-2010-Discussion-Document-Media-Diversity-and-Ownership.pdf. At 2.

[403] Ibid. At 2.

efficiency is mentioned and sufficiently proved by incumbents. The Harvard school may be a bit weary in approving a media merger (without conditions) if it believes it will be detrimental to public interest objectives.

Free and diverse media is one of the important pillars of a democratic and transformed State. The previous dispensation thrived on using media outlets to threaten democracy and other relevant constitutional rights related to free media. However, increased media consolidation may threaten democracy or encroach on people's constitutional rights. Moreover, Article 19 of the Universal Declaration of Human Rights states, "Everyone has the right to freedom of expression, seek and receive information through any media." [404]

Limited press outlets due to increased media consolidation may pose a problem by limiting the voices that citizens hear. When limited voices are being heard, this can threaten citizens' human right to seek or receive information and their freedom of expression. Thus, the structural health of democracy is threatened if there is an interruption in the free flow of information and limited choice *or* diversity of news outlets. "We're getting to a point where if they weaken it even further in small markets, you could have one media voice across the board," warned Gigi Sohn, an adviser to former Democrat Federal Communications Commission of the United States, chairman Tom Wheeler.[405]

Alternatively, citizens may deeply distrust news if the industry is not competitive or diverse. A 2016 Gallup poll showed that because of the concentration of news outlets, the citizens of the US had deep distrust in audio-visual and print news outlets.[406] Former US President Donald Trump's capitalisation on American citizens' distrust of

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[404] Universal Declaration of Human Rights

[405] McCabe, D. 2018. The FCC is kickstarting a second round of media consolidation wars. Available: https://www.businessinsider.com/fcc-starts-review-of-ownership-rules-2018-12. Available: https://www.businessinsider.com/fcc-starts-review-of-ownership-rules-2018-12.

[406] Klobuchar, A. 2021. *Antitrust: taking on monopoly power from the gilded age to the digital age.* Alfred A. Knopf. At page 199.

news sources did not help. Trump lambasted the US media's 'fake news agenda to get applause from his constituency and supporters. Those news outlets with monopolies may withhold important information based on their agenda or bias. Over the years, we have seen how US 'Fox News' has been alleged to predominantly disseminate or report news that perpetuates their right-wing views and biases.

The monopolisation of news and media outlets has been more pronounced as the years go by. In America during the 1920s, when antitrust enforcement was booming, fewer mergers would lead to more significant consolidation. Hence, there were more than 2000 daily newspapers in America, with 1,425 in 2012. The majority of US news outlets were "held by 50 corporations". [407] Modern internet news has contributed to the decrease in newspaper outlets. [408] Unfortunately, that number has significantly dropped to only a handful of corporations owning several news outlets.

Media consolidation threatens democracy by impeding the right to a free press, a condition for a democratic society. Senator Klobuchar believes that one of the reasons for the existence of media consolidations in the US was because of 'lax' antitrust laws enforcement against the power of Bigness. Klobuchar believes that the same antitrust laws are responsible for rectifying the problem of media consolidation and the confidence of US citizens towards media and news outlets. US antitrust officials are urged to pay close attention to media consolidation or mergers that would eliminate news outlets and monopolise this important industry. Furthermore, the senator acknowledges that the Senate should pass more strengthened and enhanced antitrust rules that decisively respond to increasing media consolidation. Hence, a proposed bill–the Journalism Competition and Preservation Act was elected to strengthen competition in the media outlet industry since the CWS has exposed the US to predatory mergers. The bill is said to have received bipartisan support. It is set to level the playing field for news organisations competing and desperately trying to survive

[407] Ibid. At 291.

[408] Ibid.

the headwinds created by Facebook, Google and Amazon. The three companies spend over 70 per cent of all online advertising dollars".[409] Market definition is usually a contentious issue when it comes to merger considerations. The merging parties aggressively seek to prove that markets will not be concentrated post-merger to approve their merger. Klobuchar also argues that traditional news outlets, newspapers and audio-visual media like television and radio stations should not be seen operating in the same relevant market.

Recently, the government successfully blocked the merger between two powerful publishing houses in the US–Penguin Random House and Simon & Schuster. In its papers, the government was fixated on the fact that the proposed merger would harm workers (the authors) by limiting competition in the industry. [410] Essentially, the consumer welfare standard that seeks to protect the welfare of consumers was shifted and replaced with protecting the welfare of workers. Hence, an antitrust advocate posed an important question, i.e., "Does [the ruling] mean the consumer welfare standard—which ranked consumers over workers in the antitrust hierarchy and fixated over short-run price effects—is officially dead?" [411]

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[409] Ibid. At 298.

[410] The blocking of this merger in the market for US. publishing rights protects authors compensation and quality of top selling books, while ensuring that there is diversity in the industry. The Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division said that "The proposed merger would have reduced competition, decreased author compensation, diminished the breadth, depth, and diversity of our stories and ideas, and ultimately impoverished our democracy." He further held that the victory of blocking merger is for workers as a whole, because the decision affirms that antitrust law protects competition "for the acquisition of goods and services from workers" See *Justice department obtains permanent injunction blocking penguin random house's proposed acquisition of simon & schuster.* 2022. And Bartz, D. 2022. *U.S judge says penguin random house book merger cannot go forward*. Reuters. Available: https://www.reuters.com/markets/deals/judge-rules-that-giant-us-book-merger-may-not-go-forward-2022-10-31/ [Available: https://www.reuters.com/markets/deals/judge-rules-that-giant-us-book-merger-may-not-go-forward-2022-10-31/].

[411] Albrecht, B. 2022. *Business as usual for antitrust*. City Journal. Available: https://www.city-journal.org/article/business-as-usual-for-antitrust [Available: https://www.city-journal.org/article/business-as-usual-for-antitrust].

During the transition period, the Convention for a Democratic South Africa (CODESA) proposed that one had to have "a task force to examine obstacles to diversity in the print media" for the transformative post-apartheid South Africa.[412] In A Luta Continua : a history of media freedom in South Africa, Lizette Rabe argues that CODESA's proposal failed to materialise effectively.[413] However, she praises CODES in that "a network of policies and laws", including the 1998 Competition Act's anti-monopoly mandate, was introduced. [414]

Black South Africans are no stranger to experiencing blocked freedom of expression, right to information and the curtailed freedom of media. The apartheid government relied on blocking these constitutional rights to conceal the oppression of black South Africans in the international world. Internally, the apartheid government controlled the information disseminated in print and audio-visual news outlets.

Censorship was also a fundamental tool used by the previous dispensation in South Africa. The censorship would take place in the form of substituting favourable and unfavourable terms to meet the narrative sought to be perpetuated by either citizens of the country or the international world. For example, Rabe, in *A Luta Continua*, wrote that their apartheid media would substitute referring to an anti-apartheid activist as a 'communist' with referring to them as 'Reds/*RooiGevaar*' (meaning red danger in the Afrikaans language). [415] Hence, the post-democratic government introduced various strategies to block freedom of expression, information rights, and media freedom. However, media diversity, which affects free media, is something South Africa still struggles with because the ownership is less diverse, and media outlets are in few hands.

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[412] Rabe, L. 2020. *A Luta Continua : a history of media freedom in South Africa.* Stellenbosch: SUN PReSS. At 17.

[413] Ibid. At 17.

[414] Ibid. At 18

[415] Ibid. At 16.

In terms of section 12A of the Act, a merger may be disapproved on public interest grounds.[416] The merger may be prohibited on public interest grounds where the competition agencies must consider the effect the merger will have on a particular industrial sector or region, employment, HDI-owned firms' ability to compete and national industries' ability to compete in international markets.

As mentioned above, South Africa is not immune to the wrath of ineffective and weak competition enforcement that may result in media consolidation. In 2009, the ANC National General Council issued a discussion document on media strategies.[417] In the document, the general council held that free, independent and pluralistic media could be achieved through diversity of ownership and control. The competition law and policy, through merger considerations, may be responsible for facilitating such an objective of diversity of ownership.

Freedom of information, speech and press are the cornerstone of any constitutional democracy – including the Republic of South Africa. The South African Constitution provides all those residing in this land freedom of media, freedom of expression and access to information. [418] The Constitution is further supported by various legislative frameworks that promote the enshrined rights of freedom of speech, access to information and free media.[419]One of the basic rights, like media freedom in a democratic state, is often overlooked. Citizens of a country are guaranteed the right to

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[416] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

[417] *Media transformation, ownership and diversity*. 2009. Available: https://www.anc1912.org.za/wp-content/uploads/2021/03/NGC-2010-Discussion-Document-Media-Diversity-and-Ownership.pdf.

[418] Geradin, D. & Petit, N. 2005. *Price discrimination under EC competition law: the need for a case by-case approach.* College of Europe.At 2.

[419] See Broadcasting Act of 1999, Independent Communications Authority of South Africa, Access to Information of 2000, Media Development and Diversity Agency Act of 2000.

know what is going on in your country and participate fully in decisions affecting you”. [420]

5.8 Consumer Welfare Standard and price discrimination

Dominant firms tend to abuse their position by imposing dissimilar conditions (or prices) on different competing firms that enter equivalent transactions with them. The result of such conduct is that it places one competing firm at a competitive disadvantage on the unfavoured while it benefits the other favoured competitor. In South Africa, price discrimination is regulated under section 9 of the Competition Act (the Act) and is regulated compared to other jurisdictions like the US or EU. [421] The rationale of Congress passing price discrimination, in both EU Article 82(c) and Clayton Act (as amended by the Robinson-Patman Act), was to protect secondary line injury in the downstream market that small purchasers experienced against large purchasers. [422] The legislative history of the US Robinson Patman Act is said to show that Congress viewed it as problematic that a big purchaser could gain a competitive edge over a smaller one merely because of their ability to buy in larger quantities. Therefore, the Act was enacted to prevent significant buyers from enjoying such advantages, except when a lower price could be justified due to a seller's reduced

[420] Rabe, L. 2020. *A Luta Continua : a history of media freedom in South Africa.* Stellenbosch: SUN PReSS.at 16.

[421] See Article 82 of the *Treaty European Economic Community,* 1957. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11997E/TXT. *Robinson-Patman Act,* 1936.. *Price discrimination: Robinson-Patman violations*. Available: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations [Available: https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations].It is imperative to note that price discriminations are generally lawful, and the claims of such price discrimination must meet certain legal tests. The legal tests are different in several jurisdictions. For example, in terms of the Robinson-Patman Act, the claim may not be in respect of services and sale must be across the State line. In South Africa, the Act protects both goods or services.

[422] Competition Commission v South African Breweries and others. 2015. Competition Appeal Court, Federal Trade Commission v Morton Salt. 1948. Supreme Court of the United States.

costs resulting from bulk production, delivery, or sales, or because the seller made a genuine effort to match a competitor's lower price. [423]

While the South African Act shares the same values of protecting smaller buyers who do not have quantity purchasing power, the Act protects those former marginalised who face enormous barriers to market entry. The Act prohibits practices that affect competition and public interest objectives because it prohibits unwarranted price discrimination that may harm firms owned by HDIs (and small businesses) from participating effectively in the market. [424] When responding to price discrimination, the welfare effects of such a practice are integral to whether such practice is prohibited or not. Whether total or CWS should be pursued has been a bone of contention amongst economists. [425] The type of welfare standard which should The effect of whether price discrimination is anti-competitive and injures consumer welfare is determined by whether conduct increases or decreases total output. (Petit, 2005:197) (Petit, 2005:197) (Petit, 2005:197) (Petit, 2005:197) (Petit, 2005:197) (Petit, 2005:197) (Petit, 2005:197) Discrimination manifests itself in different forms of practices such as discounts and rebates, tying, selective price cuts that bear various effects on competition or consumer welfare. Most importantly, the welfare effects depend on the facts of such cases. Thus, a case-by-case approach is used when determining whether the effect of such discrimination is anti-competitive.

It is pricing that has the exclusionary effect of forcing competitors of the dominant Seller to exit the market, i.e., reduced market output – that the Competition Act

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[423] Federal Trade Commission v Morton Salt. 1948. Supreme Court of the United States. At 6.

[424] See section 9(a)(ii) of the *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .("(ii) impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons, to participate effectively"

[425] Chicago school supporters believe that total welfare is the legitimate goal of antitrust enforcement

Many authors, amongst whom are economists of the Chicago school, agree that total welfare is the proper goal of competition law. See further Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster, Posner, R. 1979. The chicago school of antitrust analysis. *University of Pennsylvenia Law Review.* 127.

prohibits. Other rebates that do not reduce output and are thus pro-competitive because they "serve those consumers that would not be served under a uniform price"[426]result in enhanced consumer welfare. [427]

Over the years, our competition regime has continued its fixation with the laissez-faire Chicago model of competition law and policy that regards consumer welfare maximisation as the legitimate goal. This is despite its efforts to introduce a liberal regime with broad goals like protecting public interests. The two opposing goals seem to be intertwined in one piece of legislation. This begs whether relevant, non-efficiency goals in the Act would be fulfilled if we continue reliance on the strict CWS. Particularly, for this section, the question is whether the price discrimination provisions encapsulated in the Act may be effectively enforced to protect HDIs from harm and market access. This section will review, by looking at relevant case law, whether non-efficiency goals can be protected by the narrow CWS.

