

**THE EFFECTIVENESS OF COMPETITION
LAW AS A MECHANISM FOR THE
PROTECTION OF THE RIGHT TO FOOD IN
AN AFRICAN CONTEXT**

**Submitted in partial fulfilment of the requirements of the Degree
LLM (Human Rights and Democratisation in Africa)**

by

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Table of Contents

PLAGARISM DECLARATION	1
LIST OF ABBREVIATIONS	2
ABSTRACT	3
1. INTRODUCTION	4
1.1. BACKGROUND	6
1.2. STUDY OBJECTIVE	7
1.3. LITERATURE REVIEW	7
1.4. METHODOLOGY	8
1.5. DELINEATIONS AND LIMITATIONS OF STUDY	8
1.6. CHAPTER OVERVIEW	9
2. CHAPTER TWO: THE RIGHT TO FOOD IN AN AFRICAN CONTEXT	10
2.1. THE SCOPE OF THE RIGHT TO FOOD	10
2.2. THE IMPORTANCE OF SMALLHOLDERS IN AFRICA	14
2.3. THE IMPACT OF NON-STATE ACTORS ON SMALLHOLDERS AND THE RIGHT TO FOOD	15
2.3.1. BUYER POWER IN THE COMMODITY MARKET	15
2.3.2. BUYER POWER IN THE COMMODITY MARKET	17
2.4. RETAILERS IN AFRICA	21
3. CHAPTER THREE: AN INTRODUCTION TO COMPETITION LAW	22
3.1. INTRODUCTION TO COMPETITION LAW	22
3.2. THE REGULATION OF MERGERS AND ACQUISITIONS	23
3.3. ABUSE OF DOMINANCE	25
3.4. CARTELS	26
3.5. COMPETITION LAW IN AFRICA	27
4. CHAPTER THREE: COMPETITION LAW AND THE RIGHT TO FOOD	29
4.1. THE LINK BETWEEN THE RIGHT TO FOOD AND COMPETITION LAW	29
4.2. THE TRADITIONAL LIMITATIONS OF COMPETITION LAW AS A MECHANISM OF PROTECTION	29
4.3. DEVELOPMENTS IN COMPETITION LAW	31
4.4. THE EFFECTIVENESS OF COMPETITION LAW AS A MECHANISM OF PROTECTION	35
5. CONCLUSION AND RECOMMENDATIONS	38
5.1. RECOMMENDED COMPETITION ELEMENTS TO BE ADOPTED BY AFRICAN STATES	39
6. BIBLIOGRAPHY	41

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LIST OF ABBREVIATIONS

African Charter	African Charter on Human and Peoples' Rights
African Commission	African Commission on Human and Peoples' Rights
BEE	Black Economic Empowerment
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
EC	European Commission
ECMR	European Commission Merger Review
EU	European Union
FAO	United Nations Food and Agricultural Organization
GSCOP	Grocery Supply Code of Practice
ICESCR	International Covenant on Economic, Social and Cultural Rights
KFTC	Korean Fair Trade Commission
OECD	Office Economic Community for Development
TNC	Trans-national company
UDHR	Universal Declaration on Human Rights
UK	United Kingdom
UN	United Nations
UN Charter	Charter of the United Nations
UNTAD	United Nations Trade and Development Forum
US	United States

ABSTRACT

This dissertation aims to provide a study on the right to food in an African context and to determine whether or not African states may effectively adopt competition law as a mechanism to protect against hunger. The study begins by examining the right to food and the obligations which flow from this right. Given that the predominant reason that people suffer from hunger is because they lack the ability to economically access adequate food, the dissertation examines the obligations of states to protect this right against abuse from non-state parties. In the framework of the food supply chain, this equates to providing protection against companies such as commodity traders and retailers that have gained a dominant position in the food market and are consequently in a position where they are able to abuse this position of power over the smaller producers and suppliers. The dissertation analyses the importance of the right to food by looking at the key role which smallholder farmers play in their communities. This is central to an African based study because smallholders make up the majority of the world's hungry people, and it is also the foremost means through which people in Africa gain an income. The study looks at the traditional purpose of competition law and examines whether it would be an effective means to regulate the food market in order to guard against the abusive practices committed by large food companies that threaten the livelihoods of African smallholders. The dissertation concludes with an investigation into the international best practices that can be drawn from competition law regimes across the globe, in order to provide recommendations for a competition regime that is particular to an African context and which would provide the best possible protection for smallholder farmers to ensure that the right to food is upheld.

1. INTRODUCTION

1.1. Background

The right to food is a human right that is recognised under international law. It provides that individuals are entitled to have access to adequate food and resources necessary for a sustained livelihood. This right places legal obligations on states to eliminate hunger and malnutrition and to realise food security for its citizens.¹ Hunger is a reoccurring issue that continuously plagues the African continent. It is estimated that approximately one billion people went hungry in 2011, which is an increase from the 923 million people who were hungry in 2008.² But hunger today is no longer a result of there being a lack of food. In fact, the world produces enough food to feed its entire population. Generally, the problems associated with hunger arise due to an inability to access available food.³ People are not deprived of food because the world produces too little: they are deprived because food prices are unaffordable or because they lack the necessary resources to produce food themselves.⁴ The implication of this is that hunger stems from disempowerment, marginalisation and poverty.

This lack of economic access has been inflated by technological advances in the world's agricultural businesses, which have shifted the way the world sources its food.⁵ Traditionally, food was supplied through local farmers markets. However, the world's population increase has resulted in the economisation of our food supply chain to vast distribution systems. The removal of direct food sales by farmer to customer has meant that most of the world's food is now sourced through stores and supermarkets.⁶ Urbanisation trends increased the amount of convenience stores and markets to suit the needs of a changing world and economy. People today have less time to source their food from local markets and so the need for supermarkets increased, leading to what is now known as the 'supermarket revolution'. This surge in retailers across the world spurred economic innovation where businesses sought to maximise their profits by creating efficient food distribution systems from the farm gate to supermarket isle.⁷

The advance of technology has meant that large corporations with immense distribution systems are able to source fresh and packaged foods from anywhere in the world. This has completely changed the economic market for food, broadening it to become almost global in nature. In addition, the entrance of private business and trans-national corporations (TNCs) has resulted in an increase in the price of produce, as food is traded on the global commodity market and sold in retail supermarkets across the globe.⁸

¹ Hunger is the world's number one health risk. 925 million people do not have enough to eat, and 98 per cent of them live in developing countries. <http://www.wfp.org/hunger/stats> & http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2011/Addendum_G1.pdf (accessed 02 June 2012).

² O De Schutter 'Accounting for hunger: An introduction of the issues' in O De Schutter & KY Cordes (eds) *Accounting for hunger: The right to food in the era of globalisation* (2011) 1.

³ UN Office of the High Commission for Human Rights Report 'The right to adequate food: Fact sheet No. 34' (2010) 4.

⁴ OHCHR (n 3 above) 4.

⁵ O De Schutter 'Report of the Special Rapporteur on the right to food: Agribusiness and the right to food' (2009) *Human Rights Council* Doc No. A/HRC/13/33, 4.

⁶ E Tollens 'Wholesale markets in African cities: Diagnosis, role, advantages, and elements for further study and development' (1997) *FAO Food into Cities Collection* Doc No. (AC/05-97E) 6.

⁷ O Brown & C Sander 'Supermarket buyer power: Global food supply chains and smallholder farmers' (2007) *International Institute for Sustainable Development* 6.

⁸ ActionAid International 'Power hungry: Six reasons to regulate global food corporations' (2005) 10.

Consequently, many poor and rural people are unable to keep up with these changes and cannot meet the high economic costs associated with a global food supply chain. Ironically, it is the world's agricultural workers who make up 80 per cent of the hungriest people on the planet.⁹ An estimated 1.3 billion people work in agriculture, meaning that any change in the food supply chain affects their ability to survive. Over half of the population in developing countries rely on agriculture. In the world's poorest countries this can be as high as 85 per cent.¹⁰ Food production provides the primary source of income for the majority of the world's poor.¹¹ Developed nations have the capital and ability to support their food with subsidies that allow farmers to produce staple foods at a lower cost. This has led to a disparity between food producers in developed and developing nations. Because the food market has expanded to cover almost all the corners of the planet, the smaller producers in developing nations struggle to compete with the imported cheaper staples from developed states, thereby limiting their ability to earn an income and lessening their access adequate food.¹²

The net effect of this economisation of the food supply chain has been the overall concentration of a few large TNCs in the food market. As food distribution systems globalised, larger corporations expanded their businesses to capture as much of the market as possible. This has created unequal bargaining power amongst the players in the food chain. Food producers and suppliers receive relatively low prices for their crops, while buyers and retailers continue to charge higher prices to customers.¹³ The resulting market structure gives the buyers considerable bargaining strength over their suppliers, with potentially severe implications for the welfare both of producers and consumers.

Essentially, the global food market has developed into two large areas: commodity traders and retailers. Commodity trading involves the producing, processing and eventual selling of staple crops, such as coffee, soy, cocoa, wheat and corn. Commodities are important cash crops, as they form the basis for most manufactured goods in western countries and also provide a large portion of the food in developing nations. To exploit the profitability of the western market, TNCs have expanded their operations to vertically consolidate each step of the commodity process, from the purchasing of produce from farmers, processing the raw goods, and finally manufacturing the end product. By trying to control as much of the market as possible, TNCs have increased in size to the point where they now control a majority of the world's commodities. This concentration of market power has bestowed TNCs with the ability to set prices and the movement of commodity foods across the world. This ability is what is known as 'buyer power' in the food supply chain.¹⁴

For the traditional smallholder farmer in a developing nation, this means struggling to match the giant purchasing power of these corporations. For example, in order for the 25 million producers of coffee to sell their raw coffee beans to the 500 million consumers of coffee around the world, these farmers must sell their crops to one of four international coffee bean roasters, who together own 45 per cent of the coffee roasting market. From there, the roasted coffee beans are sold to one of four major

⁹ A Bloom *et al* 'Transnational corporations and the right to food' (2009) *New York University Law Students for Human Rights* 4.

