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RESEARCH ARTICLE

Fairness and equity in South African competition law: A new direction

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Abstract
The purpose of the South African Competition Act is to resolve the present problems of inequality by emphasizing its multiple goals, which differ from those of other countries. Its objectives broadly contain efficiency, state economic development and consumer welfare. In addition, the ideas of providing opportunities for small businesses and promoting a greater spread of ownership among different groups indicate its goal of favouring or protecting weak trading parties or certain groups of people. To achieve the aim of equity and fairness, South African competition law should be vigorously applied, but the existing substantive provisions may not fulfil the task of moving towards an equal and fair society. A comparative study of competition law may help to discover a proper model and a better solution for the problems of unequal economic power in South Africa.

Keywords: abuse of market dominance; competition law; fair and free competition; South Africa; unfair trade practice

Introduction: competition law and policy for fairness and equity

One of the most important requirements for a mature democratic society is a sound system of market economy and an effectively functioning competition regime. Competition law plays the important role of ensuring a fair society through prohibiting various types of abusive conduct. Since the establishment of the first modern competition regime in the USA more than a century ago, almost all countries with a market economy have adopted competition law and policy.[1] The large number of competition regimes in the world proves the importance of competition law to serve several ends, and numerous countries have voluntarily built a competition regime to resolve certain problems, such as private economic power.[2] In particular, critics from the Neo-Brandeis school, who believe competition law can function as a panacea for all societal troubles, argue that a standard of consumer

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1 R Whish and David Bailey *Competition Law* (11th ed, 2024, Oxford University Press) at 1; DH Kim and YS Choi "Modernization of competition law and policy in Egypt: Past, present and future" (2020) 64/1 *Journal of African Law* 107.

2 YS Choi "The choice of competition law and the development of enforcement in Asia: A road map towards convergence" (2014) 22/1 *Asia Pacific Law Review* 131 at 134–37.

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welfare and efficiency in competition law should be replaced with much broader public interest goals that include the diffusion of private economic and political power, the guarantee of equity and democracy, the protection of weaker groups, such as employees and small- and medium-sized enterprises (SMEs), and equal opportunities for disadvantaged people.[3]

Each competition regime has its own distinctive purposes. Its ultimate goal often mirrors the characteristics of the society. We have seen economic regulations with specific objectives that are different from those of other countries, and the case of the South African regime is one of the prominent examples.[4] From a historical perspective, South Africa had to respond to the socio-economic problems that resulted from the longevity of racial discrimination,[5] such as notable inequality and a high rate of unemployment. Competition law frequently plays a pivotal role in safeguarding the values of public interest and social welfare, and the implementation of competition rules in developing countries, including South Africa, has been no exception. Effective enforcement of competition law has become an imperative foundation for securing not only a competitive process in the market but also a democratic process,[6] especially when there is a significant problem of inequality due to individual power or a lack of distribution of wealth.[7] The problem of inequality is often intertwined with poverty, and commentators assert the role of competition policy in resolving "a specific form of inequality" that satisfies the goal of "distributive justice" or inclusive development.[8]

The competition regime of South Africa reflects its task of regulating business conduct related to unequal bargaining power that may cause exploitative or exclusionary abuses. When compared to the competition rules on abuse of market dominance in other countries, the substantive provisions on unilateral conduct within South Africa's competition law appear unique, as its provisions deal with various types of exploitative and discriminatory conduct. One of the main reasons for the adoption in South Africa of such rigorous rules is to crack down on misuses of power by large firms.[9] As indicated by the Gini index, South Africa grapples with one of the highest levels of inequality.[10]

3 A Jones, B Sufrin and N Dunne *EU Competition Law* (8th ed, 2023, Oxford University Press) at 44; AI Gavil, WE Kovacic and JB Baker *Antitrust Law in Perspective* (5th ed, 2024, West Academic) at 76.

4 See, for example, EL Okiche and AB Okiche "The balance between equity and efficiency; reflections on the goals of the new Nigerian competition law" (2020) 46/2 *Commonwealth Law Bulletin* 331.

5 L Kelly et al *Principles of Competition Law in South Africa* (2016, Oxford University Press) at 2; M Wise "Competition law and policy in South Africa" (2004) 5/4 *OECD Journal of Competition Law and Policy* 7 at 9–17, available at: <https://www.oecd-ilibrary.org/governance/competition-law-and-policy-in-south-africa_clp-v5-art14-en> (last accessed 13 April 2024); L Ferreira and R Rossouw "South Africa's economic policies on unemployment: A historical analysis of two decades of transition" (2016) 9/3 *Journal of Economic and Financial Science* 807 at 809; J Mosomi and M Wittenberg "The labor market in South Africa, 2000-2017" (2020) *The IZA World of Labor* 1 at 2.

6 Kelly et al, id at 1–2.

7 A Venter "Uitdagings vir demokrasie in Suid-Afrika" (2000) 40/2 *Tydskrif vir Geesteswetenskappe* 141.

8 I Lianos "The poverty of competition law: The short story" in D Gerard and I Lianos (eds) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019, Cambridge University Press) 45; VK Kigwiru and G Mokaya "Building regulatory capability of competition agencies in developing countries: The competition authority of Kenya" (SSRN 16 January 2024) at 5, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4610041> (last accessed 8 August 2024).

9 See JE Stiglitz *The Price of Inequality* (2012, Norton) at 35.

10 EM Fox and M Bakhoum *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (2019, Oxford University Press) at 89. For further information, see "20 countries with the biggest inequality in income distribution worldwide in 2023, based on the Gini index" (March 2024) *Statista*, available at: <https://www.statista.com/statistics/264627/ranking-of-the-20-countries-with-the-biggest-inequality-in-income-distribution/> (last accessed 14 May 2025); "IMF country focus: Six charts explain South Africa's inequality" (30 January 2020) *IMF*, available at: <https://www.imf.org/en/News/Articles/2020/01/29/na012820six-charts-on-south-africas-persistent-and-multi-faceted-inequality> (last accessed 14 May 2025); UNU-WIDER "Wage polarization in a high-inequality emerging economy: The case of South Africa" (WIDER Working Paper 2020/55, May 2020) at 1, available at: <https://www.wider.unu.edu/publication/wage-polarization-high-inequality-emerging-economy> (last accessed 16 March 2024).

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The inequality in South Africa is manifested in a skewed income distribution, people's unequal access to business opportunities and regional disparities that affect market segregation and economic concentration within the country.[11] This generates an absence of competition not only among groups of people but also among different regions. The wealth inequality in South Africa, which is deeply rooted in its colonial, apartheid and post-apartheid history, is a stark example of how historical, political and social forces can converge to create and perpetuate economic disparities.[12] This inequality eventually shaped a societal demand for a strong competition regime in South Africa. Given this history, it was inevitable that the objective of South African competition law would be dissimilar to those of other countries, and its distinct background required a certain form in its substantive provisions. However, the existing legal provisions do not seem appropriate to meet the need to improve competition law enforcement and a competition law culture in South Africa. It is thus timely to discuss a revision to those provisions to further develop South Africa's competition regime. The Competition Act of South Africa (CASA)[13] articulates that its purpose is to deal with the problems of inequality originating from excessive private power.[14] To achieve this goal, South African policymakers can examine the competition regimes in other countries to theorize a new approach to the objectives of the law and a new substantive provision. This article aims to discuss the distinctive features of South Africa's competition regime by analysing its objectives and legal framework with a focus on the rule covering abuse of market power. This article also proposes an amendment to the rule on abuses of market dominance by adding a new provision on unfair trade practices. A new provision can be implemented to tackle certain misuses of power by large firms in the market,[15] when their conduct falls within certain categories of unfair conduct.