Price discrimination is defined as a below-cost discriminatory practice (discounts, rebates, tying, selective price cuts, discriminatory price cuts, etc.) that charges purchasers of similar goods and services differently. Price discrimination is a common cause, which is a normal business practice. However, if such normal business practice causes injury to competition – it is problematic and unlawful.[428]

Most scholars agree that there is a level of complexity attributed to price discrimination because the conduct covers various pricing strategies whose objectives *and* effects on competition differ. The objectives and effects of price discrimination on competition

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[426] Geradin, D. & Petit, N. 2005. *Price discrimination under EC competition law: the need for a case by-case approach.* College of Europe.At 6.

[427] Ibid.. at 7, for instance, demonstrates that it is valid for price discrimination to remain a *rule of reason* prohibition and not a *per ser* prohibition. Because, depending on the facts of each case and on the bases of economic theory price discrimination may have an important consequence of enhancing welfare.

[428] See section 9 of *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

differ based on the context surrounding such a transaction where price discrimination is alleged. It doesn't help that our Competition Act does not clearly define this complex business practice that can be discriminatory and harmful to the competitive aspect of our markets. We can only synthesise meaning from foreign case law and the elements of what we know as anti-competitive price discrimination – found in section 9 of the Act. In terms of South African judicial precedence, there is only a single case law that deals with such conduct, so the framers of our legislation must provide a clear definition of such conduct to help prospective litigants who may wish to litigate based on section 9.

Courts and competition agencies in South Africa adopt a rule-of-reason approach when considering whether price discrimination should be prohibited (also known as the balancing of benefits approach). The rule of reason empowers the court or government agencies to consider whether any economic or public interest benefit would justify the anti-competitive conduct, i.e., price discrimination. Furthermore, this justification or benefit must exceed the adverse effect of the anti-competitive conduct. The rule of reason crystallises in section 9(2) of the Act.

In terms of section 9 of the Act, certain conditions/elements need to be present to claim prohibited price discrimination successfully, for example, the existence of a dominant seller. [429] This substantial anti-competitive effect injures or prevents competition. [430] Additionally, another distinct element in South Africa is whether conduct by a dominant seller impedes the ability of purchasers who are small or are owned by black South Africans to participate effectively. The same dominant seller is

[429] In essence, the point of departure is to ascertain whether the Seller is dominant. This element is often seen as red tape because often times, proving this element is challenging. Additionally this provision curtails HDI or SME Purchaser from justice because the incumbents usually do not have the capacity to retain expensive competition experts to advise on whether this rule of reason is sufficient enough to attach harm dominant Seller.

[430] This element is a point of contention because of silence of whether the courts are guided by the Chicago, Harvard or the Brandeisian school when determining the effect of the conduct and whether it is substantial or not.

prohibited from avoiding or refusing to sell to the designated purchasers above to circumvent the operation of the above.

Section 9(2) of the Act triggers the rule of reason. In that, the seller may argue a convincing/valid pro-competitive reason and that the price discrimination effect outweighs the anti-competitive conduct claimed by the purchaser. In essence, discriminatory pricing conduct by dominant sellers is prohibited if it has the effect of substantially lessening competition, i.e., if the discriminatory pricing strategy has the effect of creating somewhat of a monopoly by materially reducing the existing competition in a market. The yardstick that will be relied on is whether such conduct has the effect of impeding the welfare of consumers.

As will be reviewed in detail, the reliance on the CWS is harmful because it overlooks the restrictive nature of price discrimination if such conduct does not raise prices. This case of Nationwide cc and Sasol was before the amendment of the Act. Before, differential pricing or discounts by suppliers like Sasol might be explained in that there is a difference in the cost of supplying small orders (like Nationwide Poles cc.) than large orders. Or that the small purchaser might accept a lower price for their goods because it can only supply a limited volume than their bigger competitor. [431]

5.8.1 Nationwide Poles cc. and Sasol Oil Price Discrimination

The case of Nationwide Poles cc. is an example of how relying on CWS in interpreting public interest rules of the Act may result in an unfavourable outcome for firms owned by HDIs. The CWS is so far removed in correctly interpreting the public interest competition rules that will ensure that firms owned by HDIs (and SMEs) can effectively participate in the formal economy – as envisioned by the Act. In his book, David Lewis believes the Tribunal *reconciled* orthodox competition law interpretation and the public

[431] Manual on the formulation and application of competition Law. *United Nations Conference on Trade and Development*.At 53

interest dimension. [432] Unfortunately, there is a mismatch in keeping the CWS as the yardstick for interpreting public interest objectives. The review below will show this.

Notably, the Act was amended in 2018, affirming that reliance on the CWS is ineffective in ensuring that firms owned by HDIs are effective participants. Unfortunately, the Act was amended some thirteen years after Mr Foot (owner of Nationwide Poles cc.) appeared before the Competition Appeal Court (CAC). One can only speculate about the firm's trajectory and that of similar firms in the absence of the 1998 price discrimination provisions and the use of CWS for interpretation. The CWS seeks to protect the competition ecosystem, and not a competitor–has failed to apply the Act's intended objective.

The facts concerning Sasol v Nationwide Poles cc. may be summarised as follows: Sasol Oil was a creosote's dominant seller. The respondent firm was a small pole manufacturing business and purchaser in the sale. The purchaser discovered that the seller's pricing structure was differential according to the quantity of creosote purchased, i.e., volume-based pricing structure. Thus, the purchaser held that the seller contravened section 9(1)(a) price discrimination.[433] As the dominant seller, Sasol Oil engaged in this discount system that 'likely had the effect of substantially preventing or lessening' competition in the downstream pole manufacturing market. The downstream effect is referred to as a 'secondary line' injury that arises when the discriminatory conduct of the dominant seller (Sasol Oil) places one of its purchasers (Nationwide Poles) at a competitive disadvantage. [434] This is articulated in Article 102(c) of TFEU and the Pat-Robinson Act. [435]

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[432] Lewis, D. 2012. *Enforcing competition rules in South Africa: thieves at the dinner table.* Jacana Media.at 28.

[433] *Competition Act,* 1998.

[434] *Price discrimination and competition*. 2016. Available: https://www.oecd.org/daf/competition/price-discrimination.htm [Available: https://www.oecd.org/daf/competition/price-discrimination.htm].

[435] *"applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage"*. In both the 1998 and amended 2018 Act, no mention is made of the element of 'competitive disadvantage'.

As alluded to above, not all volume-based discount pricing structures are considered anti-competitive. Sometimes, they may be an efficient pricing structure that may encourage competition while increasing revenue for the seller. However, this volume-based discounting structure may conflict with the preferential treatment associated with affirmative action for black-owned purchasing firms in South Africa's concentrated market. This is because such a pricing structure will benefit those larger purchasers (often white-owned) who are not vulnerable and impede the effective participation of HDI-owned firms (and SMEs). The quantity-based discount may artificially squeeze out the competitors, resulting in limited competition, fewer consumer choices and ultimately higher consumer prices.

The Nationwide case's crux was that large supplier Sasol's Oil quantity-based differential pricing had driven them out of business. In addition, several issues were argued before the Tribunal, including, but not limited to, establishing whether *Sasol Oil* was dominant in the alleged market. Firstly, the Tribunal confirmed that Sasol Oil was presumably the dominant firm in the creosote market as per section 7 of the Competition Act. The evidence established that Sasol Oil enjoyed more than 45 per cent of the market. Secondly, the Tribunal held that Sasol's Oil volume-based discount pricing structure met the elements of price discrimination as per the provisions of section 9 of the Act. The conduct was likely to substantially prevent or lessen competition in the downstream market, where Nationwide Poles cc was situated.

It was determined that Sasol Oil's behaviour, characterised by differential treatment, was gradually eliminating small businesses in the pole manufacturing market. In determining whether the volume-based pricing structure was likely to have the effect of substantially preventing or lessening competition, it is interpreted as follows:

> [S]ubsection 9(1)(a) invites the complainant to establish a competitive relevance to his complaint but does not require proof of some standard of harm as contended for by Sasol. When the legislature asks, 'is it likely', it asks us to situate the complaint as one

relevant to competition. When it asks 'substantial', it invites us to distinguish of trivial effect from the weightier."[436]

This interpretation was applied to the facts and held that the discount system exhibited a material differentiation between those most favoured firms (by price discrimination) versus those least favoured firms like Nationwide Poles cc. It was established that the input cost of creosote played a crucial role, and price discrimination on creosote created a significant distinction between Nationwide Poles and larger dominant firms. The latter benefited from Sasol's volume-based discount system.[437]Further, the Tribunal held that the volume-based pricing structure will likely cause Nationwide Poles and other similar small businesses that cannot benefit from the volume-based discount system to be ineffective competitors. This meant that absent Sasol Oil's conduct, Nationwide Poles cc and other SMEs could be significant competitors to their bigger competitors like Woodlines. [438]

Sasol Oil appealed to the CAC. On appeal, before Davis JP, the main issue was the interpretation of section 9(1)(a) and the application thereof to the facts. The crux of the appellant's (Sasol Oil) argument was that nowhere in the Act did section 9 intend to protect small businesses, as the respondent (Nationwide Poles) claimed. Instead, section 9 intends to protect the competitive process/ecosystem because that is the intention or purpose of competition. Justice Bork said it best in Brown Shoe v US: "Legislative history illuminates congressional concern with the protection of competition, not competitors". [439]

The appellant submitted that when considering mergers, The tribunal would be expected to determine whether the merger "is likely to prevent or lessen competition".

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[436] *Sasol Oil (Pty) Ltd v Nationwide Poles cc.* 2005. Competition Appeal Court.at 5.

[437] Ibid at 7.

[438] Ibid.

[439] *Brown Shoe Co Inc. v United States.* 1962. United States Supreme Court.at 320.

[440] In making this point, counsel for the appellant submitted that the enquiry mandated by section 9(1)(a) should be read as in section 12A because the legislature "could not have intended the same words to bear different meanings, in provisions of the same Act". [441]

The respondent argued that the volume-based pricing structure was anti-competitive because it perpetuated the lessening of competition in the downstream market. In response to the appellant's argument on the insignificant effect of such a price on the respondent, Mr Foot, who owned Nationwide cc, felt otherwise. He submitted that the discount policy's difference in total cost significantly impacted its business such that Nationwide Poles cc would possibly close shop.

Few price discrimination provisions have been tested to ascertain whether such conduct significantly affects small or black-owned firms. Our excessive reliance on market studies may have little assistance, together with the red tape that SMEs and black-owned firms would be subjected to should they decide to fight the Goliaths, which are dominant firms. Red tape like market definitions or the competition commission abandoning small and black-owned firms like Nationwide Poles cc adds to the CWS misfit.

Ultimately, in contrast to the Tribunal, the CAC held that nothing in the text of section 9 shows that the legislation intended to protect small businesses instead of protecting the competitive process. The CAC held that the Nationwide Poles cc failed to demonstrate evidence for alleged harm. The court held that the SMEs that closed shop in the market were nothing related to the conduct. The court held that based on the evidence adduced, the requirements of section 9 (1)(a) of the Act must fail.

It was determined that Nationwide Poles cc should have presented evidence illustrating the reduced operations of small competitors. This evidence would

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[440] *Nationwide Poles v Sasol Oil.* 2005. Competition Tribunal.at 9

[441] Ibid at 9.

substantiate the claim that volume-based discounting adversely affected small and SMEs within that specific market. It underscores the impact of the stringent Chicago model of competition law and policy on our competition law. Such theory should not have a place in this developing nation rife with high concentration levels, resulting in those few dominant players holding just enough power to abuse SMEs and black-owned firms or inhibit them from effectively participating.

Regarding interpreting the words "likely to have the effect of substantially lessening competition", the Tribunal held that the product sold at a differential and discriminatory price is a significant input cost for the Respondent – a pine building and fencing pole-producing firm. The CAC agreed with the Tribunal's interpretation.[442] However, I was not convinced that there was enough evidence to prove that *Sasol Oil's* discount pricing system would "likely have the effect of substantially lessening competition" in the downstream pole manufacturing market in Nationwide Poles cc resided. This evidence ought to prove that price discrimination was likely to threaten or injure competition in the market, and it was Nationwide Poles cc who ought to provide proof that shows injury.

Without the creosote input cost being subjected to differential price, the Nationwide Poles cc firm held that it would be squeezed out of the downstream market (especially since it is already vulnerable because of its size). In response, it was argued that it was not the Act's concern to protect small businesses (or black-owned firms) instead of merely seeking to protect the South African market's competitive process for the sale of creosote.