¹⁰ C Dolan & K Sorby 'Gender and employment in high-value agriculture industries' (2003) *World Bank Agriculture and Rural Development Working Paper* 7.

¹¹ ActionAid (n 8 above) 11.

¹² M Martins, L Colen & J Swinnen (2011) 'Vegetable production and marketing in Africa: Socio-economic research' 127.

¹³ O De Schutter 'Addressing concentration in food supply chains: The role of competition law in tackling the abuse of buyer power' (2010) *UN Briefing Paper* 2.

¹⁴ P Gibbon 'The commodity question: New thinking on old problems' (2005) *UN Human Development Report Office Occasional Paper* 3.

coffee traders, who together control 40 per cent of the international market. Consequently, these massive corporations now have the ability to source their raw product from millions of different coffee producers world-wide, while the actual farmers are left with very few, if any, options of buyers for their product.¹⁵

The second area of the global food market has been the development of retailers. Globally, supermarkets are becoming the main front where consumers are purchasing their food stuffs.¹⁶ Large supermarket chains in developed nations, such as the United States (US) and the United Kingdom (UK), are expanding their offerings to include fresh fruit and vegetables from all over the world.¹⁷ The supermarkets are becoming so dominant in these nations, that farmers are forced to sell their product to only one of a few stores at whatever price they are able to get. The UK, for example, is so concentrated that there are four major retail chains that control two-thirds of the market, and the US's Wal-Mart controls six per cent of the entire world's retail sector. This concentration of retailers has granted them significant buyer power over their suppliers. This places the farmers in a weakened bargaining position, where they are often forced to accept unfavourable terms from retailers simply to stay in business. These changes in the retail and commodity food markets are having a drastic change in the ability of developing countries to maintain their food security. It is important for smallholder farmers to remain competitive in the food market, especially, in those developing countries where the majority of impoverished people rely on agriculture as a means of income and food security.¹⁸ Accordingly, states have a duty to protect the right to food from abuse by non-state actors, including food corporations that may negatively affect the ability of their citizens to access adequate food.¹⁹ According to the United Nations (UN) Special Rapporteur, one method of protection is regulation of the food supply market by incorporating competition (or antitrust) law into the domestic legislation of a state.²⁰

Competition law is aimed at the protection of the marketplace by, amongst other things, ensuring that companies do not abuse their positions of strength in the market to undermine normal competitive economic dynamics. Generally, this involves regulating the activities of businesses within a market so that the stronger players do not illegally push out the smaller businesses in an economic sector, and reviewing the merger activities of corporations to guard against an over concentration of market power in an economic market.²¹ As many of the problems associated with hunger result from a lack of economic access to the food, competition law has been presented as a way in which the food market of a state can be regulated and protected against abuse, ensuring that large TNCs do not distort the market, making food inaccessible for the local people.

1.2. Study Objective

Given that the majority of the world's hungry people are smallholders or agricultural workers, it is important to protect their ability to earn an income and consequently access adequate food. This is particularly essential for Africa, where more than half of the populace rely on food production as a means of survival. Most people going hungry are placed in this position by their

¹⁵ As above.

¹⁶ M C Schmidt 'The transformation of food and retail and marginalisation of smallholder farmers' in O De Schutter & KY Cordes (eds) *Accounting for hunger: The right to food in the era of globalisation* (2011) 68.

¹⁷ Bloom (n 9 above) 39.

¹⁸ ActionAid (n 8 above) 11.

¹⁹ De Schutter (n 5 above) 3.

²⁰ De Schutter (n 5 above) 14.

²¹ S Joecks & P Evans (2008) *Competition and development: The power of competitive markets* 23.

inability to economically access food on the available market. The globalisation of the world's food supply chain has threatened the security of smallholders, as they struggle to compete with the larger corporations and remain in business. This dissertation aims to investigate whether or not the state may use competition law as an effective protection mechanism to protect the right to food, by regulating the activities of non-state actors, such as TNCs, in the retail and commodity markets against abuse. The paper will investigate the role of the state in protecting the right to food and the obligations that arise from this right, focussing on the following areas:

- A study on the importance of smallholders in the African food market, looking at the impact of the global food supply chain on their ability to access adequate food.
- Secondly, the paper will examine the purpose and effect of competition law on an economic market. It will revise the traditional scope of competition law, concentrating on the influence of merger analysis and the illegal anticompetitive acts, such as vertical restrictive practices and cartels in a market.
- Thirdly, the paper will analyse the link between competition law and the right to food. This section will unpack the effectiveness of competition law to protect the right to food against abusive practices by TNCs, looking at both the impact on consumers of food and the producers of food in an African context.
- Finally, the paper will propose the ideal competition law regime for African states in relation to protecting the right to food for the people of this continent.

1.3. Literature Review

A vast amount of literature has been written on both the topic of the right to food, and on the area of competition law. The human right to food is enshrined in a host of international agreements. Article 25 of the Universal Declaration of Human Rights (UDHR) is considered the first articulation of the right to food in an international legal instrument. It was adopted as part of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 of the ICESCR and General Comment 12 by the Committee on Economic, Social and Cultural Rights (CESCR) together contain the most detailed and widely accepted articulation of the right to food. Furthermore, the specialist Food and Agriculture Organization (FAO) of the UN published Voluntary Guidelines for states to adopt in support the progressive realisation of the right to adequate food in the context of national food security.²² The FAO provides key information and research on the scope of the right to food, as well as the obligations that arise for states as a result of this right.

The UN Special Rapporteur on the Right to Food, Mr Olivier De Schutter, has released a number of documents illuminating on the ambit of the right to food and the measures that states should adopt in upholding this right, and sets out the state's responsibility to respect, protect and fulfil the right to food.²³ The right to food was recognised as an implied right under the African Charter for Human and People's Rights (African Charter) by the African Commission on Human and Peoples' Rights (African Commission) in the case of *Social and Economic Rights Action Centre v Nigeria* (SERAC Case).²⁴ The rights to life,

²² FAO 'Voluntary Guidelines' (2005).

²³ De Schutter (n 5 above).

²⁴ (2001) AHRLR 60 (ACHPR 2001).

health, and economic, social and cultural development were held to imply the protection of the right to food.²⁵ Following on from the rights in the African Charter, African Union adopted the Declaration on Agriculture and Food Security in Africa in 2003. Known as the Maputo Declaration, the instrument addresses the qualitative aspect of the right to food security and the steps that states should adopt in providing for food security in their territories. Drawing on from this literature, it is clear that states do have an obligation to protect the right to food, specifically in ensuring the availability and accessibility of food for their people, including the obligation to an equitable distribution of world food supplies in relation to need.²⁶

The literature on competition law is as wide and varied as the number of competition regimes across the world. This paper examines buyer power as a restrictive practice that unfairly affects the ability of suppliers to operate in a competitive market. Most research on buyer power comes from a European or US perspective, and there is little information on the impact of buyer power in an African context. As a result, much of the competition law relied on for this paper is drawn from competition regimes across the globe which allow for the protection of socio-economic rights in developing markets. Apart from literature from the US and the EU, the research led to competition law from countries such as Korea, Taiwan, Malaysia and South Africa - all countries with similar food market systems.

1.4. Methodology

The bulk of the research was collected via desktop review of the literature on the right to food and competition law, from both an international and domestic perspective. Case law was used to illustrate the boundaries of the rights in relation to the enforcement and protection of the right to food, as well as the areas of limitation for competition law.

In addition, a number of interviews were conducted in July in South Africa with experts on the two areas of investigation. An interview with Mr Mark Garden and Mr Justin Balkin, both directors of Edward Nathan Sonnenbergs Inc. was held. Mr Garden and Mr Balkin were both intricately involved in a number of competition law suits of relevant to the dissertation. An interview was held with Mr David Lewis, who headed the Competition Tribunal for the past decade in South Africa. Mr Lewis was instrumental in the establishment of South Africa's competition regime. Finally, Professor Johann Kirsten, the Director of the University of Pretoria's Agricultural Sciences Department was interviewed. Professor Kirsten also sits on the board of the National Agricultural Marketing Council (NAMC) of South Africa.

1.5. Delineations and Limitations of Study

Ideally, this dissertation aims to focus on the right to food in the African context. However, the scope of the right to food itself is a broad legal concept, which is made even wider when applied to the whole African continent. As such, the study was limited to the area of state responsibility in protecting the right to food, and more specifically, in protecting the right of economic access to food – meaning the protection of the right against abuse by third parties. Similarly, it would be ideal to examine the full scope of competition law, including the anti-competitive practices in the vertical and horizontal markets. However, a full

²⁵ C Lumina 'The promotion and protection of economic, social and cultural rights and the right to development under the African regional human rights system: note' (2006) 27(2) *Obiter* 328.

²⁶ Article 11 of the ICESCR.

explanation of the intricacies and technicalities of competition law is beyond the word limit of this paper. Consequently, the examination of competition law was limited to the particular practices relevant to the protection of the right to food.

The interviews mentioned above were conducted before leaving South Africa for Ethiopia in the second semester. The idea behind obtaining expert input from South African competition law practitioners and authorities was drawn from the fact that many of the recommendations put forward by the UN Special Rapporteur on the Right to Food (and other academic writers) were based on the South African competition regime. As such, these interviews were held to examine South African law as an example of best practice and to determine whether these practices could be applied in the context of the right to food. Further interviews were initially envisioned to examine the competition law regime of Ethiopia, as well as the state's commodity trading industry. However, time constraints coupled with restrictions on the word count of the dissertation limited this research.