Background of inequality: problems of distribution of wealth and economic concentration

Colonial legacy and apartheid: the legislative history of discrimination and unequal bargaining power

The policy of apartheid was implemented for a certain group of people to control the economy and market,[16] and the economic disparities in South Africa trace back to colonial times.[17] The European colonizers implemented the discriminatory policies that laid the groundwork for systemic inequalities with lasting socio-economic impacts. These included land dispossession, labour exploitation and racial segregation, which significantly contributed to wealth inequality. The systemic discrimination in South Africa influenced the development of laws targeting a certain group of races, which resulted in an unfair society. In particular, the pass laws were a cornerstone of apartheid and colonial administrative policies that were designed to control the movement of the non-white population within South Africa. The systematic discrimination through mobility control of certain races had a more

11 T Hartezenberg "Competition policy and practice in South Africa: Promoting competition for development" (2006) 26/3 *Northwestern Journal of International Law & Business* 667 at 686.

12 Colonial policies have created notable problems of economic concentration and inequality. See T Stewart "Competition regimes in the Caribbean Community and Sub-Saharan Africa: A comparison" (2020) 1 *African Journal of International Economic Law* 84 at 88.

13 Competition Act No 89 of 1998 (updated and applied as from 13 February 2020).

14 D Davis and L Granville "South Africa: The competition law system and the country's norms" in EM Fox and MJ Trebilcock (eds) *The Design of Competition Law Institutions: Global Norms, Local Choices* (2013, Oxford University Press) 265 at 267.

15 The goal of protecting small firms can be justified by a concept of fairness that aims to preserve equal opportunities for them. See R van den Bergh *Comparative Competition Law and Economics* (2017, Edward Elgar) at 115.

16 D Lewis "South African competition law: Origins, content, and impact" in V Dhall (ed) *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007, Oxford University Press) 340 at 341.

17 For further details, see P de Klerk "1652-Die begin van kolonialisme in Suid-Afrika?" (2002) 47/2 *Historia* 736 at 752–62.

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pronounced effect on economic concentration.[18] This was essentially done to secure a reliable supply of cheap labour for the white-owned mines and farms.[19] These exploitative policies contributed to significant wealth accumulation for a small segment of the population while exacerbating inequality and limiting economic opportunities for the majority of South Africans.

With the institutionalization of apartheid in 1948, the pass laws were further entrenched as a national policy by the National Party government. For example, the Pass Laws Act of 1952 forced every black South African to carry an internal passport when outside of their designated "homelands" or townships.[20] By restricting the movement of the non-white workforce and systematically excluding them from meaningful participation in the market, the apartheid government could ensure a steady supply of cheap labour for the white-owned industries and agriculture that underpinned the economic disparities between races.[21] However, the supply of a low-cost labour force did not help to develop the state economy; rather, it deepened the private economic power that distorted competition. The systemic poverty due to the control of mobility also enhanced the monopolistic position of the privileged people.[22] In particular, the regime's policies of economic exclusion were mirrored in the enterprise sector, where economic power remained concentrated in the hands of a few companies like De Beers.[23] These monopolies were supported by colonial policies that restricted the entry of other competitors, thereby controlling the supply and, by extension, the price of these resources.[24]

Another notable example is the control that was exercised over the agricultural sector. This effectively created a monopoly over agricultural production and distribution, which had long-lasting impacts on the agricultural landscape in South Africa.[25] The foundation for this control was laid by various land acts, most notably the Natives Land Act of 1913. One of its major goals was to limit African land ownership to 7 per cent, which became 13 per cent following the adoption of the Native Trust and Land Act of 1936.[26] These acts severely restricted the ability of black South Africans to own land and forced them into poor homelands and townships or to work on white-owned farms and mines under oppressive conditions. South Africa still faces significant socio-economic challenges today, such as landlessness, poverty and wealth inequality.[27]

18 The discovery of diamonds of the Free State led to widespread illegal diamond trading and arms smuggling, and a police force known as the "Rijdende Dienstmacht" was instituted in 1899 to patrol the country districts and to enforce the pass laws. See DA Van der Bank "Polisiemagte van die Vrystaatse republiek, 1854–1900: Inleiding" (2004) 20/2 *Navorsinge van die Nasionale Museum* 22 at 22–24.

19 The prosperity of the diamond mines intensified racial tensions and discrimination. See JM Smalberger "The role of the diamond-mining industry in the development of the pass-law system in South Africa" (1976) 9/3 *International Journal of African Historical Studies* 419.

20 JD Bakker, C Parsons and F Rauch "Migration and urbanization in post-apartheid South Africa" (2020) 34/2 *The World Bank Economic Review* 509 at 512.

21 A Mabin "Labour, capital, class struggle and the origins of residential segregation in Kimberley, 1880–1992" (1986) 12/1 *Journal of Historical Geography* 4 at 4–26.

22 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 97.

23 De Beers held market power in the diamond industry in 1888 as it controlled more than 80 per cent of rough diamond distribution. De Beers is often cited as a classic example of a monopoly. See D Bergenstock and M Maskulka "The De Beers story: Are diamonds forever?" (2001) 44/3 *Business Horizons* 33 at 33–34.

24 Smalberger "The role of the diamond-mining industry in the development of the pass-law system in South Africa", above at note 19 at 434.

25 D Esterhuizen *An Evaluation of the Competitiveness of the South African Agribusiness Sector* (2006, PhD thesis, University of Pretoria).

26 "1913 Natives Land Act Centenary" *South African Government*, available at: <https://www.gov.za/news/events/commemorative-events/1913-natives-land-act-centenary#:~:text=The%20Act%20became%20law%20on,employees%20of%20a%20white%20master> (last accessed 16 March 2024). See Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 89.

27 The Land Act was withdrawn when the Abolition of Racially Based Land Measures Act of 1991 (Act No 108 of 1991) became effective in 1991.

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There were other legal provisions that affected the inequality of wealth in South Africa.[28] For example, the introduction of the Bantu Education Act of 1953 limited academic choices for the historically disadvantaged people, resulting in a less developed society.[29] The educational system was designed to prepare children for manual labour and low-skilled jobs, which the government considered appropriate for their racial group.[30] The Bantu education system thus limited non-whites from developing their socio-economic abilities.[31] These colonial and apartheid policies generated the deep-rooted structures of inequality of wealth by dispossessing indigenous people of their land, excluding them from meaningful participation in the economy, exploiting labour and institutionalizing racial segregation. The legacy of these policies laid the foundation for a racially stratified society in South Africa, where land ownership and economic power were concentrated in the hands of white South Africans.[32] In summary, the historical background of discrimination engendered the problem of disparity of economic power in South Africa. The apartheid policy caused economic power to be held by private enterprises as well as causing economic concentration, and competition law has been stressed in its role of resolving these issues.[33]

Post-apartheid policies: a profound shift to fair and free society and the role of competition law

The termination of apartheid in 1994 marked the beginning of South Africa's commitment to redress past injustices and promote equity across racial and economic lines. The new government exerted significant efforts to address the persistent levels of inequality and to resolve issues related to the distribution of wealth. These efforts encompassed progressive fiscal measures for wealth redistribution, increased social expenditures, the implementation of affirmative action and the encouragement of entrepreneurship among those previously marginalized.[34] Among other things, affirmative action is one of the policy frameworks designed to address the historical and systematic inequalities imposed by colonialism and apartheid. The government implemented various affirmative action policies aimed at increasing the participation of previously marginalized groups, particularly black South Africans, in the economic, education and employment sectors.[35] The policy direction for the inclusive economy or development has been discussed in many ways,[36] especially through policies on employment and competition.[37]

28 The apartheid regime instituted a comprehensive array of legislation, including the Populations Registration Act (1950), the Group Areas Act (1950) and the Bantu Education Act (1953 and 1974).

29 For further details, see EJJ Truter "Die ontplooiing van dei taalbeleid in die onderwys in die vier staatkundige gebiede van Suid-Afrika, 1652–1910" (2004) 2 *Acta Academica* 8.