In the 1955 Brown Shoe case, the US Supreme Court held that the House of Representatives passed antitrust laws to protect competition, not competitors. This

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[442] See foonote 15. (CAC held that the tribunal's interpretation and was influenced by section 2(a) *Robinson Patman* Act, which, unlike SA, is not restricted to dominant firms only. Perhaps South Africa should attempt to look into this tool of not restricting to dominant firms, but those firms that have benefited from discrimination irrespective of them not meeting the criteria of being a 'dominant firm'. Because it is that first step of market definition that the complainant first has to prove, which results in a lengthy and expensive trials that deter small HDI owned firms.)

reason led to various competition systems employing (intentionally or tacitly) this narrative of not being concerned with competitors when interpreting various competition provisions. The Preamble of the Act recognises that apartheid and the other discriminatory laws of the past resulted in an excessive concentration of ownership and control within the national economy and that the economy must be open to greater ownership by a greater number of black South Africans. The Act's purpose is to promote and maintain competition to ensure that SMEs or HDI owned firms have an equitable opportunity to participate in the economy and increase ownership stakes of the incumbents. In consideration of the historical discriminatory laws against black industrialists and the purpose of the Act – the narrative perpetuated above in Nationwide Poles that competition law ought to be concerned with competition and not competitors is incorrect because it deviates from the goal of redressing the past inequalities and gaining of incumbents' access to the market. It would be nearly impossible to restore that balance if our competition policy reflected the sentiments focusing on one legitimate goal of protecting competition and not competitors.

The CAC also held that the competitive process had not been lessened or prevented, and thus, the conduct was not anti-competitive or restrictive to the consumer's welfare. This evidence would substantiate the claim that volume-based discounting adversely affected SMEs within that specific market. It underscored the impact of the stringent Chicago model of competition law and policy on our competition law. This led to the CAC's conclusion that evidence had confirmed that the Nationwide Poles cc could compete in the market, irrespective of its size and differential pricing structure. Furthermore, its smallness did not deter it from competing with large rivals because of price discrimination. This test overlooked cognisance of small businesses' vulnerability and lack of resources for the small firm to conduct a report as evidence (as Sasol did). This judgment probably deterred other small or black-owned firms from reporting alleged unjustifiable price discrimination conduct and the opportunity to test these provisions. Nationwide Poles' impact led to the legislature amending provisions of section 9 and inserting section 9(1)A.

5.8.2 Substantial disadvantage

The 1998 Act prohibited dominant firm sellers from engaging in unlawful price discrimination towards their purchasing customers because it prevents dominant firms. [443] To render such a behaviour anti-competitive, the complainant had to prove that such price discrimination by a dominant firm was likely to have the effect of substantially lessening or prevent(ing) competition. In essence, these requirements sought that the purchaser proves that conduct placed the dominant firm's competitors at a disadvantage and conducted the lessened competition. This injury may be referred to as a 'primary line' injury. [444] The Act does not explicitly make mention of the rationale of such conduct, including protecting secondary line injury, which smaller purchasers are often disadvantaged by. However, one might argue that likely to have the effect of substantially lessening or prevent(ing) competition' includes both injury at the primary and secondary level, i.e, prohibits conduct that would result in lessening competition in both levels. The US explicitly mentions that the harm or creation of monopoly may be in any line of commerce.

Section 2 of the Clayton Act broadens its scope to encompass actions likely to substantially diminish or impede competition, including those that tend to establish a monopoly in any line of commerce. Circling back to Nationwide v Sasol Oil, one of the main questions that counsel asked for Sasol Oil was whether the price discrimination by Sasol Oil had resulted in a substantial disadvantage on Nationwide Poles's ability to compete. In essence, Sasol Oil differential treatment was held to have resulted in a differential cost of between 3.6% and [445] [OBJ] On appeal, counsel regarded this differential cost as not constituting a substantial disadvantage and asked Mr Foot (the owner of the SME) the following question:

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[443] The prohibited conduct was stipulated section 9(1)(a) of the 1998 Act.

[444] Geradin, D. & Petit, N. 2005. *Price discrimination under EC competition law: the need for a case by-case approach.* College of Europe.at 9.

[445] *Sasol Oil (Pty) Ltd v Nationwide Poles cc.* 2005. Competition Appeal Court. At 7.

> What I am putting to you is that you are able, and we don't need to go any further than this for our purposes and certainly for these proceedings, that you are able to sell product as a competitor of Woodlines. You do sell product and you are able to do so in the Western Cape, which appears to be your principal market."[446]

Mr Foot answered in the affirmative to this question.

In FTC v Morton Salt, the US Supreme Court held it is not enough to state that the discounts are very small or insignificant and not enough to warrant that the discount does not substantially lessen competition and may injure those purchasers who are denied the discount. [447] Additionally, Justice black in FTC v Morton Salt held that US legislation only requires that there be a reasonable possibility that differential quantity discounts may have the effect of harming competition or creating a monopoly. [448] This suggested that the existence of price differentials resulting in distinct resale prices at lower levels, particularly in the retail sector, may be sufficient to establish that price discrimination is likely to diminish or impede competition substantially. [449] This is in line with the CWS standard.

As mentioned above, the interpretation and application of price discrimination provisions illustrated in the 1998 Act seem to follow a somewhat conservative approach to antitrust/competition.[450] This conservative approach was followed despite

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[446] Ibid. At 7.

[447] *Federal Trade Commission v Morton Salt.* 1948. Supreme Court of the United States. At 6 In this appeal, the respondent sold table salt at a differential price to wholesalers/retail for resale. The respondent sold table salt using a quantity discount system. The system is said to have been available to all of its customers but only 5 of the respondents' customers were dominant enough to obtain discount and only these 5 companies were able to resell table salt for lesser price in their chain stores. The FTC held that respondent differential quantity-based discount was in violation of price discrimination as per section 2 of the Clayton Act (as amended by the Robinson-Patman Act).

[448] Ibid. at 6 (" The Act does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility they may have that effect."

[449] Ibid. at 7.

[450] See Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. (In the book, Justice Bork outlines that the true intention of the house of representatives, through the Sherman Act, was to protect the competition in US. markets and *not* competitors.) *See Brown Shoe Co Inc. v United*

our legislature's mention of the non-economic objectives in section 2 of the 1998 Act, which was unwarranted. The *Sasol Oil v Nationwide Poles* above demonstrates how applying price discrimination provisions followed the strict Chicagoan approach (and the CWS was the rightful yardstick).

This thesis believes that while we still rely on the CWS standard as a yardstick, we cannot effectively enforce the 2018 price discrimination amendments.

5.9 Adopting a broader narrative of the CWS

A broader framework strategy may be developed to have an effective competition regime that meets its objectives of ensuring the effective participation for firms owned by HDIs and SMEs. The 2019 amendments and Preamble and section 2 public interest objectives should effectively represent a deviation from mainstream and traditional competition to respond to the South African context and needs successfully. The current provisions are not a disjuncture from mainstream competition law, which is problematic. The below will show that rejecting a neoliberal/laissez-faire approach and deviating from the status quo is essential for developing countries with a colonial or racial discriminatory past like ours to experience redress and transformation.

Part of ensuring that the Competition Act is reconceptualised in a manner that may serve the South African developmental and affirmative action agenda is to reject the influence of neoliberalism and those that follow the same or similar analysis. When we allow or acknowledge the influence of this economic theory in competition enforcement, we may serve the hybrid or blended goal approach that will benefit HDIs and consumers. As developing nations, we can use the law for the economic liberation of black industrialists by redistributing wealth and achieving social equality in post-1994 South Africa.

States. 1962. United States Supreme Court. See Bork, R. 1979. *The antitrust paradox: a policy at war with itself.* Simon & Schuster. (In the book, Justice Bork outlines that the true intention of the house of representatives, through the Sherman Act, was to protect the competition in US. markets and *not* competitors.) *See Brown Shoe Co Inc. v United States.* 1962. United States Supreme Court.

As canvassed above, the previous dispensation had various policies that significantly excluded the black population from market participation. This marginalisation led to the current structural position of the collective black population in South Africa, which is also heavily canvassed above. Excessive market power on those white populations that were not excluded in the previous dispensation has also been integral in perpetuating wealth inequality. [451]This is where a far more aggressive form of competition law enforcement comes into place. This is to respond effectively to the market concentration abuse of market power and benefit the perpetually poor black collective in South Africa. Hence, it is important to use the CWS, which has been the approach that prevails in most jurisdictions – including South Africa. Alternatively, the continued reliance on the CWS may exacerbate perpetual or generational poverty. This is because the traditional CWS ignores the possibility that monopoly may have the far-reaching impact of passing down harm or poverty from generation to generation. [452]

The existing CWS standard has been characterised as narrow, as it primarily centres its attention on one group, namely consumers while disregarding any other collective that might be adversely affected. Considering how, in South Africa, only a certain group within the consumer collective has previously been marginalised, only *that* group should have protection under the CWS. Thus, South African competition policy

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[451] There have been ongoing debates that lack of market power and competition in a specific market may contribute to wealth inequality. See Lianos, I. 2019. *The poverty of competition law: the short story.* Centre for Law, Economics and Society. At 48 where it is argued that market power and lack of competition may pose a significant cause in economic inequality. Lionos notes that reduced competition and market power may cause wealth inequality in relation to inheritance of wealth that passes along various generations when competition is reduced and market power. The perpetual inheritance of wealth is exacerbated by the possibility of using that perpetual wealth for purpose of possessing collateral to obtain loans, etc. This is in contrast to the perpetually poor historically disadvantaged individuals who exclusively rely on their labor, which unfortunately cannot serve as collateral to obtain loans. This discussion of access to capital is beyond the scope of this thesis. However, it is to show the major role that lack of competition law and excessive power on the historically privileged white population in South Africa.

[452] DarityJr., W. & Mason, P. 1998. Evidence on discrimination in employment: codes of color, codes of gender. *Journal of Economic Perspectives.* 12(2).at 84-85.

should adopt a broader narrative of intervention by widening the scope of 'consumer welfare' for the standard to serve our distributive justice agenda. The distributive justice agenda is based on the hypothesis that the black consumers, because of the previous marginalisation in the colonial and apartheid era, are in much of structural inequality that they face some weakness that renders them entitled to distributive justice that is brought about by the consumer welfare approach.

The CWS should be calibrated to serve the less disadvantaged consumers. This suggestion is based on the question that distributive justice strategies often ask – what is to be equalised? In response, if we should retain the consumer welfare standard, it should be remodeled to have a social equity focus and effect. This approach of CWS would render conduct anticompetitive "if it harms middle-and lower-income consumers, even while benefiting wealthier consumers and shareholders". [453]

It is thus argued that the current overreliance on mainstream CWS adversely affects the proper enforcement of the Act's objective. It doesn't make sense to rely on mainstream CWS, which has been the approach that is often used by Western countries –countries that do not have the same issues or history as South Africa. We must develop our canvas when we decide on the correct approach.

We have a progressive piece of legislation that acknowledges public interest objectives, seeking gains in the form of redistributive justice. Hence, this thesis argues that the current mainstream approach to CWS may be unqualified to remedy monopoly, concentrated economic power and the untransformed economy in post-apartheid South Africa. In other words, the pegging competition analysis approach to mainstream CWS may continue to stifle the Act's goals.

The Chicago model of competition law and policy's narrow scope that competition should unilaterally maximise consumer welfare is, at face value, in contrast with the

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[453] Baker, J. & Salop, S. 2015. Antitrust, competition policy, and inequality. *Georgetown Law Journal.* 104(1). At 24, Lianos, I. 2019. *The poverty of competition law: the short story.* Centre for Law, Economics and Society. At 40.

preamble of the Competition Act. [454] The Act directs there to the balancing exercise of ensuring the welfare of several stakeholders. [455] The Preamble of the Act confirms that our competition policy is dedicated to an extended meaning of what 'welfare' means and is not unilaterally focused on the interest of consumer efficiency. [456]

[454] Competition Act, 1998.

[455] Ibid. Preamble (The people of South Africa recognise: That an efficient, competitive economic all South Africans.)

[456] *Background note on competition amendment bill.* 2017. Pretoria.("The Preamble also records that an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans.")

CHAPTER 6

RACIAL AND GENDER INEQUALITIES: BLOCKING EFFECTIVE MARKET PARTICIPATION?

6.1 Introduction

In Chapter 4 above, this thesis reviewed the ownership trends report that served as an indicator of the progress of economic transformation. The report outlined the low level of firms explicitly owned by black women. As per this report, black women industrialists in South Africa remain at the bottom of the pack. The review of the statistics above is against the backdrop that one of the purposes of the 1998 Act was to ensure enhanced ownership control and greater ownership by the firms owned by a black woman. The Competition Act is supposed to prohibit or block any bottleneck distortions that result in barriers to entry for firms owned by black HDIs. However, the enforcement strategies are the silent and overlooking role and the effect of intersectionality on the part of a black woman's ability to be an effective competitor.