1.6. Chapter Overview

- Chapter two will concentrate on the right to food and the state's responsibilities in relation to this right. Focus will be spent on the international obligations provided by the UN system, as well as the state responsibilities as set out in the African Charter. The chapter will highlight the problems relating to hunger in Africa, looking specifically at the importance of Africa's smallholders as producers of food. The chapter will also examine the influence of non-state actors, such as TNCs, on the right to food, and provide examples from the commodity and retail markets that illustrate the effects of abusive practices on farmers.
- Chapter three will provide an introduction to competition law, focussing in particular on mergers, restrictive vertical and horizontal practices of buyer power, concentration and cartels. This section will provide an explanation of the areas of competition law relevant to the protection of the right to food.
- Chapter four will discuss the recommendations of the UN Special Rapporteur on the Right to Food of using competition law as a means to protect the right to food. In doing so, the chapter will examine the effectiveness of competition law in protecting the food industry, drawing on best practices from other international competition regimes, and examining whether competition law should be adopted as a measure of protection.
- In conclusion, the study will compile the above research and recommend the ideal elements to be incorporated into an African competition law regime that specifies the unique challenges of the continent in relation to the right to food.

2. CHAPTER TWO: THE RIGHT TO FOOD IN AN AFRICAN CONTEXT

2.1. The scope of the right to food

There is little else in this world that can compare to the debilitating effects of hunger and starvation. For the millions of people who struggle to feed themselves and their families, this daily fight to provide food is an attestation to the huge inequalities of our society. It is for this reason that international law has recognised the right to adequate food as a fundamental human right, which requires action on the part of our governments to ensure that every person is able to feed themselves with dignity.²⁷

The right to food was first recognised as part of the right to an adequate standard of living in the UDHR that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...'²⁸ The right gained a legally binding status when the ICESCR came into force in 1976. Since then, a number of other international agreements have confirmed the right to food, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²⁹, and the Convention on the Rights of the Child (CRC).³⁰ Article 11(1) of the ICESCR requires that state parties

[r]ecognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This includes recognising the 'right of everyone to be free from hunger, [where states] shall take, individually and through international co-operation, measures, including specific programmes [to improve food production].'³¹ Thus, the right to food comprises of the right to an adequate standard of living and the right to be free from hunger. While these two rights are interrelated, the CESCR in its General Comment No.12 identified 'the right to freedom from hunger' as requiring all states, irrespective of their development status, to take the necessary steps to mitigate and alleviate hunger.³² Consequently, states have a duty to immediately realise the right of their populace to be free from hunger, which should include taking steps to supply their citizens with their minimum subsistence needs.³³ The CESCR goes further to state that being free from hunger is only the baseline action that is immediately necessary; the broader obligation on states is to implement the right to adequate food for everyone through the progressive realisation of the right in accordance with the state's abilities.³⁴

²⁷ J Ziegler UN Special Rapporteur on the Right to Food 'Report of the Rapporteur on the right to food, delivered to the Human Rights Council' UN Doc. No A/HRC/7/2008, 16.

²⁸ Article 25 of the UDHR.

²⁹ Article 14 of CEDAW.

³⁰ Articles 24 & 27 of the CRC.

³¹ Article 11(2) of the ICESCR.

³² UN Economic & Social Council Committee (ECOSOC) and CESCR 'General Comment 12: The Right to Adequate Food (Art. 11)' UN Doc No. E/C.12/1999/5 (12 May 1999) (CESCR General Comment 12) 6.

³³ L Niada 'Hunger and international law: The far reaching scope of the human right to food' (2006)22 *Connecticut Journal of Int'l Law* 152.

³⁴ CESCR General Comment 12, 6.

The right to adequate food has been defined by the CESCR General Comment 12 as being realised ‘when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.’ Furthermore, the Committee underlines that the right to adequate food ‘shall not be interpreted in a narrow and restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients.’³⁵ This has been interpreted to mean that every person should be able to access the resources they require to produce sufficient food, or to earn income enough to purchase the required amount of food to prevent hunger, but also to ensure the nutritional needs of themselves and their families. General Comment 12 regards the core content of the right to adequate food to include two fundamentals. The first is the *availability* of food ‘in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable to a given culture.’ The second implies the *accessibility* of such food ‘in ways that are sustainable and that do not interfere with the enjoyment of other human rights.’³⁶ The term ‘availability’ refers to the ‘possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems.’³⁷ ‘Accessibility’ relates to both the economic and physical accessibility of food, in that a person should be able to have the economic means to procure food, while physical accessibility requires states to feed victims or individuals suffering the effects of humanitarian disasters.³⁸ In summary, General Comment 12 requires that states have the primary responsibility to ensure that their citizens are free from hunger, which includes ensuring that their minimum dietary needs are met. The right to food obliges states to protect and develop existing food sources and to allow citizen’s access to adequate food. At the core, the right to food requires that states must abstain from destroying or contaminating food resources or hindering the ability of people to produce their own food supply.³⁹

However, not all states are party to the ICESCR, but this does not mean that they escape the responsibility for ensuring the right to food for their people. Articles 55 and 56 of the Charter of the UN (UN Charter) state that:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the UN shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- b. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Although not specifically related to the right to food, these articles in the UN Charter have been used by the UN’s Food and Agricultural Organisation (FAO) to imply a responsibility on states to progressively realise food security in their territories. The FAO Council created a set of Voluntary Guidelines to ‘support the progressive realisation of the right to adequate food in

³⁵ As above.

³⁶ FAO ‘Right to food making it happen: Progress and lessons learned through implementation’ (2011) 18.

³⁷ CESCR General Comment 12, 12.

³⁸ CESCR General Comment 12, 13.

³⁹ C Lumina (n 25 above) 329.

the context of national food security’, where states are encouraged to apply the Guidelines when developing their strategies, policies, programmes and activities, and to do so with no discrimination of any kind in promoting food security.⁴⁰

The right to food has also been recognised regionally in instruments such as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988),⁴¹ the African Charter on the Rights and Welfare of the Child,⁴² and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.⁴³ As mentioned above, the right to food has been recognised as an implied right by the African Commission in the SERAC Case,⁴⁴ and in the Maputo Declaration. In addition, a considerable number of states the right to food is acknowledged in the constitution as a fundamental right. It is protected as a direct right in countries including Congo, Finland, Haiti, Nicaragua, Russia, Uganda, Ukraine and South Africa. In many other states, such as in Brazil, Colombia, Cuba, Ecuador, Guatemala and Paraguay, the right to food is recognised for certain vulnerable groups within the population, including: children, adolescents or the aged.⁴⁵

The progressive realisation of the right to food denotes that the full enjoyment of the right to food requires time and resources that may not be achieved immediately by a state. However, states are not allowed to infringe the principle of non-retrogression in implementing the right to food, such that once a commitment is made to protect the right to food; a state cannot subsequently retract that obligation.⁴⁶ The African Commission called upon states in *Purohit v The Gambia* to take concrete and targeted steps within its full available resources to progressively realise the socio economic rights of its citizens.⁴⁷ This finds basis in article 2 of the ICESCR, which requires states to take the necessary steps to the maximum of their capabilities to progressively realise the right to food security.

The African Commission has indicated that the African Charter, in alignment with other international human rights standards, imposes four kinds of duties on the state parties, namely the duty to respect, protect, promote and fulfil human rights. These are universal obligations that apply to all rights that incur both positive and negative duties for the state.⁴⁸ Typically, it is the state that has been identified as holding power over its subjects. Consequently, human rights, which impose negative duties on the state (of refraining from intervention in these rights), have acted as a check and balance against governmental actions recognised to be unjust. The positive duties of the state mean that it bears accountability for ensuring the implementation of human rights, in that the state has the power of regulation to administer the public resources within its territory.⁴⁹ In relation to the right to food, this call for states to refrain from obstructing existing access to food (the respect element), to ensure that other third parties do not interfere with the access to food (the protect element), and finally to take positive steps to implement adequate food for citizens and groups within their borders (the fulfil element).⁵⁰

⁴⁰ FAO ‘Voluntary Guidelines’ (2005) 2.

⁴¹ Article 12 of the Protocol of San Salvador recognises the right to food, and in article 17 in the context of the protection of the elderly.

⁴² Articles 14(2)(c), (d) and (h) of the African Charter on the Rights and Welfare of the Child.

⁴³ Articles 14(2)(b) and 15 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

⁴⁴ (2001) AHRLR 60 (ACHPR 2001).

⁴⁵ C Golay & M Özden ‘The right to food’ (2009) *Paper prepared for the Human Rights Programme of the Europe-Third World Centre (CETIM)* 19.

⁴⁶ FAO (n 40 above) 18.

⁴⁷ *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) 84.

⁴⁸ *Lumina* (n 26 above) 330.

⁴⁹ *Niada* (n 33 above) 153.

⁵⁰ *Bloom* (n 9 above) 6.

States have an obligation to protect human rights, comprising at a minimum ‘a duty to protect against human rights abuses by non-state actors, including by business, affecting persons within their territory or jurisdiction’.⁵¹ Because TNCs have such a large impact on the right to food, specifically the ability of people to economically access adequate food, the CESCR General Comment 12 has expanded this obligation to mean that this requires ‘measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food’.⁵² The concluding observations of the CESCR have stated ‘clear[ly] that the realm of state responsibility extends not only to the acts of agents of the state but also to those of third parties over whom the state has or should have control.’⁵³

Fundamentally, the duty to protect arises out of an understanding of the tremendous influence that private actors, such as TNCs, have over people’s lives – including the connection between these private actors and the state.⁵⁴ In applying this duty the Special Representative of the UN Secretary General on Human Rights and Transnational Corporations and Other Business Enterprises, Professor John Ruggie, has argued that states must protect the right to food against abuse by third parties including TNCs, but that TNCs also have a responsibility to respect human rights, including the right to food, and that both the state and non-state actors should provide remedies for any transgression of this right.⁵⁵

Professor Ruggie has stated that:

The framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial. The three pillars are complementary in that each supports the others.⁵⁶

It is based on this framework by Ruggie that the current Special Rapporteur on the Right to Food, Olivier De Schutter, has indicated that states must adopt regulatory and legislative measures to prevent abuse of the right to food by TNCs and other non-state actors.⁵⁷ In fact, a government would be in violation of this obligation if it accepted the exploitation of the country’s food-producing abilities for the limited interests of a corporation while leaving the majority of the populace to starve.⁵⁸ Because of the importance of ensuring that the ability of farmers and those persons who rely on agriculture to maintain an adequate standard of living is not unreasonably impacted by non-state actors, De Schutter has stated that the passivity of states in protecting against corporate abuse may be seen as a failure to comply with the obligation to protect.⁵⁹

⁵¹ J Ruggie ‘Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’ (2008) *Human Rights Council* UN Doc No A/HRC/8/5 24.