30 LC Nancy and WH Worger *South Africa: The Rise and Fall of Apartheid* (2nd ed, 2011, Routledge) at 145.

31 E Matambo and NC Ani "Endorsing intellectual development in South Africa's affirmative action" (2015) 32/1 *Journal of Third World Studies* 273 at 277.

32 For details about how South African businessmen and the consultative business movement (CBM) responded to this political and economic change, see S Hoogenraad-Vermaak and G Verhoef "Die Suid-Afrikaanse sakegemeenskap se rol ten opsigte van politieke mobilisering in die aanloop tot'n nuwe Suid-Afrika, 1980–1992" (2010) 55/2 *Historia* 204; S Hoogenraad-Vermaak "Die role n bydrae van die Stedelike Stigting tot die politieke hervorming van Suid-Afrika" (2011) 56/2 *Historia* 133.

33 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 4.

34 "South Africa: Bridging the income divide" (7 February 2020) *IMF*, available at: <https://www.imf.org/en/Blogs/Articles/2020/02/07/south-africa-bridging-the-income-divide> (last accessed 19 March 2024); O Dupper "Affirmative action: Who, how and how long?" (2008) 24/3 *South African Journal of Human Rights* 425.

35 M Sebola "Affirmative action policy: The administrative efficiency and socio-cultural impact on the South African society" (2009) 44/4 *Journal of Public Administration* 1102.

36 MW van Wyk "A critical analysis of some popular objections to affirmative actions" (1998) 2/1 *Southern African Business Review* 1; M McGregor "Affirmative action and non-discrimination: South African law evaluated against international law" (2006) 39/3 *Comparative and International Law Journal of Southern Africa* 385; D Benatar "Justice, diversity and racial preference: A critique of affirmative action" (2008) 125/2 *South African Law Journal* 274.

37 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 89.

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One of the key pieces of legislation in this effort is the Employment Equity Act of 1998 which aims to improve equal chance and fair action in employment through eliminating discrimination and applying "affirmative action measures" to redress the historically disadvantaged people. Another significant initiative is the Broad-Based Black Economic Empowerment Act, first introduced in 2003 and revised in subsequent years.[38] This has a more inclusive approach to empowerment as it focuses not only on transferring ownership and management to black South Africans but also on ensuring equality in employment and socio-economic progress.[39] While different policies in South Africa have made strides in addressing historical imbalances, they have also faced criticism. Critics argue that such policies have sometimes led to reverse discrimination, inefficiency and the creation of a small elite group of beneficiaries without sufficiently broadening economic opportunities for the majority of disadvantaged people. It has also been pointed out that these measures should be supplemented with improvements that promote investments by private entities, job creation and inclusive growth.[40] These structural inequalities are longstanding and stubborn barriers to progress. Despite the fact that most legal and institutional discrimination has been replaced by progressive policies based on equity principles, South Africa has been slow to close the opportunity gap.

Competition law in South Africa is, thus, important for creating a consistent and coherent policy on equal distribution of wealth. It has a significant focus on addressing the economic imbalances of colonialism and the apartheid era by promoting broader participation of historically disadvantaged individuals and businesses in the economy. The preamble to the CASA articulates that the South African people recognize that apartheid and the previously adopted laws and enforcement of discrimination caused "excessive concentrations of ownership and control", which reveals the country's concerns about economic concentration in a few enterprises.[41] The negative outcomes from discriminatory laws and practices include anti-competitive conduct and unjust restrictions on free trade that keep all South Africans from participating in the state economy. The preamble further states that the national economy should be open to all South Africans and that a sound competition law and its effective enforcement are important for the functioning of the state economy. Likewise, it highlights the importance of various factors within the goals of competition law, such as an efficient and competitive environment that balances the interests of workers, owners and consumers and the development of the state. This statement reveals the role of the competition regime in South Africa, which is to guarantee effective competition in the market with a consideration of public interests,[42] mainly those of labour, enterprises and consumers.

The new legislative acts of the post-apartheid period have not been sufficient to resolve private economic power. Therefore, the CASA should play a major role in ensuring a fair and equal society as it is the important guardian of the free market. This principle is further clarified by explaining its general aims that provide equal opportunity for competition, efficiency, consumer welfare,[43] improving competitiveness in the global market, prohibiting certain practices that under-

38 F Horwitz and H Jain "An assessment of employment equity and broad based black economic empowerment developments in South Africa" (2011) 30/4 *Equality, Diversity and Inclusion: An International Journal* 297.

39 T Vilakazi and T Bosiu "Black economic empowerment, barriers to entry, and economic transformation in South Africa" in A Andreoni et al (eds) *Structural Transformation in South Africa* (2021, Oxford University Press) 189.

40 *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (2022, International Bank for Reconciliation and Development and World Bank) at 9–10, available at: <https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf> (last accessed 21 March 2024).

41 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 90.

42 The concept of public interest covers both social and industrial policy in South Africa. See Lewis "South African competition law", above at note 16 at 344.

43 The preamble states that its goal is to "provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire". These elements cover most of the factors of consumer welfare, such as low price, high quality, consumer variety and innovation.

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mine competition, regulating the transfer of economic ownership for satisfying public interests, establishing independent enforcement agencies and giving effect to the tasks of international law. South Africa adopted its first law on monopolies, the Regulation of Monopolistic Condition Act, in the 1950s.[44] Nevertheless, this act did not seem to reflect an effective functioning of competition law, and the transitional stage to the new democratic era against apartheid in the 1990s eventually led to discussions on the independence of the competition agency, which is now the Competition Commission of South Africa (CCSA).[45] The modernized CASA includes purposes that show the importance of competition law for ensuring fairness and equity. To conclude, the post-apartheid policies and laws, including competition law, reflect the policymakers' considerations of "the historically disadvantaged people" who were excluded from most economic activities due to apartheid.[46]

The idea of fairness and equity in competition policy

Objectives of competition law in South Africa in the face of specific problems

Factors such as fair and free competition are relevant for ensuring fairness and equity in business transactions. When a large conglomerate controls the market, it is possible that smaller trading parties may face problems of unfair and discriminatory treatment. In such a case, a sufficient level of public enforcement by competition agencies may improve competition, as it can help economic entities better participate in the market. Each competition regime has its own task that is different from the regimes in other countries, and the case of South Africa seems particularly unique as it underpins the equitable functioning of competition law for "the historically disadvantaged people".[47] The objectives stated in the preamble are continued in section 2 of the CASA. It stipulates that its goal is to promote and maintain competition,[48] which reveals its objectives of efficiency, state economic development, consumer welfare of price and choice, employment and socio-economic welfare, opportunities for global competition, equal chances for SMEs and distribution of ownership (or wealth).[49]

The expressions of efficiency and consumer welfare within section 2 of the CASA can be observed in competition laws in other countries.[50] However, the role of the CASA in public interests that broadly cover social objectives,[51] including employment and wider socio-economic progress, appear to be distinctive. One of the interesting parts in section 2 is the promotion of a greater spread of ownership for the people who have historically received disadvantages. This factor indicates its socio-political goal melded with the philosophy of competition law.[52] The exercise of monopoly power by a few conglomerates may harm the historically disadvantaged people. Therefore, it is highly likely that the competition agency and courts will consider the non-economic or socio-economic

44 Act No 24 of 1955. For further details, see Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 91.

45 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 8–11.

46 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 90.

47 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 4.

48 M Burke "Prioritizing in practice: Insights from the Competition Commission South Africa" (2018) 6 *Journal of Antitrust Enforcement* 261 at 264.

49 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 4. The authors assert that the objectives of the CASA are a mixture of economic and non-economic objectives.