This chapter suggests that we adopt the intersectionality doctrine when we enforce public interest objectives. As such, when merger consideration is conducted as per section 12A(3), a review of the effect on those persons who find themselves at the intersection of race and gender should not be forgotten. Additionally, block vertical restraints exemptions should be considered if we seek to use the Competition Act to enhance ownership trends and have an inclusive economy.

6.2 Redistributive justice

It has been mentioned several times in this thesis that one of the goals of the Competition Act is to fulfil redistributive justice for the benefit of historically marginalised populations in South Africa. Redistributive justice is the theory of punishment, where accountability is defined as assuming responsibility and acting to

assuming responsibility and acting to repair the harm committed in the past to maintain a harmonious future. [457]

The fact that redistributive justice is one of the goals, and not the only goal, results in the question of how the various objectives should be balanced. In other words, the redistributive component versus the efficiency component. The Preamble of the Act clearly directs that there be a balancing exercise of redistributive and efficiency components. [458] In Walmart/Massmart [459], the balancing act was alluded to by the CAC Judge President. In the judgment, the commission or the Tribunal was directed to balance the two competent arguments of consumer welfare and the public interest objectives.

The importance of redistributive justice for the historically marginalised population cannot be overstated, particularly regarding economic emancipation and equal treatment of HDIs. However, the current policy strategy and a one-size-fits-all approach are counterproductive. By a one-size-fits-all approach, I mean an approach that overlooks the personal characteristics of the various demographics who fall under the historically marginalised population. For this reason, the government saw it fit to introduce a competition policy that includes the public interest objectives.

One of the Competition Act's foundational principles is transforming the South African economy by undoing past structural injustices. In other words – redistributive justice. This foundational principle is reinforced in the purpose of the Act. Section 2(b)(c)(e) and (f) of the Act states the following:

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[457] *See* Markovits, D. 2003. How much redistribution should there be? *The Yale Law Journal.* 112(8):2291-2329. Available: http://www.jstor.org/stable/3657477 [2023/07/14/].S Markovits 'How Much Redistribution Should There Be?' 2003 112 *Yale Law Journal* 2291,2293.

[458] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

[459] 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. 2012. Competition Appeal Court.

> The purpose of this Act is to promote and maintain competition in the Republic in order
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons.

This part of the thesis will focus on black women industrialists who are multiply disadvantaged, i.e., they find themselves at the intersection of race and gender. The Competition jurisprudence in South Africa does not embrace this intersectional approach to competition enforcement. As articulated above, very few black women-owned firms in South Africa exist in various industries despite the Act's intention in s 2(f) of the Act – to increase the greater spread of ownership for historically disadvantaged and small businesses. In contrast, there seems to be some increase in white women-owned and black man-owned firms.

The Constitutional values of equality, freedom and dignity underpin redistributive justice. One of the purposes of the Act is to ensure that the historically disadvantaged and marginalised population groups are treated equally to their privileged counterparts who had centuries of privilege at their disposal. This equalisation protects the freedom and dignity that the Constitution values and empowers those who were marginalised in the past. When we put these values and redistributive agenda into practice, one has to ensure that we adopt an effective method that will yield the intended outcome of true redistributive justice.

The purpose of introducing competition policy and the Act [460] in South Africa was to redress the barriers to entry and promote black business in post-colonial and apartheid South Africa. This was to dismantle the excessive concentration of ownership resulting

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[460] Competition Act, 1998.

from past apartheid and discriminatory laws that, amongst others, restricted the black population from participating in the South African formal economy. This Purpose is articulated in the Preamble of the 1998 Act and the memorandum accompanying the same Act. However, adopting standard provisions and mainstream consumer welfare maximisation prohibits such redress and promotion.

The competition policy seems to recognise the need for a fairness-driven competition policy; however, the adoption of certain competition/antitrust principles and application thereof hinders the fruition of the Purpose of the Act. Our competition policy has sought *and* still seeks to equalise market access for black businesses to be effective competitors and possibly reduce generational market concentration. Once this black business is an effective competitor to current (white-owned) businesses, the South African market will not be concentrated to a point where consumers are price takers and vulnerable to high prices and poor quality. One of the overarching goals of competition policy is to achieve redistributive justice where equality is present. It would be unfair to burden competition law and policy with all responsibility of achieving such equalisation with a redistributive justice element.

The current Competition Act understands and agrees that market access should be equalised because our historical past hindered such ability to have market access and effectively compete. However, we cannot negate the tremendous ability that competition policy has to advance the social contract and restore economic equality, tackling poverty and transformation in post-democratic South Africa.

The question is whether and to what extent our competition policy has lagged to redress our racist past while successfully promoting black business. Further, it investigates what a transformed and progressive piece of legislation or policy ought to look like if we want to redress effectively. I review whether an intersectional competition enforcement model may ensure that public interest objectives are fully realised. I do this by first probing whether a more equity-driven competition law that acknowledges an intersectional approach to redress will help unequal South African

jurisdictions that sadly find themselves leading with an 88.8 Gini coefficient. [461]

In essence, the below will investigate whether it is sufficient to adopt either universal[462], targeted [463] or targeted universalism [464] policy strategy in a context where size (of the firm), race (of the firm owner) and gender (of the firm owner) are bound up in anti-competitive conduct, practice or agreement. In essence, the question arises as to whether the presence of multiple forms of discrimination necessitates a distinct policy approach, such as applying the intersectionality principle. Moreover, it remains to be seen whether such policy strategies or responses will be effective when addressing the intersectionality of race and gender.

6.2.1 Justifiable methods for redistributive justice

Currently, the Competition Act groups all HDIs under one umbrella. The Act does not look at the personal characteristics of each historically disadvantaged individual. The one-size-fits-all approach of the redress in Competition Act may be stifling the attainment of enhanced ownership trends that reflect the racial and gender demographics of post-colonial and apartheid South Africa. Perhaps the current one-size-fits-all approach is not an effective solution to serve the black women industrialists seeking to gain market access and empowerment by the Competition Act. Hence, this thesis seeks to review whether we can replace or develop a far more effective

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[461] The Gini coefficient measures wealth inequality by statistically measuring the dispensation of income or wealth distribution in a country.

[462] Universal/universalism approaches like minimum wage or social security provide the same minimum protection to all despite their status or group membership.

[463] Targeted approach is a policy response that provides a benefit or protection based on group membership/constituency or status, like affirmative action that is directed at historically disadvantaged individuals or an approach that directs resources to disabled persons.

[464] Targeted universalism approach is a policy response that "supports the needs of the particular while reminding us that we are all part of the same social fabric".Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846.. At 9.

approach. An approach should be developed that looks at individuals' circumstances by acknowledging the impact of gender, race, and social class discrimination, as well as the effects of intersectionality on gaining market access and redistributive justice."

Lianos underscores the method of redistributive justice in The Poverty of Competition Law by posing the following questions: [465]

1. What is to be equalised?
2. Between whom?
3. What are the reasons it should be equalised?
4. What are justifiable methods for proceeding with this equalisation?

Based on the inquiry above, several key points emerge. Firstly, it is essential to determine what needs to be equalised. The focus should be on addressing the gender disparity that persists in firm ownership in post-colonial and apartheid South Africa.

Secondly, addressing the “between whom” question involves ensuring equality between black women industrialists and other HDIs, namely black men or white women. It should be emphasised that this effort is not intended to undermine the discrimination faced by other HDIs nor engage in a competition of victimhood. To achieve genuine and effective redistributive justice, careful consideration must be given to the positioning of black women industrialists.

Thirdly, the rationale for equalisation is supported by the legislature's intent and directive, which emphasise that competition policy should incorporate a redistributive justice component. This is evident in the inclusion of various public interest provisions within the Competition Act. Lastly, we will explore the justifiable methods of equalisation in the subsequent discussion.

If one reflected on Lianos’ stance above, the contentious aspect would be the justifiable equalisation methods. This is because the Competition Act clearly defines

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[465] Lianos, I. 2018. *The poverty of competition law: the long story.* Centre for Law, Economics and Society.

what and to whom should be equalised – SMEs and HDIs. However, the reason why equalisation should occur is also quite clear – to redress past discriminatory conduct and achieve a competitive market that represents the demographics of post-apartheid South Africa. Unfortunately, the gap is found in the justifiable methods that must have been applied when proceeding with such equalisation or redistributive justice.

Perhaps it is difficult for justifiable equalisation/redistributive justice to be achieved for all incumbents because an ill-fitting policy strategy influences the policy instrument adopted. The bundling up or one-size-fits-all approach that ignores the burdens that intersectionality has on black woman-owned businesses is one of the irregular methods that set the Competition Act up to fail in redistributive endeavours.

At the beginning of this chapter, it was expressed that a replacement of the current approach to redress and redistributive justice would need to be explored if the purpose of the Act would be realised. [466] We ought to learn from the other countries who may not look like South Africa, but instead, we desire to look like them. I see no benefit in imitating the US or EU competition policy strategy instead of learning from them and, in the process, avoiding negative spillovers. A highlight of some questions one needs to understand before committing to a specific *method* for gaining redistributive justice was explained. In the *Poverty of Competition Law*[467] , Lianos notes that one should ascertain which methods provide the intended equalisation through fairness-driven legislation, i.e., competition law.

Preceding this section, this thesis argued that intersectionality should be considered if we seek redistributive justice to benefit black women industrialists. Once the

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[466] One of the purposes of the Competition Act is to ensure that HDIs have greater ownership and are effective competitors in the post-colonial and apartheid economy. In other words, the Act seeks to ensure that historically disadvantaged individuals are treated *equally,* and redistributive justice is achieved. As mentioned above, for the purpose of this chapter and thesis, the focus is on the Black South African women and them being beneficiaries of this redistributive justice expressed by the Competition Act.

[467] Lianos, I. 2018. *The poverty of competition law: the long story.* Centre for Law, Economics and Society.

intersectional approach has been affirmed, a strategy that may be utilised is targeted universalism. Targeted universalism ensures that the effective and appropriate implementation of fairness-oriented legislation, such as the Competition Act, is achieved. This approach acknowledges and addresses the unique challenges faced by historically marginalised sub-groups, examining these obstacles from a structural, systematic, and institutional perspective. This will be shown below.

Targeted universalism is an approach that recognises that different groups are situated differently and need to be treated differently. Targeted universalism is a policy strategy that intends to centre around fairness by not treating different individuals equally but relevant to their needs and place in society. Professors Powel and Ake developed targeted universalism. Target strategies or policies recognise the hardships a certain demographic faces, for example, the Black Lives Matter Movement (BLM). They emphasise that the concept of targeted universalism is distinct from both targeted and universal strategies as separate concepts. The BLM is a targeted strategy because it recognises the structural hardships and harm that were and are faced by black people in America. Essentially, the targeted strategy focuses on one group. This strategy of focusing on one group to the exclusion of others is said to possibly cause resentment from the demographic who is "still in need, even if their need is not as extreme as that of those targeted".[468] Hence, Powell and Ake note that targeted strategies might exacerbate inequality, marginality and othering.

On the other hand, universal strategies or policies recognise everyone and assume that a solution ought to serve or help everyone. However, these strategies often overlook the people's differences and "fail to serve everyone". [469] Powell and Ake reject the claim and method of formal equality that would target people the same way and deny or ignore their differences. In the context of this thesis, the Competition Act adopts a formal equality strategy by having public policy provisions impact both black

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[468] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. At 53

[469] Ibid. at 54.

and white-owned small businesses the same way irrespective of gender, race or class. A difference between the incumbents is denied, irrespective of them being situated differently in society. A distinction of the race, gender, socio-economic standard, and ability/disability of the business owners are disregarded, and small business owners are granted the same privilege. The Competition Act ought to embrace intersectionality. The amendments should accommodate these differences.

The detractors of the influence of universalism may argue that such strategy perpetuates reverse discrimination – defined as preferential treatment associated with affirmative action, which may constitute discrimination against other groups (in the competition law context, female white-owned SME owners may regard such targeted universalism strategy as reverse discriminatory because the preferential treatment that is attached to black-owned female owners, to the exclusion of them). Alternatively, the opponents may claim that deviation from the universalism strategy will lead to 'statistical discrimination. Statistical discrimination may be described as judging an individual based on the average characteristics of the group to which they belong rather than their circumstances or characteristics. We should rely on the affirmative provisions encapsulated in the Labour Relations Act to mitigate the realisation of the above arguments of reverse or statistical discrimination.

Furthermore, the reliance on relative philosophy plays a crucial role in assessing the likelihood of such discrimination taking place. It should be emphasised that the specific context in which these considerations are made plays a pivotal role in determining the outcome.

6.3.1 Overlooking Intersectionality

> In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, gender, class and other grounds – Judge Victor in Mahlangu and Another v Minister of Labour and Others. [470]

[470] *Mahlangu and Another v Minister of Labour and Others.* 2020. Constitutional Court. at 26.