⁵² CESCR General Comment 12, 15.

⁵³ M Craven ‘The international covenant on economic, social and cultural rights’ (1998) 112.

⁵⁴ A Ganesh ‘The right to food and buyer power’ (2010) 11(11) *German Law Journal* 1201.

⁵⁵ Bloom (n 9 above) 7.

⁵⁶ Ruggie (n 51 above) 3.

⁵⁷ De Schutter (n 5 above) 3.

⁵⁸ P Alston ‘International law and the human right to food’ in P Alston & K Tomagevski (eds) *The Right Not to Be Hungry* (1984) 23.

⁵⁹ De Schutter (n 13 above) 3.

International law acknowledges the importance of the right food in the daily lives of each person on the planet. In order to work towards an equal society where every person has the ability to feed their families, states must protect the food sources of their populace from being unreasonably exploited by third parties. Part of this obligation means that states should take progressive steps, through regulatory and legislative mechanisms, to protect the rights of their citizens against abuse from corporations or businesses that might be in a far more powerful position than that of the average low-income citizen.

2.2. The importance of smallholders in Africa

Agriculture produces the primary source of food and income for the majority of the world's poor people. Accordingly, agriculture acts as the main line of defence against poverty and hunger and is essential for safeguarding people's basic human rights. Agriculture is additionally an important social, cultural and environmental factor for rural communities, as it tends to be the women in communities who are responsible for feeding their families. Small-scale family farms (or smallholders) provide the lion's share of food to African cities.⁶⁰ This is usually in the format of informal food markets or stalls, and while there are a few large-scale farmers that provide produce specifically for the African market, most smallholders produce staples (such as cassava, maize, rice, millet, bananas, meat, milk, fruits and vegetables) principally for subsistence, and only the surplus is sold.⁶¹ The food supply chain for these markets begin with 'trader-collector drivers' who purchase produce from informal rural markets or directly from smallholders. These trader-collector drivers represent the main connection between geographically dispersed smallholders in rural areas and the distribution network of wholesalers and retailers in urban centres. They also sell produce directly to consumers.

Smallholders in developing countries, and particularly in Africa, produce their crops by cultivating small plots of land, often with no or minimal support from the state. The food and income support that they provide their communities with makes smallholders among the most important group of people who stand against food insecurity in the world today. Because smallholders do not have surplus capital, they are unable to market their produce themselves, and often lack storage and processing facilities. As a result, these smallholders often have only a handful of buyers for their goods – limited by the perishability and transportation costs of distributing their stock widely. For smallholders, the key factor is the price they receive for their crops.⁶² ActionAid has reasoned that the economic development of smallholders is the most successful way of alleviating rural poverty. An increase in smallholders' incomes increases the local demand for goods and services, such as transport, construction and farm labour, thereby reducing poverty in the wider economy.⁶³

It is therefore of fundamental importance that smallholders are not excluded from the food market by other, more powerful, agribusinesses operating in Africa. With the number of people relying on family farms to keep poverty at bay, the state needs to ensure that non-state actors do not abuse their positions of power and limit the ability of these farmers to keep providing for their families and their communities.

⁶⁰ ActionAid (n 8 above) 11.

⁶¹ Tollens (n 6 above) 6.

⁶² De Schutter (n 5 above) 11.

⁶³ ActionAid (n 8 above) 11.

2.3. The impact of non-state actors on smallholders and the right to food

As mentioned above, the food supply chain can be separated into two areas that control the distribution of food around the globe: the commodity market and the retail market. In both of these economic markets, corporations and businesses have the potential to negatively impact the right to food. In developing technological advances which allow us to store food for longer periods, making it transportable to other continents and retail shelves, the supply chain (and therefore economic market) in which producers of food have to compete, has grown to include a number of competitors within a specific region and sometimes even incorporates the whole world.⁶⁴

The positive outcome of this change is that we are now able to source food goods from anywhere in the world with sophisticated distribution systems. This improves efficiency and affordability of food for consumers as TNCs have a large number of producers where they can purchase their raw products. When a powerful retailer, such as Wal-Mart, or a commodity trader, such as Nestle, has millions of producers from where it can source its input goods, it means that it has a strong position from which it can bargain. And bargain it does. Much of the positive impact that buyer power brings, is the fact that it can push down the prices paid to farmers who produce goods, passing on these savings to the consumer.⁶⁵ While this may at first appear to benefit consumers, the corollary of this ability is that many smallholders are unable to compete in their respective food markets with the unfair practices that these companies inflict on farmers from their heightened market power positions.

Put simply, governments need to reduce the concentration in their food markets as a competitive supply chain allows suppliers and food producers better bargaining power to negotiate fair prices for their produce. Additionally, states must guard against abusive practices by commodity traders and retailers that limit the ability of smallholders to compete and stay in the market.

2.3.1. Buyer power in the commodity market

Commodity traders are companies that purchase staples, such as sugar, coffee, soy, cocoa and wheat from farmers and then sell them to food processors (if necessary, for example, to process raw sugar cane into usable product) or directly to retailers.⁶⁶ According to former UN Secretary-General Kofi Annan, as many as 38 developing countries are reliant on a single commodity crop for more than 50 per cent of the state's income, with 48 countries relying on only two commodities.⁶⁷

The impact of fluctuations in the commodity market was illustrated by the 2007-2008 food riots around the world following the increase in prices for many of the world's basic commodities. These staple foods are the primary source of nutrition for millions of people living on the breadline, and when there are price changes in the market it means that a large number of people are unable to afford their basic food stocks.⁶⁸ For the growers of these commodities, price fluctuations can mean the

⁶⁴ Schmidt (n 16 above) 73.

⁶⁵ PW Dobson 'Retailer buyer power in European markets: Lessons from grocery supply' (2002) *University of Loughborough Business School Research Series 4*.

⁶⁶ Bloom (n 9 above) 20.

⁶⁷ Address given to the General Assembly 58th Session, accessible at <http://info.worldbank.org/etools/docs/library/57495/sgreport.pdf> (accessed 28 July 2012).

⁶⁸ KY Cordes 'The impact of agribusiness transnational corporations on the right to food' in O De Schutter & KY Cordes (eds) *Accounting for hunger: The right to food in the era of globalisation* (2011) 32.

difference between staying in the market and having to exit the system because they can no longer continue their business on the low prices paid for the raw produce.⁶⁹ The main reason for this is that once invested in a crop, commodity farmers are unlikely to be able to switch harvests because of the specific climate and cultivation requirements for different plant species. Coffee, as an example, is generally grown on hilly terrain located in high altitudes, making it difficult for farmers to grow any other crop in their fields.⁷⁰

In response to a number of developments in the commodity market over the past three decades, including the globalisation and liberalisation of markets, the advancement of new technologies, and the increased concentration among retailers and food processors, commodity traders have merged their operations with other traders to capture higher segments of the commodity market. This has led to an increased concentration of market power among a few commodity traders.⁷¹ This concentration has meant that commodity traders are in a position to capture ever more of the values created in commodity supply chains, setting the prices they are willing to purchase crops at, and the selling prices provided to retailers. As such, a smaller share of the total value goes to the developing nations who rely heavily on commodities for their income, and a larger share of the commodity prices are gathered by the TNCs acting as processors and retailers of these products.⁷²

Increasing levels of concentration in the commodity market result in farmers selling their produce to an increasingly smaller number of players. This gives companies tremendous bargaining power over smallholders and makes it possible for them to push down farmgate prices. Commodity traders exert their buyer power through aggressive negotiations on price, bulk buying and playing suppliers off against each other. As a result, smallholders have accepted prices that are lower than they would if the market had a better competitive structure, and to cut investments they need to make on their farms.⁷³ In 2011, the world's banana trade was dominated by two TNCs who together controlled almost 50 per cent of the entire market. Similarly, the commodity market for Cote d'Ivoire cocoa was concentrated with three firms who governed the processing of the raw product, and three companies handled 80 per cent of the US' corn exports – a produce that is found in multiple products exported worldwide.⁷⁴ The knock-on effect of this is that farmers may be forced to cut the wages paid to their farm workers in order to keep the business afloat, which in turn places the workers in a position where they may not be able to afford the cost of food to support their families.⁷⁵ In Cote d'Ivoire, where the predominant export commodity is cocoa, this has translated into the use of child labour in order to compete in the market.⁷⁶

In response to lower prices for their crops, farmers resort to what is known as the 'commodity problem' where they increase the amount of produce grown to make up for the shortfall in price. This, however, tends to have a negative impact on the market, flooding it with an increase in the availability of goods and driving the prices even lower as the commodity traders have even

⁶⁹ ActionAid (n 8 above) 14.

⁷⁰ De Schutter (n 13 above) 3.

⁷¹ Bloom (n 9 above) 20.

⁷² South Centre & ActionAid 'Commodity Dependence and Development: Suggestions to tackle commodity problems' (2008) 10.

⁷³ Cordes (n 68 above) 34.

⁷⁴ ActionAid (n 8 above) 13.