50 Most competition laws in developing countries, such as those in Asia, contain objective provisions that underpin efficiency and consumer welfare or sovereignty. See Choi "The choice of competition law and the development of enforcement in Asia", above at note 2 at 140–42.

51 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 2.

52 Jones, Sufrin and Dunne *EU Competition Law*, above at note 3 at 1278.

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goals[53] pursuant to the public interest,[54] mainly in the implementation of merger control[55] or exemptions for certain cartels in specific and key sectors in South Africa.[56] Prominent examples reflecting the wide public interest of the state industrial policy are the Walmart merger case in 2010,[57] the PepsiCo / Pioneer Foods merger in 2020 and the Heineken / Distell merger in 2023.[58] These cases uncover a trade-off between efficiency (consumer welfare) and other objectives like protection of SMEs or employees,[59] which may be considered as a compromise between different policy goals.[60]

Akin to other countries, the South African competition regime provides a statement encompassing broad and multiple goals, but it does not provide a priority or ranking of these goals, which may

53 Critics argue that the protection of competition satisfies non-economic goals like a dispersal of private power and the positive social mobility of people. See MS Gal "The social contract at the basis of competition law: Should we recalibrate competition law to limit inequality?" in D Gerard and I Lianos (eds) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019, Cambridge University Press) 88 at 89.

54 J Hodge, S Goga and T Moahloli "Public-interest provisions in the South African Competition Act: A critical review" in K Moodaliyar and S Roberts (eds) *The Development of Competition Law and Economics in South Africa* (2012, HSRC Press) 2 at 3.

55 See DM Davis "Competition law and labour law" in S Paul, S McCrystal and E McGaughey (eds) *Cambridge Handbook of Labour in Competition Law* (2022, Cambridge University Press) at 183–92; H Irvine and C Upfold "South Africa" in DD Sokol, D Crane and A Ezrachi (eds) *Global Antitrust Compliance Handbook* (2014, Oxford University Press) 703 at 704–05. Sec 12A(3) provides a justification clause for a merger, which includes employment and small businesses. See A van Wyk, A Pretorius and D Blaauw "'n Oorsigtelike ondersoek na die oorweging en toepassing van openbare belang tydens Suid-Afrikaanse samesmeltings en oornames" (2023) 20/3 *LitNet Akademies* 53.

56 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 94 and 118; Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 4 and 10. A broad set of economic and non-economic goals may contain various aims like promotion of industries, ensuring employment and protecting the environment. There are some contrasting views on the scope of non-economic goals, especially between the USA and the EU. See D Chalmers et al *European Union Law* (5th ed, 2024, Cambridge University Press) at 859. The non-economic goal often affects the enforcement of the merger and cartel exemption pursuant to public interest in South Africa. See Davis and Granville "South Africa", above at note 14 at 274; L Mncube and H Ratshisusu "Competition policy and black empowerment: South Africa's path to inclusion" (2023) 11 *Journal of Antitrust Enforcement* 74 at 84–85.

57 *Minister of Economic Development and Others v Competition Tribunal and Others; South African Commercial, Catering and Allied Workers Union/Walmart Stores Inc and Another* [2012] ZACAC 2; [2012] 1 CPLR 6 (CAC). For a discussion of this case, see M Griffiths and W Gumbie "The public interest test in the South African merger control regime" (2015) 3 *Journal of Antitrust Enforcement* 408; Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 11. This case could also involve a South African industrial policy. See D Lewis "Embedding a competition culture: Holy Grail or attainable objective?" in DD Sokol, TK Cheng and I Lianos (eds) *Competition Law and Development* (2013, Stanford University Press) 228 at 239–43.

58 The Heineken / Distell merger in 2023 serves as an example of how public interest considerations encompass various socio-economic aspects. The stubborn application of public interest can also be a hindrance to mergers and acquisitions, the Heineken / Distell merger faced significant delay due to the public interest requirements set by the CCSA. Examples of the key requirements in this merger were: "Acquisition of previously disadvantaged people (currently 27%) must remain at least this percentage in the next 5 years", "May not lay off more than 166 workers over the next 5 years" and "No layoffs of unskilled workers or anyone in production operations". See van Wyk, Pretorius and Blaauw "'n Oorsigtelike ondersoek na die oorweging en toepassing van openbare belang tydens Suid-Afrikaanse samesmeltings en oornames", above at note 55 at 54–55 and 62; H Stadler "Heineken kry jawoord om Distell te koop" (9 March 2023) *Netwerk24,* available at: <https://www.netwerk24.com/netwerk24/sake/maatskappye/pas-bekend-heineken-kry-jawoord-om-distell-te-koop-20230309> (last accessed 13 April 2024); H Stadler "Voorwaardes vir Distell-verkryging: Heneken moet meer as R16 mjd. in SA belê" (9 March 2023) *Netwerk24*, available at: <https://www.netwerk24.com/netwerk24/sake/maatskappye/voorwaardes-vir-distell-verkryging-heineken-moet-meer-as-r16-mjd-in-sa-bele-20230309> (last accessed 13 April 2024).

59 In South Africa, an employer may make all-or-nothing offers to the historically disadvantaged people, thereby extracting the surplus of weaker employees in the labour market. This may happen when it is difficult to find perfect substitutes between jobs. See BL Alderman and RD Blair *Monopsony in Labor Markets* (2024, Cambridge University Press) at 21–22 and 40.

60 For the discussion of whether equity undermines efficiency, see EM Fox "Competition policy at the intersection of equity and efficiency: The developed and developing worlds" in D Gerard and I Lianos (eds) *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019, Cambridge University Press) 441 at 442.

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cause legal uncertainty and incoherent or inconsistent enforcement of the CASA. Another reason to be concerned about diverse goals relates to the priority of competition law enforcement, which is to protect a competitive process. In other words, an excessive focus on the values and goals of protecting SMEs and historically disadvantaged people will bring a state-driven rather than competition-driven market.[61] Therefore, the CASA needs to clarify the ultimate purpose of the competition regime. The lack of competition, which initially originated from political power, has caused economic and social inequality and may deepen this problem.[62] In sum, its single objective should be free competition that encompasses fairness and equality. The rest of the objectives need to be narrowed down. The list of various objectives within section 2 of the CASA may cause confusion, and it is time to revise this statement to pursue free and fair competition that includes consumer welfare and economic growth.

The competition regimes in several countries have developed a balance between fairness and efficiency. Their experience may not fit into the South African regime as they have different historical, economic and political backgrounds. However, the general concept of economic democracy can allow the adoption of certain legal provisions, like the rule on unfair trade practices, which can effectively catch unfair conduct. Through active enforcement by the competition agency, the competition law culture can be improved, which can balance the values of fair competition and efficiency. The courts will decide the balance standard, as harm to competition in unilateral conduct comes in many guises – exploitative, discriminatory and exclusionary abuse. In addition, each sector or industry has different weights of values. For example, in the pharmaceutical sector, innovation is more important than price, while in the large retailer sector, price or consumer choice is more important than efficiency, because e-commerce is rapidly developing and is less concerned with innovation in the sector.

Inclusive competition law for inclusive development

Except in the USA, the competition regimes of most countries have their own goals that fit into their societies. Thus, it is not difficult to find consideration of an industrial policy goal in merger control in developing countries. Some competition regimes, like the South African regime, have important competition policy values and goals. Section 2 of the CASA places a strong emphasis on the importance of employment and a fair share for the people who systemically received disadvantages from a historical perspective. However, it is often impossible to satisfy this type of goal because competition law applications for protecting employees and certain groups of people may lead to a distortion of competition or an inefficient outcome that ultimately brings harm to the society.[63] For instance, competition policies for SMEs that protect competitors rather than competition itself may result in a price increase that injures consumer welfare. The founding principle of protection of competition – avoiding protection of competitors – has been confirmed in the case law in South Africa.[64]

In many countries, competition law can only be applicable to an "enterprise" or "undertaking", which means employees cannot be directly protected by competition law when they act during the

61 Despite the noble intention behind the South African competition policy, academics such as D Reekie were already questioning whether these are indeed areas of society in which competition authorities should be involved in such a direct way. They also warned that the new competition policy was not necessarily the best option to address the country's various socio-economic problems. See van Wyk, Pretorius and Blaauw "'n Oorsigtelike ondersoek na die oorweging en toepassing van openbare belang tydens Suid-Afrikaanse samesmeltings en oornames", above at note 55 at 59.