The redistributive justice objectives dedicated to all HDIs (without distinguishing the HDI's attributes) are essential for redressing past inequality and regaining freedom and dignity for the incumbents. However, the one-size-fits-all approach, i.e., one that overlooks intersectionality, subverts the redistributive justice objectives that the Competition Act seeks to achieve. This chapter reviews the effect of overlooking intersectionality when enforcing public interest objectives in post-colonial and apartheid South Africa. Furthermore, there is the question of whether the country's competition enforcement should adopt a more customised approach that recognises the unique position of black women industrialists who experience the intersection of race and gender.

Research shows that black firms often underperform and survive more than white firms. It is the opinion of this thesis that race and gender have a role in blocking success and that the competition framework in South Africa should acknowledge that. A small business owned by a black woman is less likely to have the privilege that may grant them market access and effective participation in most of those concentrated industries than white-owned ones. [471] For example, consider Nationwide Poles cc, a small business supplier of treated wooden fencing poles owned by a white South African male, Mr. Foot. In this scenario, Mr. Foot's background would likely provide him with certain advantages in terms of market access and intersectionality. Ignoring such intersectionality may imply that competition enforcement and protection of the Act is not inclusive but reserved for a privileged few (small businesses owned by white, abled males). Utilising mainstream competition enforcement strategies will stifle such inclusive reach. Universalism overlooks differences, which is “incredibly meaningful

[471] Vorobeva, E. 2022. Intersectionality and minority entrepreneurship: at the crossroad of vulnerability and power. In *Disadvantaged Minorities in Business.* Springer International Publishing. 225-235. DOI:10.1007/978-3-030-97079-6_11.

[and] profoundly felt".[472] There is a risk of missing the mark if we fail to consider intersectionality.

In Mahlangu and Another v Minister of Labour and Others, the Constitutional Court affirmed that domestic workers' race and gender were bound up in the discrimination. The bound-up discrimination was caused by COIDA excluding (often) black female domestic workers as 'employees' who can benefit from social security and compensation for work-related injuries. The COIDA policy excluded black female domestic workers despite claiming to be a 'universal' policy approach to treat all employees equally by benefiting from social security and compensation for work injury. If a targeted universalism approach was utilised, the COIDA policy would support the needs of particularly vulnerable people at the intersection of race, gender, class or other grounds while "reminding us that we are all part of the same fabric". [473]Thus, a competition policy that seeks to adopt a more comprehensive approach like 'targeted universalism' would benefit South Africa by gaining an inclusive economy where developmental socio-goals in the NDP are realised while protecting the competitive aspect and consumer welfare. However, the current structure of the Competition Act seems to reject the 'targeted universalism' approach. Instead, the current structure of the Act, particularly the parts relating to the Purpose of the Act of enhanced effective participation of small or firms owned by HDIs. This purpose seems to adopt blanket universalism, which is likely to be indifferent to the reality that different groups are situated differently relative to the institutions and resources of society. [474] The overlooking of the persons who find themselves at intersections of race, gender, class

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[472] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846.at 56.

[473] Ibid.at 9. ("targeted universalism is:

An approach that supports the needs of the particular while reminding us that we are all part of the same social fabric. Targeted universalism rejects a blanket universal which is likely to be indifferent to the reality that different groups are situated differently relative to the institutions and resources of society. It also rejects the claim of formal equality that would treat all people the same as a way of denying difference").

[474] Ibid. at 9.

and other grounds. For example, the blanket support of small or HDI-owned firms results in such vulnerable demographics not being empowered as such intersectionality is ignored, nor does the 'universal' policy approach effectively support such vulnerability.

In 2018, the legislature amended the Competition Act. One of the amended Act's goals was to reconceptualise and "ensure to protect and stimulate the growth of small and medium businesses and firms owned and controlled by historically disadvantaged persons". [475] The 2018 Act, on its face, has reinforced the overall objective—the purpose and goals of the Act. The Act has broadened its reach by reconceptualising various provisions that harmed various vulnerable and previously marginalised groups through anti-competitive price discrimination and buyer power.

Within the South African context, black-owned small businesses run the highest risk of being susceptible to the effects of market barriers, evidenced by the express purpose of the Competition Act to protect the incumbent's small business. [476]

Our competition agency and courts should perhaps adopt an intersectional and case-by-case approach. Proponents of mainstream competition [477] need to recognise the multiple prejudices brought about by various aspects like race, gender and size of the

[475] The group of people that were legally and socially marginalized before 1994 because their race.

[476] The preamble recognizes that apartheid and the other discriminatory laws of the past resulted in excessive concentration of ownership and control within the national economy and that the economy must be open to greater ownership by a greater number of black South Africans. The Act's purpose is said to promote and maintain competition in order to ensure that SMEs have an equitable opportunity to participate in the economy, secondly, to increase ownership of stakes of historically disadvantaged persons.

[477] 'Mainstream Competition' in the context of this thesis means: competition enforcement that overlooks the need for an intersectional case-by case approach and groups those discriminated against as a single group.

firm. Therefore, a one-size-fits-all approach could be as damaging as a single approach to the feminist movement. [478]

In Mahlangu and Another v Minister of Labour and Others, the applicants argued that the intersectionality of race, gender, class and other grounds exacerbate domestic workers' already compromised position in our society. Applicants argued, "Intersectionality requires that courts examine the nature and context of the individual or group at issue, their history, as well as the social and legal history of society's treatment of that group." [479] The Court affirmed this position.

The Competition Act states that one of its objectives is to ensure the effective participation of firms owned by HDIs and SMEs. On its face, the Act seems to ignore the role of intersectionality when developing redress strategies. The objective does not recognise the harm suffered by those at the intersection of race, gender, economic background, and class. This is reflected in the following statement:

> Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. An accident in an intersection can be caused by cars travelling from any number of directions and, sometimes, from all of them. Similarly, if a black woman is harmed because she is in the intersection, her injury could result from gender or racial discrimination."[480]

The personal characteristics of HDI industrialists should be considered when enforcing competition law versus a one-size-fits-all approach and seeing the historically marginalised as the same. The Act aims to provide SMEs with an equitable opportunity to participate in the economy. Secondly, the Act seeks to promote a greater spread of

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[478] S*ee* Kendall, M. 2020. *Hood feminism: notes from the women that a movement forgot.* New York: Penguin Random House.at 18. With reference to dangers of a one size fits all approach in the feminist movement in the United States. Kendall narrates how mainstream feminism fails to show up for black woman by centering feminist movement to benefit white women when it is silent on the importance of advancing an intersectional and inclusive approach to feminist movement.

[479] *Mahlangu and Another v Minister of Labour and Others.* 2020. Constitutional Court. at 95.

[480]Crenshaw, K. 1989. Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum.* 8.at 149.

ownership for HDIs. Lastly, the Act seeks to promote social and economic welfare for South Africans. With all these promises as the backdrop, the Act will continue to fail, particularly SMEs owned by black women, until it can utilise targeted universalism strategies by acknowledging intersectionality. Or risk the continued false positives to transformation.

Crenshaw's paper titled *The Critique of Antidiscrimination Doctrine*, *Feminist Theory and Antiracist Politics*[481] centres around black women and their experience with the mainstream treatment of race and gender as mutually exclusive categories of experience and analysis, i.e., single axis analysis. [482] The traditional reliance on a single-axis analysis in response to antidiscrimination frameworks places black men and white women (who are more privileged) on the same axis as black women. The single axis analysis, she argued, distorted the different experiences of the incumbent's categorisation by equating it to other privileged demographic – even though their experiences are not equal.

For this thesis, the analysis will centre around black women who fall under the umbrella of small HDIs that the Competition Act seeks to help.[483] The same Act intends to facilitate effective participation for small and previously marginalised black businesses. In the South African competition law system, white-owned small businesses do not find themselves in such an intersection of race and gender, i.e., as a multiply disadvantaged class. Alternatively, those HDIs who are black male are also

[481] Ibid.

[482]Ibid. Crenshaw explains concept of intersectionality of race and gender that Black women in the United States of America are susceptible to) available at http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8?utm_source=chicagounbound.uchicago.edu%2Fuclf%2Fvol1989%2Fiss1%2F8&utm_medium=PDF&utm_campaign=PDFCoverPages.

[483] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. . See section 2 footnote 418 above

not multiply disadvantaged by their race and gender, in contrast to black women industrialists in South Africa. [484]

By ignoring the depth and effect of intersectionality, the status quo judges black women's businesses not by their characteristics of blackness and being women-owned. Instead, the policy measures the need to benefit from the Act's equity-based goals by looking at race and the size of discrimination. This narrow measurement perpetuates statistical discrimination. Statistical discrimination is the practice of judging an individual based on the average characteristic of the group they belong to rather than their characteristics instead of judging an individual based on their characteristic, like being a black woman. When the same substantive laws that seek to achieve redistributive justice overlook the burden that comes with the intersection of race and gender, such laws promote inequality and abandon hope for effective redress of any nature possibly taking place. In turn, if our hybrid competition policy continues with the status quo, we may be faced with the false belief that structural

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[484] In the South African context, the effects of being vulnerable to intersectional oppression because of one's gender and race is mentioned in *Mahlangu and Another v Minister of Labour and Others.* 2020. Constitutional Court.The Plaintiff Ms Mahlangu (deceased) was employed as a domestic worker for twenty-two years. In executing her duties as a domestic worker, she drowned in her employee's pool. The deceased's daughter Sylvia Mahlangu (plaintiff) sought to claim compensation from the Department of Labour as covered by the Compensation for Occupational Injuries and Diseases Act (COIDA). Unfortunately, domestic workers were excluded from protection by COIDA. Section 1 (xix)(v) of COIDA excluded domestic workers from the definition of an "employee", and resultantly from protection by COIDA in the event of injury, disablement or death in the workplace. The plaintiff argued that exclusion was without a legitimate purpose and that such exclusion infringed rights to equality, human dignity and social security. The plaintiff brought an application to declare above section 1 (xix)(v) of COIDA unconstitutional. The second *amicus curiae* proposed that the Court adopt a nuanced, purposive and socio-contextual approach in the interpretation of COIDA.[484] In its judgment, the Court makes mention of the effects of intersectionality towards a certain member of the population, i.e., black South African women. The Court held the following: "In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, gender, class and other grounds". [484]

reform is being achieved. We will have a false narrative of success because we will measure transformation through the lens of group characteristics rather than gender or individual personal characteristics of the firm owner.

In Chapter 3 above, we see the property sector in South Africa depicted in a deceiving way. The statistics do not show actual transformation in the property has been achieved. Instead, the statistics show that the percentage of black ownership increases in the property sector until the annual goal of twenty-seven per cent is exceeded. However, black women's ownership in the property industry is lagging. Personal characteristics like gender, socio-economic background, first-generation firm owners, etc., tremendously impact whether such firms can gain market access and grow to be effective competitors.

The personal characteristics of HDI industrialists should be considered when enforcing competition law versus a one-size-fits-all approach and 'seeing' the historically marginalised as the same. In Chapter 2 above, this thesis reviewed the *Ownership Trends Report* (the Report). [485] That report served as an indicator of the progress of economic transformation since the introduction of various laws and policies that sought to advance economic transformation and enhance the participation of HDIs in the formal economy. The Report revealed the low level of firms explicitly owned by black women. As per this report, black women industrialists in South Africa continue to be at the bottom of the pack.

The purpose of the review of ownership trends is because one of the Purposes of the Competition Act was to fulfil enhanced ownership control by HDIs (including black women). The Competition Act is supposed to prohibit or block any bottleneck distortions that result in barriers to entry for firms owned by the incumbents. However, the enforcement strategies of the Act are silent and overlook the role and the effect of intersectionality on a black woman's ability to be an effective competitor. The Purpose

[485] See *National status and trends on broad – based black economic empowerment.* 2019. South Africa.

of the Act is to provide SMEs with an equitable opportunity to participate in the economy. Secondly, the Act seeks to promote a greater spread of ownership for HDIs. Lastly, the Act seeks to promote social and economic welfare for South Africans. With all these promises as the backdrop, the Act will continue to fail, particularly SMEs owned by black women, until it can utilise targeted universalism strategies[486] by acknowledging intersectionality. Over twenty years after the Competition Act's promulgation, the laws that seek redistributive justice have been poorly enforced. The Act's purpose is to acknowledge past discriminatory laws and practices that culminated in the present-day economic and social plight in South Africa finds itself. The Preamble acknowledged the prohibition of free participation in the economy by all South Africans. [487]

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[486] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846.at 9. John Powell describes Targeted Universalism as an approach that believes the different groups which situated differently in society should not be treated the same. Adverse to the formal equality approach, targeted universalism argues that the incumbents' difference should be taken into account.

[487] Competition Act, 1998. 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.

That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy.