⁷⁵ OHCHR (n 3 above) 11.

⁷⁶ Ganesh (n 54 above) 1196.

more input to purchase from.⁷⁷ A World Bank report estimated that discrepancy between farmer and consumer prices may have cost commodity-exporting countries more than \$100 billion a year.⁷⁸ Concentration of TNCs in the commodity market creates increased costs for suppliers and insecurity of income which reduces the incentive to innovate and invest in their business growth, causing financial distress that may result in high levels of debt and insolvency. This may also add additional pressure to workers in the form of low wages, short term contracts and delayed payments.⁷⁹

In respect of the right to food, this places farmers, especially those smallholders who do not have a strong bargaining position, in a severely compromised station where they are dependent on the commodity traders for survival, and beholden to them without the ability to strongly negotiate secure income and stability. This filters through to the rest of the community who rely on these commodity producers for their economic access to food sources. It is important, therefore, that states implement proper regulations and protection of these producers to ensure their continued survival in the market.

2.3.2. Buyer power in the retail market

The retail market has grown considerably in the last few decades and now dominates the food store front in most western countries. The growth of supermarkets arose predominantly from the changes in the economic sector, responding to the needs of the populace for convenience and efficiency. As more and more people moved into cities and began entering the fast-paced world of the corporate urban environment, so the food supply chain developed to respond to the time needs of the populace.⁸⁰ The major change in food retail came when more women entered the workplace. As the primary home-makers, women no longer had time to go to farmers markets for their goods, and the retail sector responded by producing more ‘one-stop-shops’ and supermarkets to make shopping a matter of ease and convenience. Eventually the efficiency and innovations of the retail sector pushed out the traditional ‘mom-and-pop’ stores from the market, replacing them with the now well-known chain stores such as Wal-Mart (in the US) and Tesco (in the UK).⁸¹

The retail sector expanded from a domestic to a regional and now global operation. Wal-Mart is the world’s biggest retail outlet with operations under 69 different banners in 27 countries across the world.⁸² Its market share of the global retail sector stands at approximately six per cent.⁸³ The result of such massive growth in the retail sector has meant that the market has become incredibly concentrated as supermarket chains gain market power. Unlike the commodity market, retailers tend to gain their market power by horizontal concentration. This is where a corporation merges its enterprise with other companies to grow its presence in the market.⁸⁴ Often, large retail chains will merge their business with an existing competitor in a new market, using the established supply chain distribution systems as a base from which it can expand its operations. A recent example is the

⁷⁷ Gibbon (n 14 above) 3.

⁷⁸ J Morriset ‘Unfair trade? Empirical evidence in world commodity markets over the past 25 years’ (1997) *World Bank Report*.

⁷⁹ South Centre ‘Rebalancing the supply chain: Buyer power, commodities and competition policy’ (2008) 7.

⁸⁰ Brown & Sander (n 7 above) 2.

⁸¹ Schmidt (n 16 above) 67.

⁸² <http://corporate.walmart.com/our-story/> (accessed 24 September 2012).

⁸³ De Schutter (n 13 above) 2.

⁸⁴ ActionAid (n 8 above) 12.

merger between Wal-Mart and the South African retail giant Massmart. Wal-Mart hopes to use its new stores in South Africa as an entry point to the African market, where Massmart had operated in 12 countries in sub-Saharan Africa.⁸⁵

Concentration of the retail sector has meant incredible buyer power for these retail giants over their suppliers. In a market where suppliers have one of only a handful of buyers for their stock, they are inevitably placed in a weakened bargaining position. This is made even more precarious with the changing nature of people's shopping habits. Today, consumers' loyalties are usually given to a specific retail chain or store that is conveniently located in their residential area.⁸⁶ Retailers have innovated the shopping front so that customers are able to purchase almost all of their house-hold needs from a single outlet. This means that as a supplier, it is very important to maintain a business relationship with the retailer to ensure that the supplier's stock remains on the retail shelf.⁸⁷ It is this relationship that is often abused by retailers and impacts the ability of suppliers to remain in the market as they are laden with higher and higher conditions to keep their stock on the shelves.

The relationships between suppliers and retailers can be described on three levels. Firstly, retailers act as customers for suppliers purchasing their goods to stock their shelves.⁸⁸ A retailer's buyer power here can have a massive impact on the ability of the supplier to get a fair price for goods. In a market that is highly concentrated, retailers have a number of suppliers whose stock can be sold in their stores. Because of this, retailers have high bargaining power to negotiate down the prices paid to their suppliers. The suppliers know that if they do not accept the terms of the sale, there are a number of other suppliers who would happily take their place on the limited shelves in a given retail chain. This threat of 'delisting' a supplier from a retail chain keeps them in check and largely under the thumb of the more powerful retailers in the market.⁸⁹ If a supplier does not accept the given price, the loss of the product to the retailer is of no huge consequence. For the retailer it can be devastating, especially if the retailer is responsible for the majority purchase of the goods. The only way in which suppliers can ensure their space on the supermarket shelf is to produce a 'must-have' product that adds value to a supermarket, without which the retailer risks losing customers to its competitors. There are not many must-have items that cannot be easily switched with another brand, but it is the aim of suppliers to reach this point.⁹⁰ Unfortunately for smallholder farmers whose goods are mostly made up of fresh produce, these items are highly interchangeable and therefore very vulnerable to delisting by a retailer if they do not meet their conditions.

Low prices are, unfortunately, not the only hurdle that keeps smallholders from being preferred suppliers to retailers. As the retail market became more concentrated, the remaining retail giants had to find ways to distinguish themselves from their competitors and carve out a segment of the market to keep afloat. To do so, they usually market themselves to be associated with a particular kind of brand or image that customers can come to expect from a particular store. This may be super-low savings, targeting the lower-income classes, or that the store produces luxury goods for the higher end of the market. In order to

⁸⁵ <http://corporate.walmart.com/our-story/locations/south-africa> (accessed 24 September 2012).

⁸⁶ PW Dobson 'Exploiting buyer power: lessons from the British grocery trade' (2005)72 *Antitrust Law Journal* 535.

⁸⁷ MV Stichele & B Young 'The abuse of supermarket buyer power in the EU food retail sector' (2009) *Agribusiness Accountability Initiative* 15.

⁸⁸ Dobson (n 86 above) 537.

⁸⁹ European Communities (EU Commission) 'Competition in the food supply chain' (2009) Working Document No. {COMM(2009)591} 21.

⁹⁰ Dobson (n 86 above) 535.

maintain this image, retailers often place conditions on the quality of the produce received.⁹¹ For fresh produce this usually means that retailers will only accept products that are uniform in aesthetics, grading and health standards. Increasingly, retailers are placing their own private food standards on the produce they purchase, above those of the state's own health-standards. These requirements are passed on to the producers of the goods. This means that farmers need to have storage facilities to ensure freshness, transportation systems for 'just-in-time' deliveries to the stores, and a hands-on outfit of farm workers to respond to the changing demands of the supermarket.⁹² These are just some of the conditions that are often associated with the provision of fresh produce to retailers. Because retailers need to keep their shelves stocked, they are less inclined to source their goods from smallholders who are generally unable to meet the high standards set by the retailers. The costs of having all these extra food and cosmetic standards are mostly beyond the small-time farmer. As a result, retailers are purchasing the bulk of their goods from larger farming operations that they can rely on to meet their quality and delivery standards.

In addition to these kinds of 'tying-in' contracts (where a producer may only sell his or her product to a single retailer),⁹³ suppliers are kept caged by retailers with other conditions such as: delayed payments for produce, which puts strain on smallholder's ability to keep their businesses afloat and wages paid to workers;⁹⁴ buying less than the original amount agreed to;⁹⁵ threatening to delist farmers from the retail stores;⁹⁶ charging high interest rates for credit advanced;⁹⁷ or changing quality standards for goods without notice.⁹⁸ For smallholders, these conditions may prove too high for them to keep selling their goods to the retailers, and with a concentrated market it often means going out of business as there are no other buyers for their crops.

The second kind of relationship that suppliers have with retailers is that of a competitor.⁹⁹ Modern retailing has started to input 'own-label' goods on the shelves. These are in-house brands that compete with the items supplied by external producers. Again, this places suppliers at a disadvantage since the retailers have carte-blanche on stocking, shelf-allocation and retail pricing, allowing the supermarket a huge advantage over its competitors. These own-labels are used to push down the prices of suppliers and to take more of the market share, further promoting the brand of the retailer.¹⁰⁰ Own-label branding has become increasingly popular in the UK where almost all retailers have their own goods on the shelves. This increases the threat of delisting for suppliers and places even more pressure on them to meet the standards of the retailers.¹⁰¹

The final relationship between producers and retailers is that of retailers-as-suppliers.¹⁰² In a concentrated market, retailers hold their shelf space as an article of trade for purchase by producers. Shelf space is sold through the use of listing fees and allowances for space allocation on the supermarket floor. This is known as category management, and is an important method

⁹¹ Dobson (n 65 above) 17.

⁹² Stichele & Young (n 87 above) 22.

⁹³ EU Commission (n 89 above) 26.

⁹⁴ Brown & Sander (n 7 above) 10.

⁹⁵ J Kirsten 'The impact of market power and dominance of supermarkets on agricultural producers in South Africa' (2009) *National Agricultural Marketing Council* 21.

⁹⁶ Dobson (n 65 above) 18.

⁹⁷ ActionAid (n 8 above) 23.

⁹⁸ Schmidt (n 16 above) 80.

⁹⁹ Dobson (n 86 above) 538.

¹⁰⁰ Stichele & Young (n 87 above) 24.

¹⁰¹ Dobson (n 86 above) 538.