62 Lianos "The poverty of competition law", above at note 8 at 48.

63 Mncube and Ratshisusu "Competition policy and black empowerment", above at note 56 at 77–78.

64 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC). The Competition Appeal Court held that competition law protects competition rather than competitors and that consumer welfare is the priority in the enforcement of competition law. See U Akgün, S Moresi and R Stillman "Price discrimination in input markets: Analysing competitive effects following the Nationwide Poles case" in K Moodaliyar and S Roberts (eds) *The Development of Competition Law and Economics in South Africa* (2012, HSRC Press) 122.

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course of employment.[65] Furthermore, the objective of employment and redistribution of wealth by protecting certain ethnic groups can impede a competitive process, which, in turn, causes distortion in a democratic process. Yet, some argue that it is almost impossible to have a single fundamental principle of competition law and policy, especially in the developing or underdeveloped countries. Regarding a monopsony problem in the labour market, Alderman and Blair argued that the best competition policy in the labour market is to provide an environment for competition in the product market and to ensure the labour market is as competitive as possible by eliminating labour market concentration and unreasonable restrictions on labour mobility.[66] Therefore, the objective of protecting employees and the disadvantaged people should be replaced with another principle that can widely cover various public interests that are consumer welfare and economic growth.[67]

It is not easy to find a robust theory of competition law for employment and the disadvantaged people. Competition law cannot be a cure-all measure for socio-political and economic problems. However, given the priority of certain values of the society, competition policy often emphasizes specific non-economic goals that outweigh the economic goals of efficiency or innovation.[68] The legislature of South Africa appeared to aim at using the competition rules for purposes beyond the traditional economic theories and principles.[69] The people's belief in the role of competition policy in redistribution of wealth often becomes a convincing or even promising principle for a crosscut to a mature and democratic society. In that case, the establishment of a sound theory is essential. One of the possibilities for a comprehensive standard that makes trade-offs among various goals and values is the principle of economic democracy,[70] which incorporates the ideas of social market economy[71] and ordoliberalism.[72] Ordoliberalism underlines the importance of individual economic freedom in bringing about a competitive process.[73] This assertion provides an interplay between economic freedom and competition law.[74] A vigorous enforcement relying on the principle of economic democracy may improve a culture of competition by covering a theory of harm to the historically disadvantaged people[75] because it aims to limit the economic power of private

65 Chalmers et al *European Union Law*, above at note 56 at 911. USA antitrust law also excludes legal challenges to labour unionization under sec 6 of the Clayton Act. See Alderman and Blair *Monopsony in Labor Markets,* above at note 59 at 141.

66 Alderman and Blair, id at 185.

67 Vilakazi and Bosiu "Black economic empowerment, barriers to entry, and economic transformation in South Africa", above at note 39 at 195–97.

68 The non-economic goals do not directly relate to competition either. See Hodge, Goga and Moahloli "Public-interest provisions in the South African Competition Act", above at note 54 at 5. Relating to innovation in the digital sector, certain topics like data privacy and competition have become important in South Africa. See F Cachalia and J Klaaren "Towards a public law perspective on the constitutional law of privacy in South Africa in the age of digitalization" (2024) 68 *Journal of African Law* 89 at 94 and 100; S Ncube "Complexities of competition regulation in Zimbabwe's mobile money sector" (2023) 32 *African Journal of Information and Communication* 1.

69 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 1.

70 The concept of economic democracy involves the aim to reduce the market power of large firms. See Van den Bergh *Comparative Competition Law and Economics*, above at note 15 at 115. This aim is often observed in the developing world. See also Kim and Choi "Modernization of competition law and policy in Egypt", above at note 1 at 108.

71 The concept of social market economy refers to the combination of "a capitalist free market with regulation" and "a system of social welfare". See Jones, Sufrin and Dunne *EU Competition Law*, above at note 3 at 2.

72 For further discussion on the social market economy and ordoliberalism, see G Monti "EU competition law from Rome to Lisbon – Social market economy" in C Heide-Jorgensen et al (eds) *Aims and Values in Competition Law* (2013, DJØF Publishing) 27 at 36–37.

73 Jones, Sufrin and Dunne *EU Competition Law*, above at note 3 at 31–32.

74 I Lianos, V Korah and P Siciliani *Competition Law* (2019, Oxford University Press) at 98–101.

75 Kim and Choi "Modernization of competition law and policy in Egypt", above at note 1 at 110.

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entities to achieve active participation in the market by other entities.[76] One of the examples of successful enforcement to achieve the goal of social market economy and economic democracy is the case of the Korean competition regime. Following the principle of economic democracy, the Korean regime lowered the bar of market intervention through vigorous application of the rules on unilateral conduct.[77] In effect, the CASA cannot directly serve the goal of protecting SMEs and the historically disadvantaged unless the enforcement agency obtains the power of divestiture of monopolies. However, it can indirectly provide equal opportunities for SMEs and the historically disadvantaged to obtain access to the market if the enforcement agency vigorously enforces the rules on unilateral conduct. Briefly stated, a strong antitrust weapon is crucial for achieving the goal of fairness and equity.[78]

A new direction against market power

The presumption of market dominance and market power: a clear-cut standard

Much like the substantive provisions in other competition regimes, the CASA contains three key rules. First, chapter 2, part A of the CASA includes prohibitions on both horizontal and vertical agreements that are anti-competitive. Second, chapter 2, part B of the CASA prohibits abusive conduct by a firm that holds a market-dominant position. Third, chapter 3 of the CASA provides the rules of merger control to prevent any merger that substantially lessens competition (SLC)[79] in the market.[80] The substantive provision on unilateral conduct – the rule against abuse of market dominance – echoes the objective of competition law. The first stage of applying this provision relates to the presumption of market dominance, for which the rule is as follows.

First, section 7 states that a firm can be presumed to have a market-dominant position if it has a market share of at least 45 per cent or a market share between 35–45 per cent with market power. Second, in the case of a market share between 35–45 per cent, a firm should prove that it does not have market power so that it will not be deemed to be market dominant. Interestingly, section 7 further states that a firm can be market dominant even though it has a market share of less than 35 per cent when it holds market power. The criteria for the presumption of market dominance appear very similar to those in other countries that focus on legal certainty. In contrast, the presumption of dominance within the CASA is different as it contains a conditional wording of market power. This term seems very unclear and may generate a legal uncertainty problem. Therefore, it is necessary to clarify the meaning of market power or withdraw this provision.

In most countries, competition rules for presumptions contain the approach of a "concentration ratio (CR)", which may show a competitive constraint and, importantly, market power. One of the main reasons to have a CR test is to examine whether the firm in question has the market power to raise a price without any influence from the market competition. In other words, a firm's market share and its rivals' shares can indicate market power, and a concept of market dominance and market power can be interchangeable.[81] However, section 7 includes an unusual condition for market

76 YS Choi "The evolution of fair and free competition law in the Republic of Korea" in S Van Uytsel, S Hayashi and JO Haley (eds) *Research Handbook on Asian Competition Law* (2020, Edward Elgar) 65 at 68.