That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans and
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;

Based on their political movements, Jurisdictions may support a political agenda that seeks to promote equity, non-discrimination, and inclusion. [488] Such redistributive and transformative policies seek to create systematic changes versus jurisdictions uninterested in building shared wealth because they support continued marginality. For example, the US government utilised "targeted" or "universal" strategies to be successful in systematic change. This chapter seeks to interrogate, firstly, whether it is sufficient to adopt the same approach in a context where size (of the firm), race (of the firm owner) and gender (of the firm owner) are bound up. And whether effective enforcement will be realised when the court interprets anti-discriminatory provisions by considering intersecting axes of discrimination. Secondly, whether adopting a targeted universalism approach will realise the achievement of an equity-driven competition policy. A competition policy that advances goals reflected in the NDP and to realise the Purpose of the Act stipulated in section 2(b)(c)(e) and (f). [489]

The Act may be a possible and efficient intervention that will reduce such socio-economic challenges and advance inclusive growth for black women-owned firms that

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Restrain particular trade practices which undermine a competitive economy;

Regulate the transfer of economic ownership in keeping with the public interest; and

Establish independent institutions to monitor economic competition"

[488] Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846.at 52.

[489] *See National development plan 2030: executive summary.* n.d. *See* section 2 Purpose of Act
The purpose of this *Act* is to promote and maintain competition in the Republic and in order –

…

(b) to Provide consumers with competitive prices and product choices;

(c) to Promote employment and advance the social and economic welfare of South Africans;

…

(e) to Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

have been struggling with market access (in contrast to the white-owned, white-women and black man-owned firms). To cure such disparities, one must end racial isolation in the mainstream market for structural transformation and diversity to fully exist.[490]

Part of having the correct policy alternatives to guide our competition laws is recognising the need for an 'intersectional [491] approach to policy intervention. The recognition of intersectionality requires an appreciation of how gender, race etc., impact certain individuals who belong in a 'protected group,' i.e., small, or firms owned by HDIs. Currently, the provisions promoting redistributive justice do not appreciate the individual-specific one-down status of a small business owner. For black women in South Africa, being a small business owner (suddenly allowed to participate in the formal market) is compounded by racism and sexism. Because a black woman small business owner does not fit the mould of a successful industrialist who deserves the benefit of the doubt and trust– the incumbents must work twice as much to gain what other small non-black women-owned firms have. This compounded one-down status of black women small firm owners should not continue to be ignored or overlooked by the Competition Act. If we continue to overlook the compounded one-down status for certain individuals when considering merger reviews or conduct, we fail the same individuals the Act seeks to provide justice for. By acknowledging the one-down status of certain incumbents, whatever degree that may be, we offer an accurate and fair equal opportunity to those who historically face compounded injustice.

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[490] See Flynn, A. 2017. *The hidden rules of race: barriers to an inclusive economy.* New York, NY: Cambridge University PressDOI:10.1017/9781108277846. at 96 ("Poverty and race are so highly correlated that if we want to lessen achievement disparities and thereby increase school attainment, income, and other long-term outcomes – including health and overall well-being – for African Americans, we must end racial isolation.").

[491] Professor Kimberlé Williams Crenshaw coined the term to describe the way race and gender impact Black womxn in the justice system. A decolonised and intersectional approach to competition enforcement requires understanding that too often U.K and US (mainstream competition laws and policy alternatives) overlook the plight faced by that certain incumbents in the 'protected group' E.g. Black womxn SME owners are, as author Mikki Kendall coins, "the proverbial canaries in the coal mine of hate." And *See* Kendall, M. 2020. *Hood feminism: notes from the women that a movement forgot.* New York: Penguin Random House.at 44.

In this thesis, the analysis has centred around black women who fall under the umbrella of small HDIs that the Competition Act seeks to help.[492] The same Act intends to facilitate effective participation for small and previously marginalised black businesses. In the South African competition law system, white-owned small businesses do not find themselves in such an intersection of race and gender, i.e., as a multiply disadvantaged class. Alternatively, those HDIs who are black males are also not multiply disadvantaged by their race and gender, unlike black women industrialists in South Africa. [493]

The firms owned by black South African women should be placed at a 'greater standing' than, for example, white women-owned or black man-owned businesses. By 'greater standing', I mean that to achieve real redress, we should consider that the incumbents face greater oppression because they are at the intersection of race and

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[492] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. . See section 2 footnote 418 above

[493] In the South African context, the effects of being vulnerable to intersectional oppression because of one's gender and race is mentioned in Court's judgment of *Mahlangu and Another v Minister of Labour and Others* (CCT306/19)(2020) ZACC 24 (19 November 2020). The Plaintiff, Ms Mahlangu (deceased), was employed as a domestic worker for twenty-two years. In executing her duties as a domestic worker, she drowned in her employee's pool. The deceased's daughter Sylvia Mahlangu (plaintiff) sought to claim compensation from the Department of Labour as covered by the Compensation for Occupational Injuries and Diseases Act (COIDA). Unfortunately, domestic workers were excluded from protection by COIDA. Section 1 (xix)(v) of COIDA excluded domestic workers from the definition of an "employee", and resultantly from protection by COIDA in the event of injury, disablement or death in the workplace. The plaintiff argued that exclusion was without a legitimate purpose and that such exclusion infringed rights to equality, human dignity and social security. The plaintiff brought an application to declare above section 1 (xix)(v) of COIDA unconstitutional. The second *amicus curiae* proposed that the Court adopt a nuanced, purposive and socio-contextual approach in the interpretation of COIDA. [493] In its judgment, the Court makes mention of the effects of intersectionality towards a certain member of the population i.e. Black South African women. The Court held : "In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, gender, class and other grounds". [493]

gender. It is beyond the thesis of this scope to investigate whether other firms owned black women who find themselves at, for example, the intersection of race, gender and disability. However, the same would be sufficient, i.e., acknowledge that their standing in the intersection between race, gender and disability may require a different response than that of black-woman-owned firms.

The lived experiences of black women encompass a wider range of challenges and discrimination compared to other marginalised groups within the designated category of individuals. Black women face multiple layers of disadvantage, whereas those who do not fall within this scope experience a singular disadvantage. The colonial and apartheid regimes have long passed, but in post-apartheid South Africa, black women are still one of the most vulnerable populations. [494] Unfortunately, the black woman's distinct experiences are erased by the current structure of a (well-meaning) competition law's anti-discrimination doctrine.

The black women's experience was erased because the Act overlooks intersectionality doctrine. The intersectional nature of disadvantage (based on more than one ground) is complex, creating different and multiple forms of inequality that cannot be explained or understood simply by referencing one of the grounds, such as the size of the gender or race of the firm owner. Sensitivity to a certain population's context or lived experience requires sensitivity to the intricate and compounding nature of multiplying the disadvantaged. Black women are not only disadvantaged by past racist legislation (that the Competition Act intends to redress). Still, they are also disadvantaged by being women in a world that is said to be designed for the (white) man.

6.4 Operationalising an intersectionality lens on competition enforcement in South Africa

[494] Mahlangu and Another v Minister of Labour and Others. 2020. Constitutional Court. at fn 20 (" racial distribution of domestic workers is highly uneven, with the vast majority classified as "black" (91%) and the remainder as "coloured" (9%).")

The preamble of the Competition Act states that the Act's purpose is to promote a greater spread of ownership in the current mainstream economy .[495] This comes after the realisation that 20 years after introducing the 1998 Competition Act, South African firm ownership and market participation were skewed towards the white population and against the previously marginalised black population. As such, the 2018 Bill was the government's attempt to finally eliminate the legacy of apartheid and colonial policy measures that disempowered black industrialists. The greater spread of ownership seems to consider that the past racial inequality and exclusion of HDIs have resulted in racially skewed, concentrated formal markets. How the above Preamble is enforced is extremely important in ensuring a diverse and inclusive economy. Part of that objective is reforming competition enforcement to effectively empower those vulnerable market participants and ensure that the government under the democratic dispensation achieves the intended inclusive economy.

Now, the 2018 Act empowers the previously marginalised in various ways. Firstly, the Act empowers the black industrialists in the regulation process of mergers. The Act directs government agencies to consider the effect of a specific merger on small businesses and firms owned by HDIs to participate in a market effectively. However, little is said about the compounded discrimination that exacerbates barriers to market access and participation for black woman-owned firms (black women-owned firms).

In this part of the thesis, I will offer suggestions on how the intersectional lens of competition enforcement can be operationalised. This ensures that the Act provides

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[495] See the Preamble and section 12A(3)(e) of the *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. . The 2018 Act intended to ensure effective participation for historically disadvantaged individuals and section 12A(3)(e) merger consideration was added as the fifth public interest consideration. The section 12A(3)(e) directs that when merger consideration is being conducted by the competition commission or competition tribunal, they must consider the mergers capacity to promote greater spread of ownership, particularly increase the ownership levels of historically disadvantaged individuals and workers in a market.

tailored support so that black-owned firms may effectively participate in those lucrative industries and are not blocked by their intersectional identities. [496]

6.4.1 Merger consideration

The Competition Commission or the Competition Tribunal must determine whether a merger may be justified on substantial public interest grounds. [497] According to section 12A(3) of the Competition Act, the Competition Commission is directed to determine the impact of a merger on the public interest objectives. In other words, determine whether a merger can or cannot be justified on public interest goals. The competition commission must consider the effect a merger will have on (i) a particular industry, (ii) employment, (iii) the ability of small businesses and firms owned by HDIs to be effective participants, (iv) the ability of natural industries to contribute in the international markets and (v) promoting a greater spread of ownership, in particular increase levels of ownership by HDIs and workers in the firm. Furthermore, the Competition Commission and the Competition Tribunal depend on the Guidelines for Assessing Public Interest Provisions in Merger Regulation, as stipulated in the Competition Act No. 84 of 1998, to enforce the provisions outlined in section 12(3).

When positioned at the intersection of race, gender, class, and size, like being a black woman who owns a small firm, individuals in this situation may require a distinct approach compared to those facing only a single form of discrimination. Hence, the argument is that we should embrace a case-by-case approach. The case-by-case approach may direct the courts, Competition Commission or Competition Tribunal to consider the complexity of certain industrialists' identities.

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[496] Vorobeva, E. 2022. Intersectionality and minority entrepreneurship: at the crossroad of vulnerability and power. In *Disadvantaged Minorities in Business.* Springer International Publishing. 225-235. DOI:10.1007/978-3-030-97079-6_11.

[497] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. . At section12A, 1A.

6.4.1.1 The Burger King SA merger consideration

On the 17th of April 2021, the Tribunal approved, with conditions, an acquisition of Burger King SA and a meat plant in Cape Town that manufactures burger patties (Grand Foods Meat Plant) [498.] The acquiring company was ECP Africa Funds. Burger King holds a long-term master franchise licence of the American multinational fast food restaurant chain. This transaction involved ECP Africa Funds seeking to acquire almost 95% of Burger King SA. Pre-merger, Burger King SA was wholly owned by Grand Parade Investments (GPI), which had 95.36% control of Burger King SA.

Before the merger, HDIs held a 68.56% stake in GPI, while black women held a 22.87% stake.[499] In turn, pre-merger, the ECP Africa Fund had no ownership by HDPs. The rationale of the proposed merger, according to ECP Africa Funds at least, was "an opportunity for it to invest in a high-growth target in line with its investment strategy and group mandate." [500]

During the Competition Commission investigation in the previous year, the fact that the merger would adversely limit the B-BBEE levels was enough to prohibit the merger. As contemplated in S12(1A) of the Act, the competition authorities require the Competition Commission to decide whether a merger can be justified because of the effect on public interest objectives. Part of those 'public interest objectives' is the effect of merger on employment, the promotion of a greater spread of ownership by HDIs and increased ownership levels by HDIs. [501]

Before the Competition Tribunal, the merging parties offered some (revised) conditions to remedy the merger-specific public interests that the Commission had

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[498] *ECP Africa Fund IV LLC & ECP Africa Fund IV A LLC Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd v Competition Commission.* 2021. Competition Tribunal.

[499] Ibid. para 16.

[500] Ibid. para 19

[501] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. . Section 12A(3) (e).

previously decided would be negatively impacted. One of the revised conditions involved an employee share ownership programme. The programme would remedy the concern that the merger would negatively affect the B-BBEE levels.

However, no conditions seem to remedy the negative effect that the merger may cause on the black women ownership trends that, at pre-merger, were sitting around 22%. [502] The overlooking of the burden that those black women may face is a lost opportunity to ensure that there is some remedy for the negative impact the merger would have on black women's ownership. The fact that there is sheer overlooking of HDPs who are multiply disadvantaged and their pre-merger presence not being considered affirms that the intersectional approach to competition enforcement is not embraced. We fail to realise the public interest objectives effectively. The ignorance of the compounded vulnerabilities due to the intersecting oppression faced by the incumbents in the pre-merger Burger Kings SA contrasts the Act's purpose of promoting a greater spread of ownership. If there was consideration of the harm towards persons who already, by their character, fall at the intersection of compounded vulnerabilities, perhaps the merging parties could have included some conditions that speak to empowering these incumbents. However, there was a blatant disregard for this merger's effect on black women's ownership.

6.4.2 Block vertical restraints exemptions for small-scale and black women-owned firms

The intersectionality lens may be operationalised by utilising a block exemption from prohibited vertical practices when those exemptions promote transformation and growth on the part of those victims of intersectional discrimination.