¹⁰² Dobson (n 86 above) 539.

and point-of-sale for time stretched shoppers. Category management is where retailers charge suppliers a fee for stocking their goods in the best showcased space on the shelves.¹⁰³ This is to ensure that the supplier's goods are the first to be seen and easiest to grab for customers doing their shopping. Obviously, the more money a supplier has for allocation fees, the better placed his or her product will be. This creates high competition between suppliers for premium shelf space, and increases their costs on each item sold.¹⁰⁴

These uses of buyer power by retailers may at first glance seem beneficial for customers and, indeed, it is the reason that competition authorities and governments have not been quick to respond to the complaints levelled by farmers against these kinds of practices. However, slowly the long-term effects of buyer power are starting to show their effects on both farmers and customers. More and more farmers are being pushed out of markets, unable to maintain the high costs of supplying retailers with their produce.¹⁰⁵ This impacts the communities who they support, and has had a dramatic effect on the employment levels of countries. For Africa, the delisting of producers often means that the farmers are forced into poverty, along with the workers they used to employ. Wealthier western countries are able to subsidise their farmers, especially those producing export crops. For developing countries, this means that the farmers are forced to try meet the private standards of their retailers, but must also compete with suppliers from foreign countries who have benefitted from the support of their governments.¹⁰⁶

For customers it means that they are no longer benefitting from the best product on the shelves, but only from the supplier who has the ability to afford the costs associated with being the category captain and listing fees. The transfer of risk from retailer to producer reduces competition between suppliers who spend less on innovation and product development, reducing the choice of goods offered to customers. This forecloses the market as the barriers to enter for a new supplier are incredibly high, requiring a huge outlay of capital before a new product can be put on the shelf.¹⁰⁷

These were some of the concerns raised by the UK's Competition Commission during its investigation into the retail market in 2008.¹⁰⁸ The results of the investigation indicated that some of the practices adopted by the retail market were indeed deemed to be against the public interest. Others, however, were allowed on the basis that their efficiency gains outweighed the damage done to the producers because the conditions incentivised both trading partners to increase the size of their businesses.¹⁰⁹ Those practices that were thought to be against the public interest were placed in the industry Code of Practice, which aims at eliminating or at least restricting the practices determined as anticompetitive. This has now been called into question, however, as research has indicated that supermarkets are continuing with their abusive practices. The suppliers are reluctant to make any formal complaint for fear of being delisted by all retailers as a result.¹¹⁰

¹⁰³ EU Commission (n 89 above) 22.

¹⁰⁴ Kirsten (n 95 above) 20.

¹⁰⁵ De Schutter (n 13 above) 2.

¹⁰⁶ Schmidt (n 16 above) 81.

¹⁰⁷ Dobson (n 86 above) 559.

¹⁰⁸ <http://www.competition-commission.org.uk/our-work/directory-of-all-inquiries/groceries-market-investigation-and-remittal/final-report-and-appendices-glossary-inquiry> (accessed 24 September 2012).

¹⁰⁹ Dobson (n 65 above) 24.

¹¹⁰ Dobson (n 86 above) 600.

2.4. Retailers in Africa

While much of these concerns are held by suppliers who sell their produce to western markets, the retail market is starting to expand to cover Africa as well. Since the 1990's the retail sector has grown in sub-Saharan Africa spreading quickly in Southern and Eastern Africa, already flourishing beyond middle-class urban-city markets into smaller towns and poorer areas.¹¹¹ Africa has seen a slight difference in its supermarket revolution trend, with retailers servicing 'supermarkets for the poor' rather than the more luxury retailers of top-end customers, aiming at being mass market merchants.¹¹² This trend is set to continue as Africa grows its economy and urbanises its cities. While most of the supermarkets in Africa (apart from those already established in Southern African countries such as Kenya, South Africa and Zambia) lack sophisticated infrastructure and distribution systems, there are already TNCs eyeing out the African market for growth.¹¹³ South African retail giant Pick 'n Pay has expanded its operations into most of its Southern African neighbours, and with new competition from Wal-Mart through the Massmart merger, it will probably begin expanding its operations into the rest of Africa.¹¹⁴

The growth of the retail market is not, however, the end for all smallholders. If proper regulation and legislative protections are put in place by governments before these retail giants arrive, the smallholder farmers and the communities they support can be protected. It is undeniable that retailers do bring in lower prices and efficient distribution systems that can be of huge benefit to customers, improving a state's obligation to uphold the right to food. They are also important for job creation and foreign investment into a developing state where this is much needed. It is nevertheless important to guard against the abusive practices that come with the entrance of a market leader, and to ensure that the retailers do not abuse their positions of power driving the smallholders from the market. To guarantee that the right to food is developed, governments need to work with TNCs to promote food security, while balancing the rights of their citizens against the economic benefits of new business in Africa.

This is a delicate balance between the rights of the fair economic market, and the socio-economic rights of citizens, specifically those rights to food. As the backbone of African society smallholders need to be protected, but governments must be careful not to choke off foreign investment that can benefit their states. The use of competition law to regulate this power balance may be a means to achieve this goal.

¹¹¹ DD Weatherspoon & T Reardon 'The rise of supermarkets in Africa: Implications for agrifood systems and the rural poor' (2003) 21(3) *Development Policy Review* 334.

¹¹² Weatherspoon & Reardon (n 111 above) 335.

¹¹³ Tollens (n 6 above) 8.

¹¹⁴ Weatherspoon & Reardon (n 111 above) 340.

3. CHAPTER THREE: AN INTRODUCTION TO COMPETITION LAW

3.1. Introduction to competition law

Competition law has developed along with our economies to protect the market place and ensure fair competition between businesses. While the technicalities of each state's competition regimes may differ, the essential purpose of this legislation is to ensure that markets where companies trade are not abused through an illegal use of market power, maintaining a competitive environment that ensures the best possible consumer welfare.¹¹⁵ Competition law is largely a mixture between the rule of law and economics, with these two forces continuously developing and adapting to the changing nature of the world's markets.¹¹⁶

Today most western states have a competition law regime to protect and regulate their markets. This has spilled over into the developing world as domestic industry has grown to emerge on the world market.¹¹⁷ What is now known as traditional competition law, as it was developed in the European Union and the US, aims at controlling or eliminating restrictive agreements among enterprises that seek to abuse their dominance in order to adversely restrain or restrict competitive trade and impact on consumer choice.¹¹⁸ The aim of any ambitious business is to carve out a large portion of the market for itself so that it can increase its profits and drive innovation in its sector. Once it achieves this goal, business will have reached what is called a 'dominant position' in the market.¹¹⁹ This is usually measured by the amount of market share a particular business controls, as well as its ability to control prices, exclude competition and to act independently of its competitors, customers or suppliers – known as market power.¹²⁰ Dominance in a market is not necessarily a negative. Often large businesses are able to achieve economies of scale that reduce the end price charged to consumers, however, it is when this dominance is abused by cutting out competitors or restricting their entrance into the market or growth that competition law needs to step in.¹²¹ Economic theory refers to monopolies as being the ability to hold exclusive possession or control of the supply or trade in a commodity or service.¹²² An example would be a state-owned industry that has no competitor who can impact its position in the market. Similar to this is where a market is known to be oligopolistic. This is where a market in which control over the supply of a commodity is in the hands of a small number of producers and each one can influence prices and affect competitors.¹²³ The global food supply chain has been accused of being oligopolistic, given the small number of TNCs and the proliferation of suppliers.

To ensure that a market remains competitive, authorities will investigate market sectors and businesses that may affect free trade and consumer choice. If a business, or firm as they are generally called in competition law, is found to have transgressed the legislative parameters of competition law, the authorities are usually entitled to impose a heavy fine or penalty that can be

¹¹⁵ Joeke (n 21 above) 19.

¹¹⁶ P Cook 'Competition policy, market power and collusion in developing countries' (2002) *Centre on Regulation and Competition, Institute for Development Policy and Management* 3.

¹¹⁷ M A Utton 'An international perspective on collusive behaviour' in *International Competition Policy: Maintaining Open Markets in the Global Economy* (2008) 23.

¹¹⁸ C Lee 'Model competition laws' in P Cook, R Fabella & C Lee *Competitive Advantage and Competition Policy in Developing Countries* (2007) 31.

¹¹⁹ R Steiner 'Vertical competition, horizontal competition, and market power' (2008) 53(2) *The Antitrust Bulletin* 257.

¹²⁰ Kirsten (n 95 above) 5.

¹²¹ Ganesh (n 54 above) 1210.

¹²² D Lewis 'Beginnings' in *Thieves at the Dinner Table* (2012) 8.

¹²³ M Gal 'The regulation of oligopoly markets' in *Competition Policy for Small Market Economies* (2003) 169.

up to ten per cent of the undertaking's turnover in the previous year, and may impose additional conditions to redress the harm caused by the abuse.¹²⁴

The scope of competition law is as wide and dynamic as the markets it regulates. The specifics of each competition law regime will vary from country to country with each state setting its own technical standards to suit the needs of its economy, however, worldwide competition law functions along similar principles of regulation. It is beyond the scope of this paper to provide a detailed analysis of each of these areas. Rather, focus will be set on providing a basic understanding of the areas of competition law that would be relevant for the protection of the global food supply chain as discussed in the previous chapter.