77 YS Choi "The rule of law in a market economy: Globalisation of competition law in Korea" (2014) 15 *European Business Organization Law Review* 419 at 436; M Cho and T Büthe "From rule-taker to rule-promoting regulatory state: South Korea in the nearly-global competition regime" (2021) 15/3 *Regulation & Governance* 513. The number of decisions by the Korean competition agency over the last four decades is over 15,000, which confirms its active enforcement. See KFTC *Statistical Yearbook of 2023* (2024) at 5, available at: <https://www.ftc.go.kr/eng/selectBbsNttList.do?bordCd=823&key=565> (last accessed 14 May 2025).

78 See Gal "The social contract at the basis of competition law", above at note 53 at 99.

79 CASA, sec 9(1)(a)(i) prohibits price discrimination if it may have the effect of "substantially preventing or lessening competition". The wording of SLC may come from the merger provisions in the UK or USA competition law.

80 CASA, sec 12A(1).

81 MA Utton *Market Dominance and Antitrust Policy* (2nd ed, 2003, Edward Elgar) at 10.

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power. Although its market share does not reach 45 per cent, if a firm has market power, it can be presumed to hold a dominant position. In effect, section 1(xviii) defines the meaning of market power as a firm's power to control prices of products or services, to engage in exclusionary conduct or to act independently from its rivals, purchasers or suppliers. This definition is a globally accepted concept of market power.[82] However, market power itself is sometimes wider than market dominance.[83] Therefore, the condition of market power for presuming market dominance should be revised.

First, the condition of market power in section 7 should be repealed as it causes notable confusion in interpretation of the provision. Second, the policymakers may consider a new provision that includes the CR test. The presumption provisions in the competition laws of Germany or in Asian countries like Korea and Taiwan can be relevant for including the CR test. The presumption rules of these regimes contain a CR standard. For instance, the German Competition Act provides a presumption test of CR1=40 per cent,[84] CR3=50 per cent or CR5=2/3.[85] The relevant Korean rule also consists of the tests of CR1=50 per cent and CR3=75 per cent.[86] This means that a firm is presumed to be market dominant if its market share is 50 per cent or the combined market share of three firms reaches 75 per cent. The CR-based presumption is popular in most developing Asian countries. When a firm's market share does not reach 45 per cent but its conduct significantly affects the market, the competition agency may apply the rule on abuse of market dominance if the CASA embraces a presumption provision of a CR-based assessment. The CR test may simply improve a legal threshold for application of the rules on abuses of market dominance by providing the crystal-clear presumption of market dominance. Through ascertaining the presumption criteria, the competition rules can be effectively applicable to abuses of market dominance that threaten the goals of the CASA.

The competition rules on abuses of market dominance: exploitative abuses

Sections 8 and 9 of the CASA prohibit abusive conduct by a market dominant firm. Section 8 widely covers both exploitative and exclusionary abuse and organizes a list of prohibited conduct. First, section 1(a) prohibits excessive pricing, which is one of the major exploitative abuses. Section 1(b) then prohibits any prevention of access to an essential facility[87] and section 1(c) broadly bans any exclusionary conduct that is not on the list of prohibited acts under section 1(d) when the anti-competitive outcomes from the conduct outweigh the pro-competitive effects. Lastly, section 1(d) provides a list of exclusionary acts, including exclusive dealing, refusal to deal, tying, predatory pricing and buying and margin squeeze.

Interestingly, the CASA seems to focus on pricing abuses, which is uncommon in other countries as their competition regimes believe that a competition agency cannot be a price regulator. Section 8(2) and (3) deals with excessive pricing, and it contains very detailed standards for an assessment test, such as a price–cost test. This means that a firm's conduct of excessively raising prices can be a major target of the CASA. In other countries, an excessive pricing or exploitative abuse is not a main concern as a high price may induce vigorous competition, which leads to consumer welfare. In other words, a high price may attract new entrants.[88] However, the provision on excessive pricing in the CASA implies a response to economic concentration by a few firms. We have seen some important

82 Jones, Sufrin and Dunne *EU Competition Law*, above at note 3 at 112.

83 See H Schmidt "Market power – the root of all evil? A comparative analysis of the concepts of market power, dominance and monopolisation" in A Ezrachi (ed) *Research Handbook on International Competition Law* (2012, Edward Elgar) 369 at 377.

84 German Competition Act, sec 18(4).

85 Id, sec 18(6).

86 Korean Competition Act, art 6.

87 According to sec 1(xi), an essential facility is "an infrastructure or resource" that cannot be replaced by others.

88 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 126.

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cases of excessive pricing, such as *Hazel Tau*,[89] *Mittal Steel*[90] and *Sasol*.[91] In these cases, the competition authority and a plaintiff lost because they could not provide robust evidence of "economic value". However, the provision itself opens the possibility of lowering excessive prices, as the parties settled in the two previously mentioned cases.[92]

Section 9 of the CASA prohibits another type of pricing abuse, namely price discrimination. Section 9(1) prohibits price discrimination by a dominant firm if its practice is likely to substantially prevent or lessen competition or to impede the ability of SMEs or firms owned by the historically disadvantaged people. The aim of fair treatment in pricing conduct for weaker entities shows a competition objective of fairness and equity. This approach can also be found in section 9(1A) of the CASA, which was adopted in 2018, as it prohibits any refusal to deal with SMEs and "the firms owned by historically disadvantaged people". The rest of section 9 provides objective justifications for dominant firms that engage in differential treatment. The list of objective justifications contains, for example, justifiable cost and freedom of contract with different parties. However, the bar for a violation of section 9 seems very high. Similar to the excessive pricing cases, the Court of Appeal rejected a decision finding a section 9 violation for price discrimination in the *Nationwide* case;[93] the court denied the inclusion of the equity objective within section 9. Some have argued that, in this case, a market-dominant undertaking does not discount the price of an input when the dominant undertaking supplies it to small firms, although a discount is essential for small firms' competition in the market.[94] Therefore, a plaintiff had to prove whether the price discrimination had prevented or lessened competition.[95] This judgment has shown the difficulty in regulating excessive pricing, even though the objective of the CASA is to protect the SMEs.[96]

In conclusion, the rules on abuses of market dominance of the CASA appear to be directed at exploitative and discriminatory abuses by large dominant firms to protect a weaker group of economic entities. It is often very difficult to prove a violation of competition rules on pricing abuses because it is vital to provide proof of "economic value" of the product or services in question. Despite the difficulty in enforcement, the CASA provides detailed assessment benchmarks to prevent any possible discrimination against the weak. Its provisions also prohibit other types of non-pricing abuses of discrimination, such as refusal to deal with SMEs and the historically disadvantaged people. Therefore, the rules on a market-dominant firm's unilateral conduct demonstrate the regime's stringent approaches to the problems arising from inequality of wealth or ownership in the South African society. This approach may continue to be applied for a while until the South African society reaches a sufficient level of economic development. However, a disproportionate focus on public enforcement against pricing abuses may lead to a distortion of competition rather than an improvement in public interests. Thus, it is time to consider a revision that can cover the problems of unfairness

89 Competition Commission, Settlement Agreement, Case No 2002Sep226.

90 *Harmony Gold Mining Co Mittal Steel Corp* 13/CR/FEB04 [2007] ZACT 21 (27 March 2007), reversed (70/CAC/Apr07) [2009] ZACAC I (29 May 2009). In this case, the Competition Appeal Court rejected the Competition Tribunal's conclusion on the firm's violation of sec 8(a) of the CASA. For further case analysis, see C Calcagno and M Walker "Excessive pricing: Towards clarity and economic coherence" (2010) 6/4 *Journal of Competition Law & Economics* 891; Irvine and Upfold "South Africa", above at note 55 at 706–07; Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 127–28.