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[502] ECP Africa Fund IV LLC & ECP Africa Fund IV A LLC Burger King (South Africa) RF (Pty) Ltd and Grand Foods Meat Plant (Pty) Ltd v Competition Commission. 2021. Competition Tribunal. At 5 ("GPI is an empowered company: 68.56% of its shareholding is held by HDPs; of which 22.87% is held by black women.")

In general, prohibiting anticompetitive conduct and protecting the competitive process is the purpose of the Competition Act. As such, the Act prohibits conduct where the parties in a horizontal or vertical relationship from acting in concert, abusing their dominance to raise prices or suppress competition. However, upon application, certain persons may be exempt from the scope of the Act.

In terms of the Act, cartels are prohibited per se, and abuse of dominance practices are prohibited. Chapter 2 of the Competition regulates exemptions. In terms of section 10 of the Act, certain exemptions are available for economic transformation on the part of HDIs and small businesses. This means that the HDIs or small businesses may be exempt from entering into certain restrictive Agreements and mergers. The Act directs the competition commission to grant exemptions for effective participation and expansion of black-owned and small firms.

Since the introduction of the 2018 Amendment Act, the scope of the exemption has been extended for economic transformation and ensuring that the ownership trends are spread across various demographics and not skewed against the white population only. The Preamble of the 2018 Act states its intention to "introduce greater flexibility in granting exemptions which promote transformation and growth". [503] However, since the thesis advocates for an intersectionality lens-based competition enforcement, one wonders what this would look like in practice.

In their nature, vertical restraints and proposed mergers of firms in different production streams are less likely to have anticompetitive effects than horizontal constraints between competitors or mergers of those firms in the same market. Additionally, vertical restraints like exclusive dealing are said to be capable of yielding some public interest objectives that outweigh the anticompetitive effect caused by restriction on

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[503] *Competition Amendment Act,* 2018. Available: https://www.gov.za/documents/competitionamendment-act-18-2018-englishafrikaans-14-feb-2019-0000. .

competition. [504]It is against this background and acknowledging the burdensome nature of intersectionality that perhaps those firms, which meet certain criteria, like small-scale and black women-owned firms, should be recipients of a block exemption from vertical restraints. This intersectionality lens may be attributed to effective participation and expansion of HDIs, particularly black women-owned firms, which seem to lag in ownership trends. It may offer some bureaucratic relief from the incumbents, wherein they do not have to apply for such exemptions.

6.5 Protecting democracy of opportunity

Anti-oligarchy scholars favour the democracy-of-opportunity doctrine, which seeks to achieve an inclusive economy, thus sustaining a constitutional democracy. The democracy-of-opportunity doctrine believes that to protect democracy, a jurisdiction needs to have a robust middle-class system and "inclusion across lines such as race and sex". [505] In other words, to protect democracy, we need to consider liberal policy doctrine that aligns with democracy of opportunity instead of conservative doctrine. For example, liberal policy approaches like intersectionality and targeted universalism policy approaches. Most anti-oligarchy scholars, like Fishkin and Forbath, resist the 'conservative' anti-discrimination doctrine. Anti-discrimination doctrine is described as anti-redistributive and narrow and cannot be relied upon as a policy response for achieving structural reform. [506]

South Africa is a nation that recognises constitutional democracy, and the Competition Act sought to, as mentioned above, achieve an inclusive economy. Relying on the anti-oligarchy scholars who believe that narrow and formal anti-discrimination cannot be the correct policy response for the redistributive justice we seek to achieve. I

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[504] Manual on the Formulation and the Application of Competition Law. 2004. *United Nations Conference on Trade and Development*. 2004. At 41

[505] Fishkin, J. & Forbath, W. 2022. *The anti-oligarchy constitution : reconstructing the economic foundations of american democracy.* Harvard University Press. At 3

[506] Ibid. At 7

believe that the single-axis analysis is a conservative anti-discrimination doctrine with deep and negative effects on the democracy of opportunity.

I argue that the starting point in effective competition law and policy is to boycott conservative antidiscrimination policy. Instead, we rely on a broadened anti-discrimination doctrine acknowledging the role of intersectionality when enforcing the Act's redistributive agenda. To gain effective redistributive justice and protect our democracy, we need to acknowledge the burdens facing black-owned firms in South Africa. By overlooking the effects of such multiple disadvantages faced by black women industrialists, we sustain conservative antidiscrimination doctrines that have been ineffective. If the Act will reach and redress certain singularly disadvantaged persons and block those multiply disadvantaged, then the status quo is not and will not change.

While anti-discrimination and inequality have been extensively discussed in previous literature, less is written about connecting these concepts in a competition law context. Less is written about the effects these concepts of anti-discrimination and inequality have on effectively advancing the socio-economic goal of ensuring enhanced participation of small businesses owned by black women in South Africa'.

The Competition Act in South Africa is notably more progressive than the legislation in many other developing countries. The Act is progressive in highlighting anti-discriminatory objectives that seek to dismantle systematic power and privilege. However, the Act is silent on the added inequality and marginalisation endured by those who experience multiple and intersecting forms of discrimination – like black female SME owners – resulting in additional discrimination, which the Act appreciates. Such a disconnection between diagnosis and treatment may be problematic in effectively enforcing the anti-discriminatory objectives.

To treat the structural inequality faced by black businesses owned by particularly black women in South Africa, we need to offer the correct diagnosis and then treatment. Our competition policy needs to identify the problem these black female business owners face. Currently, the Act does not acknowledge the problem faced by those who find themselves at the intersection of race, gender, etc. Following such diagnostic analysis,

black Female businesses face multiple forms of discrimination because they are both black, female and SME owners. The same would be true for black, homosexual, SME owners. For this thesis, a focus will be on black women-owned businesses. To cure such a disconnection between diagnosis and treatment is acknowledging that certain groups of persons will need different 'treatment' than other similarly (but not the same) multiple discriminated persons once such proper diagnosis that intersectionality affects certain groups *and* treatment being context-specific versus blanket redress that does not concern itself with the effects of intersectionality for black women-owned businesses.

As mentioned, the Act seeks to protect the 'protected group' effective participation, including small businesses or black-owned firms. However, the Act is silent on the differences relating to the race and gender of the owners of the firms. While such grouping may be effective, it may underappreciate recognising the principle and effects of intersectionality. Such grouping may perpetuate universalism, which believes all people are equal and should be treated equally. [507]

It is a common cause that the protection of small businesses and firms owned by black South Africans affirms the anti-discrimination doctrine adopted by the Act. Various sections of the Act show the commitment to anti-discrimination, i.e., section 9, section 11 and public interest objectives in merger consideration provisions. However, the Act is silent on the effect of intersectionality and how such silence may hinder the pursuance of the proclaimed goals. Despite the black South African woman's injustice, should she be a victim of price discrimination or anti-competitive conduct or harm?

In enacting what policy alternatives [508] to guide the South African competition enforcement, one needs to consider whether a nation is developing or developed. Additionally, the nation's past (discriminatory or otherwise), whether developing

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[507] https://link.springer.com/referenceworkentry/10.1007%2F978-1-4614-5583-7_545 an example, the United Nations' Universal Declaration of Human Rights asserts various rights to all people – e.g., to marry, own property, and access equal protection under the law – regardless of culture or nationality.

[508] Efficiency or non-efficiency-based policy orientation.

countries, like South Africa, should even use competition laws to protect the integrity of the market marketplace, is beyond the scope of this thesis. Other people regard competition law as “about private power and how to contain its use and abuse”.[509] Competition rules ensure that market power or industry titans own such status due to merit, not cronyism, privilege, abuse of dominance, etc.

The role of competition law in developing nations is different from that of developed countries for many reasons. The developing nation’s political, economic, social, and current contexts play a decisive role. In most cases, developing nations seek to ‘kill two birds with one stone’ by using competition laws to disable systematic economic privilege and extending their agenda to accelerate growth and development or redress the discriminatory political background.

In her article *Equality, Discrimination and Competition Law* [510], Professor Fox uses South Africa and Indonesia to study how competition law can play a fundamental role for developing nations in advancing non-efficiency goals. While developed countries can abandon public interest objectives in their competition or antirust framework, developing nations are implored to rely on their sovereignty to utilise competition policy to advance non-efficiency goals and redistributive agendas.

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[509] Fox, E. & Bazenov, P. 2021. Antitrust and inequality: the history of (in)equality in competition law and its guide to the future. *Should Wealth and Income Inequality be a Competition Law Concern?* University of Amsterdam, 20-21 May 2021 2021.

At 593.

[510] Fox, E.M. 2000. Equality, discrimination, and competition Law: lessons from and for South Africa and Indonesia. *Harvard International Law Journal.* 41:579.

CHAPTER 7

CONCLUDING REMARKS AND RECOMMENDATIONS

7.1 Introduction

Central to the argument of this thesis is the notion that South Africa continues to rely heavily on the mainstream consumer welfare standard (CWS). This overreliance is problematic because, ideologically, the CWS is concerned with fundamentally distinct objectives. For example, the CWS, which flows from the Chicago competition law and policy model, is focused on solely enhancing the efficiency-based goals, i.e., limiting price and increasing output. The reliance on this standard results in the abandonment of public interest's goals set out in the competition Act's Preamble and achieving non-efficiency-based goals like enhancing the ownership stakes of HDIs. Furthermore, the 1998 Act and the 2018 Amendment Act continue to treat HDIs without recourse to the nuances and consequences of intersectionality. The Act continues to treat race and gender as mutually exclusive.

7.2 Competition Act and policy reform

The post-apartheid government demonstrated its commitment to address historical injustices by introducing myriad policy reform guidelines. Of relevance to this thesis is the 1992 *ANC Policy Guidelines for a Democratic South Africa* [511], which recognises the importance of using policy mechanisms to shift the economic power that was disproportionally concentrated within the white minority population. Furthermore, the

[511] *ANC policy guidelines for a democratic South Africa.* 1992. This document outlined a range of non-mutually exclusive goals that served as the vision of the ANC)for democratic South Africa. Among these goals was the objectives to reform and remedy the legacy of inequality and injustice that left black South Africans destitute. Furthermore, the policy guide recognized a need to mitigate the extreme disadvantage and hardships that was faced specifically by black women.

Act and other policy legislation were enacted because of the above-mentioned transformational objective. [512]

The 1998 Competition Act was designed to address a series of transformative objectives initially set out in the 1992 ANC policy document. These are aligned with our foundational constitutional values and hence require interpretation within the framework of section 39(2) of the Constitution. [513] Furthermore, the Act shows commitment to redressing past injustices by going beyond establishing an inclusive formal economy that represents our nation's diverse demographics. Still, it is also aimed to facilitate a robust and competitive economy.

Through the Competition Act, South African competition policy has consistently taken a decisive step in transcending the influence of the mainstream Chicago model of competition law and policy at a time when this model dominates global competition law. Unlike the CWS, which flows from the Chicago model, the Act does not unilaterally look at the conduct's effect on price and output. Instead, the Act broadens its scope by considering the impact of conduct on our socio-economic and public interest goals.

The literature indicates that an increased market concentration in an economy results in significant social and economic disparities. [514] Presently, South Africa exemplifies this finding. Economic ownership and control remain concentrated among a minority, predominantly the white population. Consequently, significant social and economic disparities persist (to some extent) because the economy is not transformed and fails to represent the nation's diverse demographics accurately. [515]

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[512] Other policies and programmes include, but are not limited to black economic empowerment (BEE), Reconstruction and Development Programme (RDP) etc.

[513] S39(2) of the Constitution of the Republic of South Africa, 1996.commands that all courts "promote the spirit, purport and objects of the Bill of Rights when interpreting legislation", because the Bill of Rights is the " cornerstone of our democracy" See also Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) (2004) ZACC

[514] See Mendelsohn, J. 2021. *The challenge of inequality in the competition paradigm.* At 13.

[515] See **Error! Reference source not found.** for an in-depth reflection of social and economic disparities.

The main purpose of this thesis has been to investigate the Competition Act's ability to effectively achieve its pertinent public interest objectives. To achieve this, the thesis began by identifying the root cause behind the Act's inability to fulfil its public interest objectives. It examined whether the normative framework underpinning the Act may lead to its failure to fulfil its public interest objectives, particularly relating to the consumer welfare standard. Alternatively, it investigated how the public interest objectives can be achieved.

7.3 Addressing gender disparity and economic concentration

There is a noticeable gender disparity in firm ownership trends, particularly concerning black women. For instance, the property sector (as noted above) has 42% black men-owned firms compared to a low 11% black women-owned firms. Black women-owned firms continue to lag despite various government empowerment measures that aim to address the racial and gender disparity in firm ownership. The significance and effect of black women market participants seem to be disregarded or overlooked when the Competition Tribunal and courts analyse anti-competitive conduct by dominant firms, considering penalty determination and determining market inquiries.