3.2. The regulation of mergers and acquisitions

One of the major areas of competition law enforcement is the regulation of mergers and acquisitions. Mergers take place when two or more firms combine to form one entity. The task of the competition authorities is to ensure that the impact of the merger on the market will not stifle competition.¹²⁵ This is achieved through the pre-merger notification procedure that merging parties must submit to before the acquisition can be approved. Although this will differ from state to state, usually merger thresholds will make provision for a small, intermediate and a large merger, calculated by looking at the market share and annual turnover of both the acquiring firm and the selling firm. The larger the merger, the more impact it will have on the market and the competition authorities will act accordingly.¹²⁶

Merger analysis looks at whether the combined forces of the firms will result in a substantial lessening or prevention of competition in the market. This is based on a predetermined set of criteria that also analyses whether there will be any efficiency gains or procompetitive benefits to the merger. Thus, competition authorities must balance the negative consequences of the merger on competition with the efficiency gains that may result for consumer welfare.¹²⁷ Where the authorities place their emphasis will depend on the nature of the state's competition policy. Generally, mergers will be prohibited if they would increase the likelihood of a monopoly firm in the market or create unreasonably high barriers to enter the market for new firms. It is the lessening of competition that the authorities will look out for.¹²⁸ As an example, it is unlikely that competition authorities will approve a merger between two dominant supermarket chains in a market. Even though the merger may improve efficiencies and thus give the firm additional market power to lower prices, the effect on competition would be that the two competing firms would no longer be there to fight for their respective share of the market, thus creating a monopoly that would have no external competitor to keep it in check through price wars and innovation. The ultimate effect would be that consumers would risk being held ransom to a monopolist and have reduced choice in products.

In some jurisdictions, particularly among developing nations, competition law includes what is known as a 'public interest' consideration in the merger analysis. This is often criticised as having no place in competition law, which is predominantly an

¹²⁴ Competition Law Narrative 'Introduction' in *United Kingdom's Butterworths Competition Law Service* (2008) 3.

¹²⁵ Lee (n 118 above) 40.

¹²⁶ D Lewis 'Mergers' in *Thieves at the Dinner Table* (2012) 76.

¹²⁷ Lee (n 118 above) 40.

¹²⁸ Lewis (n 126 above) 98.

economic regulation of a market, and the introduction of what are seen as socio-economic rights are often at odds with the free market principles.¹²⁹ Be that as it may, many competition regimes have included these types of considerations in order to protect certain industrial practices or policy areas that are particular to the circumstances of that state. South African competition law, for example, requires competition authorities to view the impact on the merger on employment practices, black economic empowerment (BEE) and economic regions, as well as on South Africa's international competitiveness.¹³⁰ The reason for this inclusion of public interest stemmed from the country's past - where the historically disadvantaged were categorically excluded from the business world, resulting in high unemployment rates and inequalities amongst racial groups.¹³¹ Consequently, the competition authorities are now required to look at any given merger for its potential impact on these public interest grounds and, where appropriate, prohibit the agreement on the grounds that the negative impacts on public interest outweigh the competitive gains.¹³² When appropriate, the competition authorities may allow the merger to proceed as long as the firms comply with conditions imposed to counteract the negative impact on public interest considerations. In the case of *Tiger Brands Ltd, Ashton Canning Company (Pty) Ltd, Newco and Langeberg Foods International (Ashton Canning Case)*¹³³ the competition authorities approved the merger but imposed a condition on the parties for a three year moratorium on any further merger-related retrenchments in order to reduce the amount of job losses in what was a very rural and deprived area of the country.¹³⁴

South Africa is not the only country that has public interest considerations in merger analysis. Germany has a strong tradition of independent antitrust regulation and the minister holds a veto power over any merger that violates public interest considerations.¹³⁵ Canada too has a similar clause in its legislation, which has been used to block an attempted merger in the potash market that would have resulted in Australia's acquisition of Canada's potash company on the basis that the deal did not offer a 'net benefit' to Canada. The US also has public interest considerations that may block a merger on national security grounds. This phrase has been used in other countries with similar regulations, as was the case when France blocked a merger between PepsiCo and Danone, the French yoghurt manufacturer.¹³⁶ Latin American countries such as Chile and Brazil also include public interest considerations into their merger analysis.¹³⁷

While many states have competition regimes which include a public interest clause in merger evaluation, most of these are only applied in the case of cross border acquisitions of domestic firms by foreign-owned firms.¹³⁸ The practice is slightly different in developing countries with competition regimes that are not as well established as their western counterparts. The reasons for this are instructive: firstly, developing countries have a greater role for industrial policy, which provides support for certain historically weakened sectors of society, such as is the case with South Africa's BEE considerations; secondly, developing

¹²⁹ Lewis (n 126 above) 118.

¹³⁰ Section 12A(3) of the South African Competition Act of 1998.

¹³¹ Preamble of the South African Competition Act of 1998.

¹³² G Makhaya, W Mkwanzani & S Roberts 'How should young institutions approach competition enforcement? Reflections on South Africa's experience' (2012) 19(1) *South African Journal of International Affairs* 47.

¹³³ *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) 163.

¹³⁴ Lewis (n 126 above) 129.

¹³⁵ Lewis (n 126 above) 118.

¹³⁶ Lewis (n 126 above) 119.

¹³⁷ Inter-American Development Bank Organisation for Economic Co-Operation and Development (2006) *Competition Law and Policy in Latin America* 83 & 201.

¹³⁸ Lewis (n 126 above) 118.

countries' competition regimes are still building a solid base, and are still working towards achieving public support and credibility in their countries.¹³⁹ It is important for competition authorities to take into account the economic and social needs of the disadvantaged groups in a sector in order for the regime to build credibility and to keep in mind the particular economic needs of the state. This difference highlights the disparity between competition regimes suited for the developed and developing world.

3.3. Abuse of dominance

Apart from merger analysis, competition authorities are tasked with investigating abusive practices within the market. Abusive practices take one of two general forms: horizontal or vertical restrictive practices. Vertical restrictive practices refer to the abuses that occur by firms in a supply chain, for example, between the producer, supplier or manufacturer. Horizontal restrictive practices occur when abusive agreements or practices occur between firms who are competing in the same market, for example, between supermarket chains competing in the same economic sector. The regulation of dominance is what is known as a vertical restrictive practice.¹⁴⁰

Competition regimes will generally have two broad areas of restrictive practices: what is known as a *per se* offence, and a *rule of reason* offence. The difference between the two is that some restrictive practices, such as price-fixing, are immediately deemed to stifle competition in the market. These are called *per se* offences for which there can be no justification on the grounds of pro-competitive gains that out-weigh the harm caused to the market.¹⁴¹ In order to be found guilty, the complainant alleging abuse by a firm need only prove that a *per se* offence has occurred.¹⁴² The rule of reason test, however, places the onus on the firm to show that, on a balance of probabilities, there was no substantial lessening of competition in the market and, even if there was, that the pro-competitive gains of the conduct justified the firm's actions. Examples of this type of practice can be seen where a dominant firm concludes an agreement with a supplier on the basis that the supplier will not stock any of the firm's competitors, the intention being to exclude the competitor from the market.¹⁴³

As was stated above, dominance in a market is not illegal. In fact, if a firm naturally manages to become dominant it indicates that it was able to best all of its competitors to come out on top. This is often very beneficial for consumers who would have reaped the rewards of stiff competition between businesses. However, the danger with dominant firms is that they hold a large share of the market, allowing them to act somewhat independently of other businesses.¹⁴⁴ In a supply chain, a big player will wield immense power over both its suppliers in what is called the downstream market (which is where the producers of food would sit in the food supply chain) and its customers in what is called the upstream market (which is where the food retailers would be). Both suppliers and retailers are beholden to dominant firms who support a large portion of their business due to the

¹³⁹ D Lewis 'The role of public interest in merger evaluation' (2002) *Speech given at the International Competition Network, Merger Working Group, Naples, Italy* available at www.comptrib.co.za (accessed 03 October 2012).

¹⁴⁰ ActionAid (n 8 above) 12.

¹⁴¹ P Sutherland (2003) *Competition Law of South Africa* 43.

¹⁴² Lee (n 118 above) 35.

¹⁴³ Joekees (n 21 above) 24.

¹⁴⁴ Ganesh (n 54 above) 1210.

size of the input stock it purchases from the suppliers and the final product sold to its customers.¹⁴⁵ In order to ensure that the market place remains competitive, additional restrictions are placed on firms who have managed to gain a large share of the market and market power. The notion behind this is to allow for the entrance of other businesses into the sector and ensure that enough competition exists between competitors so that prices are kept low and innovation between businesses ensures consumer choice.¹⁴⁶ Therefore, dominant players are allowed to use their position in the market, so long as they do not unreasonably exclude or exploit that power.

Broadly, exploitative abuses are where a dominant firm uses its power to charge excessive high prices or to refuse to allow a competitor access to a facility which would be essential for its business, such as a shopping centre or a harbour port. These are usually per se abuses.¹⁴⁷ Exclusionary abuses are considered on a rule of reason test, and will include abuses such as requiring or inducing a supplier or customer to not deal with a competitor or selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract.¹⁴⁸ The aim of these abuses is to control the supply chain to the point that it becomes difficult for the dominant firm's competitors to survive in the market – leaving the firm the sole monopolist in the sector.¹⁴⁹

Price discrimination is another element of prohibition under vertical restrictive practices. If competition authorities find that a dominant firm is unfairly discriminating between purchasers or suppliers on the basis of price or services to the extent that it hinders competition in the market, the firm is liable to be found in violation of the law.¹⁵⁰ The justification for such an inclusion is to allow small business enterprises to compete, and to not be unfairly discriminated against on the basis of their size in the market.

3.4. Cartels

Cartels are the types of abusive practices that tend to grab media headlines and boost the legitimacy of competition authorities when they are apprehended. Cartels are what are known as restrictive horizontal practices referred to above.¹⁵¹ These abuses usually occur behind closed doors where competitors will meet to agree on per se abuses, such as price-fixing, dividing markets or suppliers, customers or products and collusive tendering (often called bid-rigging). The aim of these types of agreements is to eliminate competition between the players so that each firm is able to monopolise on the profits which have been agreed to by the competitors.¹⁵²

Information sharing is also a horizontal abuse that can only be justified by competitors if the pro-competitive gains of the conduct can be proven. This would be an example of a concerted practice that falls under the rule of reason test.¹⁵³ Horizontal

¹⁴⁵ Kirsten (n 95 above) 18.

¹⁴⁶ D Lewis 'Abuse of dominance' in *Thieves at the Dinner Table* 152.