91 *Sasol Chemical Industries Ltd v Competition Commission* 131/CAC/Jun14 [2015] ZACAC 4; 2015 (5) SA 471 (CAC) (17 June 2015). For the case detail, see R Murgatroyd, Y Yun and I Barnardt "Excessive pricing regulation in China, South Africa, and other BRICS Member States" in T Bonakele, EM Fox and L Mncube (eds) *Competition Policy for the New Era: Insights from the BRICS Countries* (2017, Oxford University Press) 229 at 236–38.

92 For further case details, see Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 106–08.

93 *Nationwide Poles v Sasol Ltd* (72/CR/Deco3) [2005] ZACT 17 (2005).

94 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 117.

95 Id at 111–12.

96 TK Cheng *Competition Law in Developing Countries* (2020, Oxford University Press) at 385 and 390. Cheng criticizes the Competition Appeal Court's judgment in the *Mittal* case by explaining that the firm had received governmental support, which indicates its market position was not from competition in the market.

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and inequality in market competition by looking at enforcement in other competition regimes. The settled case law appears to confirm an economic analysis that becomes a heavy burden in applying the provision on unilateral conduct, and this becomes the key challenge to the competition authority. Therefore, to achieve the equity objective by prohibiting exploitative abuse, South Africa needs a new provision that enables the enforcement agency to effectively regulate harms to fair competition.

A proposal for strengthening the rule on unilateral conduct: a new rule on unfair trade practices

The two main streams of competition or antitrust law, namely those of the USA and the EU, have affected the development of competition regimes in most countries. However, there is no single standard or model law of competition because each country has its own distinctive background that creates greater diversity.[97] It is inevitable that there will be an exceptional provision in the law to satisfy the demands of the people to achieve certain distinctive goals of a competition regime. One example of this is the Asian competition rules on unfair trade practices (UTPs). Several Asian countries, such as Korea, Japan and Taiwan, and some Southeast Asian countries, such as Thailand and Indonesia, have competition laws containing a UTP rule.[98] In addition, a number of EU member states, including Germany, France, Belgium and Italy, have adopted rules against economic dependence that are very similar to that on superior bargaining power in the UTP provisions in Asia.[99] UTP rules have an expansive basis for liability for unilateral conduct of a firm.[100] A UTP provision usually does not require evidence of market dominance, which means a firm may violate this provision if its conduct is deemed unfair. The implementation of UTP rules often focuses on "the nature and effect of the conduct".[101] Therefore, it is possible that without the need to prove significant market power, a UTP provision as a "catch-all rule"[102] can be applicable to abusive conduct. Some may criticize the implementation of UTP rules as the concept of unfair competition is often vague.[103] Nonetheless, it may improve a competition culture, especially when the market is heavily concentrated in a few firms.

Section 7 of the CASA sets out a series of presumption criteria, but its unclear presumption test due to the statement of "market power" may cause ineffective and confusing interpretations of the rule. Furthermore, sections 8 and 9 of the CASA largely focus on the ban on exploitative and discriminatory abuses to protect the weaker trading parties in the market rather than to protect consumers. However, the case law has confirmed that the objectives of those provisions, particularly section 9(1), is not to protect small enterprises as opposed to the competitive structure of the market.[104] This

97 See J Oxenham, M-J Currie and A Stargard "Changing South Africa's competition law regime: A populist departure from international best practices" (2019) 10/4 *Journal of European Competition Law & Practice* 232 at 234.

98 YS Choi and P Porananond "Competition law and policy of the ASEAN member states for the digital economy: A proposal for greater harmonization" (2023) 31/2 *Asia Pacific Law Review* 358 at 371.

99 C Bergqvist and YS Choi "Controlling market power in the digital economy: The EU and Asian approaches" (2023) 50 *Computer Law & Security Review* 1 at 9.

100 USA Federal Trade Commission Act, sec 5 prohibits unfair methods of competition, which is a more expansive basis for liability than other antitrust acts. H Hovenkamp *Federal Antitrust Policy* (6th ed, 2020, West) at 79. This provision inspires a UTP provision in Asia, including in Korea and Japan.

101 Some critics in South Africa argue that the competition authorities need to focus on the assessment of the nature and effect of the conduct of concern rather than market power. The UTP rules satisfy this approach. See Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 105.

102 M Furse *Antitrust Law in China, Korea and Vietnam* (2009, Oxford University Press) at 259.

103 The objectives of fairness and its related ideas of equity and economic freedom can be unclear in certain circumstances. The concept of unfairness often reflects a broad range of regulations that ban discrimination. See P Areeda et al *Antitrust Analysis* (8th ed, 2022, Wolters Kluwer) at 22; Whish and Bailey *Competition Law*, above at note 1 at 17.

104 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* [2006] 1 CPLR 37 (CAC). For further case detail, see Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 159.

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approach may not satisfy the goal of ensuring a competitive process, and the substantive provisions on abuses of market dominance do not clearly incorporate the goal of fairness and equity.[105] If the goal of fairness and equity, which incorporates the idea of economic democracy, is overwhelmingly important for South Africa, the regime can consider adopting a UTP provision that can be added in section 8 or 9. In summary, the principle of economic democracy can be a foundation of the implementation of a UTP rule.

As discussed in the pricing cases above, the burden of proof of "abuse" is notable in South Africa as it requires complex economic analysis. However, a UTP rule can lower the bar for the agency's enforcement when the business conduct in question falls within the category of unfair practice. A UTP provision, as a strong antitrust weapon, can improve enforcement and a competition law culture, as shown in Korea.[106] The implementation of a UTP rule often focuses on "discrimination" against smaller or weaker trading parties, and it can protect a weaker undertaking in the downstream level. Given the increasing concern about algorithmic discrimination, the role of UTP rules has recently been highlighted in the digital market. For instance, the Korean competition agency applied the UTP provision to self-preferencing conduct by a Korean e-commerce giant without proving evidence of market dominance.[107] The agency asserted that a manipulation of algorithms to favour the undertaking's private brand products in the online marketplace fell within the UTP rule.[108] Therefore, a new UTP provision can play an important role in ensuring competition in the digital market.[109]

Like most competition regimes across the globe, South Africa does not prohibit market power or dominance itself. The CASA forbids only certain types of conduct by using market power.[110] A UTP rule usually focuses on the unequal bargaining power between trading parties. Despite the importance of freedom of contract, if a larger firm abuses its position in exceptional circumstances, such as a situation of indispensable and continuous contract, a UTP rule can be applicable. Of course, the criteria of a UTP infringement vary among the competition regimes, but the idea of a UTP rule is clear: "the protection of the weak in transactions". This provision may satisfy the goals of protecting SMEs and the historically disadvantaged people. The mission of competition law, which provides opportunities and facilitates an inclusive economy,[111] can be achieved by equipping it with effective legal measures. A UTP rule can serve the goal of "inclusive welfare".[112] However, despite its role in creating a fair and equitable market economy, a UTP rule should not be misused to discipline firms owned by certain groups, as this rule is not to satisfy an aim for "a populist and punitive form of antitrust".[113] It is possible that a UTP provision can be implemented to protect competitors rather than competition,[114] which may be contrary to the goal of protecting a competitive process or efficiency. Nevertheless, a balanced approach to efficiency and fair competition can provide the right direction for implementing a UTP rule.

105 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 96.

106 Bergqvist and Choi "Controlling market power", above at note 99 at 9.

107 YS Choi and K Fuchikawa "*Self-Preferencing* in Korea and Japan" (2024) 47(4) *World Competition* 495. The problem of self-preferencing seems an important issue in South Africa. See CCSA "Online intermediation platforms market inquiry: Final report and decision" (July 2023), available at: <https://www.compcom.co.za/wp-content/uploads/2023/07/CC_OIPMI-Final-Report.pdf> (last accessed 8 August 2024).

108 "KFTC imposes severe sanctions on Coupang for consumer deception" (KFTC press release, 13 June 2024), available at: <https://www.ftc.go.kr/eng/selectBbsNttView.do?key=563&bordCd=821&nttSn=13572> (last accessed 14 May 2025).