The present government has failed to implement the initial aspirations of the then-liberation movement during South Africa's transition from apartheid to democracy. The issues highlighted in the 1955 Freedom Charter [516] , such as a non-inclusive market, market concentration, problematic conglomerates, and monopolies, persist today. They persist despite implementing policy measures like the Competition Act because economic concentration levels remain high and ownership trends are skewed towards the historically advantaged demographic. The historically marginalised black South African population continues to face tremendous barriers to entry into the formal economy.

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[516] *The Freedom Charter of South Africa,.* 1955. United Nations Centre Against Apartheid,.

The Competition Tribunal and courts face limitations in adequately considering public interest objectives when they rely on the narrow consumer welfare standard. As a result, gender parity and the intersection of race and gender are overlooked by the narrow consumer welfare standard. This is evident by the underrepresentation of black women-owned firms in various industries during post-colonial and apartheid-era South Africa. Hence, doubts arise as to whether the Act's objectives have been fully achieved, leading this thesis to investigate the reasons behind the Act's shortcomings.

One of the primary goals of the Act is to ensure a greater spread of ownership in the post-apartheid and colonial economy. The Act's Preamble advocates free and fair competition among all participating firms to address excessive concentration of power, skewed ownership trends, and barriers to entry that block vulnerable HDI-owned firms from effectively participating in the formal economy.

7.4 Recommendations

To address the pressing issues of gender disparity, racial inequality and economic concentration highlighted in this thesis, a set of comprehensive recommendations is proposed. These recommendations aim to enhance the effectiveness of South Africa's Competition Act in achieving its objectives of promoting fair competition, reducing market concentration and fostering inclusivity in the nation's economy. By addressing these multifaceted challenges, South Africa can take significant strides towards a more equitable and competitive economic landscape that benefits *all* its citizens.

7.4.1 Embracing the Brandeisian and Ordoliberal Models of Competition Law

Regarding the possibility that the normative framework that underpins the Act may hinder its ability to achieve its public interest objectives effectively, this thesis proposes abandoning the influence of the narrow consumer welfare standard, which flows from the Chicago model of competition law and policy. A continued reliance on the consumer welfare standard advocated by the Chicago model of competition law policy might restrict the Tribunals and courts from enforcing the Act's objective of promoting an equitable distribution of ownership.

Instead of relying on the Chicago competition law and policy model, the thesis proposes a shift towards principles advocated by the Brandeisian and Ordoliberalism movements. The Brandeisian movement strongly emphasises the connection between upholding a constitutional democracy and maintaining competitive markets. According to the movement, a link exists between a weakened democracy and the abuse of monopoly power. Justice Brandeis emphasises that democracy and the concentration of wealth cannot co-exist. In other words, monopoly and concentration of wealth pose a significant threat to democracy. As such, the Brandeisian movement advocates using antitrust law to monitor and control the rising monopoly power, which could threaten democracy. The rationale behind this perspective is that economic power can translate into political power over time, and such political power may be used to undermine a country's constitutional democracy or the integrity of its government. As such, the shift towards the influence of this movement's principles better aligns with the Act's objective to promote equitable ownership distribution.

The courts or Competition Tribunal should also consider the perspective of the Ordoliberal movement. According to the Ordoliberal movement, there is a strong connection between economic, social and political power. This perspective echoes the Brandeisian movement's philosophy, which suggests that increased economic power may translate into political power and, thus, threaten a nation's constitutional democracy.

In *Exploring the Ordoliberal Paradigm: The Competition Democracy,* Deutscher and Makris emphasised that when economic power rests in the few, democracy may be undermined to the detriment of the public's interest. Considering South Africa's young democracy with a history of systematic inequality market concentration and skewed ownership trends, shifting towards the Ordoliberalism philosophy could be beneficial to achieving a greater spread of ownership. Therefore, embracing the influences of Brandeisian and Ordoliberalism when addressing public interest objectives is essential.

Research shows that black women-owned firms are lagging in progress compared to

other HDIs, such as black men and white women.[517] The current strict CW approach to enforcing public interest objectives provides limited empowerment to black women-owned firms. To address this issue, I propose that the Competition Tribunal and courts consider the unique challenges black women-owned firms face at the intersection of compounded vulnerabilities like racism or sexism. The backfilling of needed skills necessary to be an effective market participant is a lot to ask of someone who *also* needs to navigate the perils of intersectionality. It is crucial to recognise that black women industrialists encounter multiple challenges compared to other HDIs, which warrants tailored support.

7.4.2 Intersectional discrimination

As mentioned above, the Competition Act is also recommended to consider the recourse and the consequences of intersectionality to attain the public interest objective relating to prompting a greater spread of ownership and, in particular, increasing the ownership stakes of the HDI. The application of the Competition Act, particularly the provisions relating to abuse of dominance (section 8), price discrimination (section 9), exemptions (section 10), and penalty considerations (section 59), should consider the identity of an HDI or small business owner by providing differential treatment. The fact that black women industrialists may be discriminated against by placement at the intersection of race, gender, class and firm size should not continue to be glanced over by courts, the Competition Tribunal or government agencies like the Competition Commission. Otherwise, the Act will continue to benefit a limited cohort of people. Below, I will canvass how the framework should operationalise.

In matters involving abuse of dominance or price discrimination under sections 8 and 9 of the Act, the courts or Competition Tribunal should recognise the identity of the incumbents and their experience of discrimination on several axes. This includes

[517] *National status and trends on broad – based black economic empowerment.* 2019. South Africa.

assessing whether the incumbent experiences broader forms of discrimination, encompassing factors such as the gender, race and size of the incumbent's business. For example, suppose a victim can provide evidence that they belong to a multiply marginalised group and encounter discrimination based on or due to their race, gender and firm size. In that case, the defence outlined in section 9 (2) of the Act should not apply to the dominant defendant. Furthermore, if the dominant defendant violates section 9(1)(a)(ii) of the Act [518], the provisions of section 9(2)(a) [519] should not apply if the harmed party is a small business that is owned by black women that face discrimination related to race, gender and firm size.

Concerning section 10 exceptions [520] available to facilitate economic transformation, I recommend an intersectionality approach that will grant block vertical restraint

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[518] **9. Price Discrimination**
(1) An action by a dominant *firm*, as the seller of *goods or services*, is prohibited price discrimination, if –
(a) it is likely to have the effect of substantially preventing or lessening competition;
(b) it relates to the sale, in equivalent transactions, of *goods or services* of like grade and quality to different purchasers; and
(c) it involves discriminating between those purchasers in terms of –
(i) the price charged for the *goods or services*;
(ii) any discount, allowance, rebate or credit given or allowed in relation to the supply of *goods or services*;
(iii) the provision of services in respect of the *goods or services*; or
(iv) payment for services provided in respect of the *goods or services*.

[519] 2. Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant *firm* establishes that the differential treatment –
(a) makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, *goods or services* are supplied to different purchasers.

[520] **10. Exemptions**
(1) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter –
(a) an *agreement* or practice, if that *agreement* or practice meets the requirements of subsection (3); or
(b) a category of *agreements* or practices if that category of *agreements* or practices meets the requirements of subsection (3).
(2) Upon receiving an application in terms of subsection (1), the Competition Commission must – (a) grant a conditional or unconditional exemption for a specified term, if the *agreement* or practice concerned, or category of *agreements* or practices concerned, meets the

requirements of subsection (3); or (b) refuse to grant a exemption, if –

(i) the *agreement*, or practice concerned, or category of *agreements*, or practices concerned meets the requirements of subsection (3); or

(ii) the *agreement* or practice, or category of *agreements* or practices, does not constitute a *prohibited practice* in terms of this Chapter.

(3) The Competition Commission may grant an exemption in terms of subsection (2)(a) only if –

(a) any restriction imposed on the *firms* concerned by the *agreement* or practice concerned, or category of *agreements* or practices concerned, is required to attain an objective mentioned in paragraph (b); and

(b) the *agreement* or practice concerned, or category of *agreements* or practices concerned, contributes to any of the following objectives:

(i) maintenance or promotion of exports;

(ii) promotion of the ability of *small businesses*, or *firms* controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the *Minister*, after consulting the minister responsible for that industry.

(4) A *firm* may apply to the Competition Commission to exempt from the application of this Chapter an *agreement*, or practice, or category of *agreements* or practices, that relates to the exercise of intellectual property rights, including a right acquired or protected in terms of the Performers' Protection Act, 1967 (Act No. 11 of 1967), the Plant Breeder's Rights Act, 1976 (Act No. 15 of 1976), the Patents Act, 1978 (Act No. 57 of 1978), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 (Act No. 194 of 1993) and the Designs Act, 1993 (Act No. 195 of 1993).

(4A) Upon receiving an application in terms of subsection (4), the Competition Commission may grant an exemption for a specified term.

(5) The Competition Commission may revoke an exemption granted in terms of subsection (2)(a) or subsection (4A), if –

(a) the exemption was granted, on the basis of false or incorrect information;

(b) a condition for the exemption is not fulfilled; or

(c) the reason for granting the exemption no longer exists.

(6) Before granting an exemption in terms of subsection (2) or (4A), or revoking an exemption in terms of subsection (5), the Competition Commission –

(a) must give notice in the *Gazette* of the application for an exemption, or of its intention to revoke that exemption;

(b) must allow interested parties 20 business days from the date of that notice to make written representations as to why the exemption should not be granted or revoked; and

(c) may conduct an investigation into the *agreement* or practice concerned, or category of *agreements* or practices concerned.

exemption for small-scale black women-owned firms who find themselves at the intersection of race, gender, class and firm size. However, it must be noted that such block exemptions from the Act should be subject to scrutiny, investigation, and penalty if there is reason to believe that some abuse of block exemption has occurred. To mitigate any abuse ensuing, the Competition Commission should be given the power to continually review and will continue to be subject to s10(5) revocation. [521]

In the context of penalty considerations, section 59(3) of the Act outlines the factors to be considered when imposing administrative penalties. This thesis suggests that there be an extension of the factors to be considered. The harm or experiences of firm owners who are victims of intersectional discrimination should be factored in when imposing administrative penalties on firms found guilty of violating the Act.

Had the recommended approach of considering intersectionality been followed, the outcome of the above-mentioned6.4.1.1 The Burger King SA merger consideration could have had a different outcome. Had the recommended intersectionality lens been considered, such a significant discrepancy between the two ownership percentages would have raised alarms. However, despite some alarming concerns, the Tribunal approved the acquisition, albeit with certain conditions. What the Tribunal had failed to consider (because of the limiting CWS and overlooking intersectionality) was that such approval might not have contributed to improving ownership dynamics within this

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(7) The Competition Commission, by notice in the *Gazette*, must give notice of any exemption granted, refused or revoked in terms of this section.

(8) The *firm* concerned, or any other person with a substantial financial interest affected by a decision of the Competition Commission in terms of subsection (2), (4A) or (5), may appeal that decision to the Competition Tribunal in the *prescribed* manner.

(9) At any time after refusing to grant an exemption in terms of subsection (2)(b)(ii), the Competition Commission –

(a) may withdraw its notice of refusal to grant the exemption, in the prescribed manner; and

(b) if it does withdraw its notice of refusal, must reconsider the application for exemption.

[521] See *Vertical agreements block exemption order: a CMA guide.* 2022.

fast-food industry. This oversight and limitation resulted from the Tribunal lacking guidance from expanded normative frameworks like targeted university strategy and, most importantly, the perspective provided by the recommended intersectionality lens.

Crucially, the Tribunal in the Burger King merger consideration failed to acknowledge that the acquiring company had no ownership ties to HDIs prior to the merger. Notably, the Tribunal could not consider that the target company exhibited a stark contrast at pre-merger: it boasted 69% HDI ownership, whereas only 22% was attributed to black women. Had the recommended intersectionality lens been considered, such a significant discrepancy between the two ownership percentages would have raised alarms.

Had the Tribunal adopted the recommended intersectionality lens, it would have compelled them to recognise the disparity within the two ownership trends and require that the merger consideration encapsulates this alarming disparity. Embracing the intersectionality lens would have required the Tribunal to identify whether a multiply discriminated demographic, black women, would face harm or benefit from the merger's approval. This would have prompted them to realise that black women's ownership, in particular, was significantly low. In essence, incorporating the intersectionality approach would have mitigated, dare I say, prevented the glaring oversight of the pre-merger situation where ownership by black women was disproportionally low compared to the seemingly rising HDI ownership.

7.5 Conclusion

Hopefully, the recommendations mentioned above will contribute to rectifying the skewed ownership trends in post-colonial and apartheid South Africa, especially relating to black women ownership trends. By considering the influence of neoliberal & ordoliberal models of competition law *and* intersectional discrimination, we can create a framework aligned with the initial policy aspirations of fostering the equitable distribution of firm ownership within a just, competitive, and inclusive economic landscape. By adopting the above recommendations, we may achieve a transformative policy that enhances participation by the black population, particularly

black women who have been the most exploited and subordinated within the historically disadvantaged individual's cohort.

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