109 For the discussions on digital cases in South Africa, see S Gumede and P Manenzhe "Competition regulation for digital markets: The South African experience" (2023) *African Journal of Information and Communication* 1.

110 Kelly et al *Principles of Competition Law in South Africa*, above at note 5 at 119.

111 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 89.

112 Welfare maximization can be regarded as "inclusive welfare". See Gal "The social contract at the basis of competition law", above at note 53 at 97.

113 Davis and Granville "South Africa", above at note 14 at 269; Lewis "South African competition law", above at note 16 at 359.

114 Choi "The choice of competition law and the development of enforcement in Asia", above at note 2 at 134.

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Conclusion

As Fox and Bakhoum explained, the South African competition regime has shown a complicated system of competition law because the country is still recovering from the impairment of apartheid.[115] To recover a democratic system, it is important to have a clear and simple statement of objectives rather than a long list that generates ambiguity. Thus, a simple statement of the goal of fair and free competition with equity and efficiency may be an appropriate option for South Africa.[116] Efficiency should also be considered as an important purpose of the competition regime in South Africa because the country may not be ready to sacrifice efficiency for equity and fairness goals.[117] In the *Sasol v Nationwide* case of price discrimination,[118] the Court of Appeal cited the statement of a Korean official who worked in the field of competition law and policy, and part of the statement is relevant for the development of the South African competition regime.[119] The summary is as follows: In the developing countries, when economic power is concentrated, competition law should play a pivotal role in improving the bargaining power of the underprivileged to take part in market competition and of establishing the legal measures of fair and free competition.[120] Unless these two goals are satisfied, a few undertakings that are historically privileged can dominate markets. This will eventually bring public dissatisfaction as the market structure is not socially acceptable or fair. Market power leads to inequality which may cause lower economic performance.[121] In effect, the concern about the protection of SMEs and the historical disadvantaged people seems prominent only in theories and not in practice[122] because the rule on abuse of market dominance is often dormant.

The high unemployment rate impedes economic growth. In addition, certain factors, including a lack of competition, high cost and an uncertain regulatory environment, impede job creation from the private sector. This is linked to the problem of "earning polarization and wage inequality".[123] Therefore, the South African government needs to intervene in the market to provide a fair share for the disadvantaged. A reduction in unemployment and polarization are part of the competition law objectives in South Africa.[124] At the same time, efficiency is one of the important goals of the regime. Therefore, the regime's mandate of combining equity and efficiency should be considered, but these two goals often conflict with each other.[125] However, the goals of efficiency and equality can overlap

115 Fox and Bakhoum *Making Markets Work for Africa*, above at note 10 at 89.

116 For further discussion on free competition in South African case law, see J Neethling and J Potgieter "Vonnisbespreking: Bemoeiing met'n uitsluitende kontraktuele verhouding getroef deur vrye mededinging" (2017) 4/1 *LitNet Academies* 374.

117 MS Gal *Competition Policy for Small Market Economy* (2003, Harvard University Press) at 48. The author asserts that for small market economies, efficiency should be a main goal.

118 *Sasol Oil (Pty) Ltd v Nationwide Poles CC* (49/CAC/Apr05) [2005] ZACAC 5; 2006 (3) SA 400 (CAC) (13 December 2005). For further case analysis, see Irvine and Upfold "South Africa", above at note 55 at 708–09.

119 See EM Fox "We protect competition, you protect competitors" (2003) 26/2 *World Competition* 149 at 163–64.

120 Critics argue that the Competition Appeal Court failed to find the effect of substantially lessening competition in the price discrimination, which did not ensure a fair and free market. See B Mankga "When is price discrimination prohibited as anti-competitive?" (2007) 15/2 *Juta's Business Law* 94 at 99.

121 A Ezrachi, A Zac and C Decker "The effects of competition law on inequality–an incidental by-product or a path for societal change?" (2023) 11 *Journal of Antitrust Enforcement* 51; JE Stiglitz "Towards a broader view of competition policy" in T Bonakele, EM Fox and L Mncube (eds) *Competition Policy for the New Era: Insights from the BRICS Countries* (2017, Oxford University Press) 4 at 17.

122 OECD "Competition law and policy in South Africa", above at note 5 at 19.

123 World Bank "Inequality in South Africa", above at note 40 at 51–55.

124 This reflects South Africa's persistently high unemployment rate, which naturally makes it a priority. In the cases of mergers, employment conditions are considered significant public interest considerations (PICs). These include employment within the merging parties as well as any impact on employment in the supply chain or otherwise potentially affected by the merger. See the Companies Regulations of 2011 and the Competition Commission's Revised Public Interest Guidelines relating to Merger Control (PI Guidelines) published on 20 March 2024.

125 Davis and Granville "South Africa", above at note 14 at 273.

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in South Africa,[126] and the philosophy of economic democracy can influence effective enforcement of competition law against any abuse by a firm when its conduct undermines individual economic freedom. It is possible that South Africa can develop its own idea of economic democracy that may be different from that of other countries.[127] The competition regime can adapt this concept to fit into South African society. Lastly, it is necessary to enhance the goal of equality to serve the efficiency goal because South African society has been very unequal.[128]

When looking at the exploitative or discriminatory abuse cases, the South African competition regime does not seem to have an effective legal measure for securing and protecting the weaker people in the market. A new provision on UTP will help to create a level playing field for both incumbents and new (and smaller) entrants to rigorously compete in the market when the agency appropriately applies a UTP rule. A suggested UTP rule may function beyond the reach of the existing rules on abuse of market dominance in South Africa. Implementation of a UTP rule will enhance the enforcement power of the enforcement agency, but it will also be necessary to develop case law to prevent the agency from gaining excessive discretion in its enforcement of a UTP provision. A new provision can only work as a supplementary measure designed to protect SMEs or the historically disadvantaged people because sections 8 and 9 of the CASA are not intended to protect only small businesses.[129] According to Lianos, market power or dominance can be an important source of generating inefficiency and inequality.[130] In effect, competition law may not stop the fashion towards inequality, but it may play a role against the expansion of inequality.[131] If substantive provisions like sections 8 and 9 cannot be used to solve the problem of market power, a UTP rule can work to curb abuses from economic power.

We see competition law as a guardian of our free-market economy and of enhancing a democratic process because competition law aims to inhibit negative effects from the monopolistic market. The so-called inclusive competition law, which may satisfy a broad public interest, may help South Africa achieve the policy goal of inclusive development. A fair share of economic growth for the historically disadvantaged people should be one of the major objectives of competition law in South Africa at the moment. However, we should not ignore the shortcomings from excessive intervention in the market by enforcing a competition rule on abuses of market dominance as it can engender a problem of protecting competitors rather than competition. An appropriate balance between free market and regulatory intervention will be a critical task for the competition regime of South Africa in the future.

Competing interests. None

126 Fox "Competition policy at the intersection of equity and efficiency", above at note 60 at 444. Fox argues that, in certain circumstances in the developing world, "efficient moves to bring competition to the market are equitable, and equitable moves to bring competition to the market are efficient".

127 For instance, some countries declare the importance of economic democracy: The Korean Constitution articulates economic democratization, and the Indonesian Competition Law states economic democracy. Korea and Indonesia have experienced an excessive economic concentration. See T Prosser "Competition law and the role of the state in East Asia" in MW Dowdle, J Gillespie and I Maher (eds) *Asian Capitalism and the Regulation of Competition* (2013, Cambridge University Press) 228 at 246–47.

128 Fox "Competition policy at the intersection of equity and efficiency", above at note 60 at 445.

129 See Akgün et al "Price discrimination in input markets", above at note 64 at 132.

130 Lianos "The poverty of competition law", above at note 8 at 55.

131 Id at 87.

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