¹⁴⁷ Section 8(a) & (b) of the South African Competition Act of 1998.

¹⁴⁸ Section 8(c) & (d) of the South African Competition Act of 1998.

¹⁴⁹ Steiner (n 120 above) 257.

¹⁵⁰ Lewis (n 146 above) 198.

¹⁵¹ ActionAid (n 8 above) 12.

¹⁵² Cook (n 116 above) 16.

¹⁵³ Sutherland (n 141 above) 68.

restrictive practices are dangerous for competition as they muddy the waters of business trade, especially when competitors come together to sit around a table to create agreements that ultimately damages consumer welfare. This is particularly the case when cartels exist in the food sector. When businesses are left with free rein to collude and push prices of food up the profit margins, it is the poor who suffer the consequences of this abuse. Ensuring a free market is critical to the continued transparent low prices that are needed for food availability and accessibility.

3.5. Competition law in Africa

African states have been making strides in their economic sectors over the last few decades. In 2011, a total of 24 African countries had competition regimes, with 15 having passed this legislation in the last ten years.¹⁵⁴ Most of these regimes contain merger review provisions which require firms to notify transactions with competition authorities who will evaluate the impact of the merger on the competitiveness of the market.¹⁵⁵ Local considerations remain important in African competition law regimes, and some African states include public interest clauses that require competition authorities to examine the impact of a potential merger on employment and export objectives.¹⁵⁶ In addition, African competition law regimes are particularly focussed on cartel regulation, with almost all countries providing for penalties against anti-competitive conduct in a horizontal plane. Importantly, the prohibition of price-fixing and allocation of markets is a dominant feature in African competition regulations, which is an important aspect in protecting abusive conduct that violate abuse the right to food.¹⁵⁷

Furthermore, many African states have provisions that prevent an abuse of dominance in a market. Prohibited conduct in a vertical market includes the prevention of price-discrimination, tying agreements and excessive pricing.¹⁵⁸ These are all key provisions that can be used as tools to prevent TNCs from pushing smaller suppliers out of the food supply market. Some African states have gone further to tailor their competition law regimes to protecting the supplier and producer market. Egypt, Botswana, and Mauritius have lower thresholds for establishing the dominance of a firm, with Egypt in particular regulating the conduct of firms against potential buyer power abuses.¹⁵⁹

These positive developments indicate that African states are taking steps to protecting the competitiveness of their economic markets. This having been said, however, there are still many African states that do not have competition regimes or policies due to financial and other resource limitations.¹⁶⁰ While there are a number of states that do have competition laws, not all of these states have competition authorities who are tasked with monitoring and prosecuting the abuse of competition in the market. African competition authorities have also been criticised for not having the necessary expertise to deal with international cartels and complex abuse of dominance cases, which form the basis of the protection against the violation of the right to food.¹⁶¹

¹⁵⁴ Makhaya (n 132 above) 43.

¹⁵⁵ J Lang *et al* 'Competition Law in Africa' (2011) *Bowman Gilfillan* 5.

¹⁵⁶ Malawi, Zambia and South Africa have public interest considerations in their competition regimes.

¹⁵⁷ Lang (n 155 above) 13.

¹⁵⁸ Lang (n 155 above) 17.

¹⁵⁹ Lang (n 155 above) 6; 12; 17.

¹⁶⁰ UN Conference on Trade and Development (UNTAD) 'Trade liberalization, investment and economic integration in African regional economic communities towards the African common market' (2011) UNCTAD/DITC/TNCD/2011/2 31.

¹⁶¹ UNTAD (n 160 above) 32.

Therefore, it seems that Africa is moving towards a progressive implementation of competition law protection, and while many states have sophisticated competition law regimes, there is still further development that needs to occur before the competition laws of African states can be properly adapted to the protection of the right to food.

This chapter has not been a comprehensive analysis of all the facets of competition law, its aim has been to highlight some of the tools in the competition arsenal that are used to regulate the market. The next chapter examines the link between the right to food and competition law, and whether it can effectively be used as a mechanism of protection.

4. CHAPTER FOUR: COMPETITION LAW AND THE RIGHT TO FOOD

4.1. The link between the right to food and competition law

The previous chapters highlighted the importance of the right to food, and the state's obligation to protect this right. Concomitant within the right to food is the requirement on a state to ensure that its populace has both adequate accessibility and availability of food.¹⁶² As most people lack access to food due to economic disempowerment, the responsibility to protect this right requires that states take progressive steps to ensure that non-state parties, such as commodity traders and retailers, do not abuse their position and unreasonably restrict people's ability to access food.¹⁶³ Chapter two set out a number of harmful practices that may result when commodity traders and retailers abuse their position and put pressure on smallholders in the market, hindering their ability to compete within the food sector and violating the right to food as a result.

One method of ensuring protection is for the state to enact laws and regulations that preclude non-state parties from violating this right. Indeed, the Special Representative of the Secretary-General, John Ruggie, indicated that a state should have redress mechanisms that include legislative and regulatory measures to implement the obligation to protect.¹⁶⁴ In relation to the right to food, the UN Special Rapporteur has expanded this notion recommending that states adopt competition law as a mechanism to regulate the food market against abusive conduct on the part of third parties to protect the right to food in particular.

The previous chapter on competition law set out the basic elements of competition law as they would relate to the right to food. This chapter aims to examine the effectiveness of competition law as a mechanism for redress in the protection of people's economic access to food. As the objective of competition law is to regulate the economic market to ensure fair competition and consumer welfare, it has been put forward as being uniquely placed to provide legislative and regulatory protection against abusive practices by commodity traders and retailers that impede the accessibility of the right to food.¹⁶⁵

4.2. The traditional limitations of competition law as a mechanism of protection

A number of competition regimes consider that the sole or even the main purpose of competition law is the maximisation of consumer welfare and to ensure fair competition in the market.¹⁶⁶ In its present form, it is possible to conceive that competition law may be of some use as a mechanism for addressing excessive buyer power.¹⁶⁷ The UK Competition Commission's investigation of certain abusive practices by large supermarket retailers in the UK, for instance, resulted from the realisation that specific actions by dominant buyers were transferring the risk and uncertainty of their contracts onto the producers, the end result being the following harm caused to consumers: reductions in quality or choice on products stocked, higher sale prices,

¹⁶² Niada (n 33 above) 152.

¹⁶³ De Schutter (n 13 above) 3.

¹⁶⁴ Ruggie (n 51 above) 22.

¹⁶⁵ South Centre (n 79 above) 5.

¹⁶⁶ Lee (n 118 above) 31.

¹⁶⁷ De Schutter (n 13 above) 3.

and diminished level of investment and innovation by producers.¹⁶⁸ The Commission realised that the exit of competitors on the producer / supplier market lead to higher prices for consumers and reduced income for producers meant less innovation and differentiation in product supply. The problem with the consumer welfare standard, however, is that it focusses its attention on the demand side of the market – that being the effect on consumers, predominantly in the form of prices. Practices that may be harmful to suppliers or farmers are often deemed acceptable so as long as consumers benefit or where there is a suggestion that some of the advantages gained by the firm are to be passed on to consumers. The consumer welfare standard does not allow for sufficient protection against the potential harms suffered by smallholders, despite the fact that they are the ones most often affected by an excessive concentration in the food sector.¹⁶⁹

The existing law and policy that relates to mergers, vertical restraints and horizontal agreements is still relevant, however, it often lacks in clear practical interpretation guidelines, appropriate jurisdiction and consistency in decisions and treatment. This stems from three factors: firstly, that there is no clear definition or measurement of buyer power, secondly, there is a lack of clear policy guidelines, and finally, there is a marked absence of vested national interests in the more developed nations to address the issue. At present, competition law does not hold a consensus on the economic and legal meaning of buyer power. Although there are a number of definitions that have been presented, no single one has been globally accepted or adopted. Furthermore, there has been no clear consensus on the appropriate threshold for buyer power. Competition authorities seem to be unable to agree on the required market share necessary for retailers to exert significant buyer power.¹⁷⁰ The UK Competition Commission suggests that eight per cent of the relevant market may afford buying power,¹⁷¹ the OECD has indicated 15 per cent,¹⁷² and more recent merger decisions of the European Commission allow for 22 per cent.¹⁷³ The only universal agreement across the regimes seems to be that buyer power may exist well below the usual level of dominance associated with a 40 per cent market share as used in seller power analysis. This inconsistency is problematic in that it results in dissimilar treatment between cases, which prolongs setting much needed precedent to address buyer power abuses.¹⁷⁴

Secondly, mergers and restrictive practices (either in a horizontal or vertical form) are usually addressed on a case-by-case basis. There is, however, a notable absence of specific guidelines or agreement between competition regimes on the appropriate treatment for particular instances of buyer power. Some jurisdictions do not consider buyer power as being abusive unless a clear case of harm to competition can be shown.¹⁷⁵ This can be very difficult to prove as buyer power is usually a progressive problem that affects the sustainability of a market rather than its immediate anti-competitiveness.¹⁷⁶ In addition, buyer power generally affects a number of suppliers over a period of time. A single complaint by a supplier may not be enough to establish a clear case of buyer power abuse. Case-by-case analysis stems from the practice of considering and weighing possible efficiency

¹⁶⁸ P Davis & A Reilly 'The UK Competition Commission's Groceries Market Investigation: Market Power, Market Outcomes and Remedies' (2009) *Paper Presented at the 27th International Association of Agricultural Economists Conference Beijing, China* 4.

¹⁶⁹ De Schutter (n 13 above) 4.

¹⁷⁰ Dobson (n 65 above) 21.

¹⁷¹ Dobson (n 86 above) 535.

¹⁷² OECD 'Buyer power of large scale multiproduct retailers' (1998) *Background paper by the Secretariat, Roundtable on Buying Power*.

¹⁷³ J Lücking 'Retailer power in EC Competition Law' (2000) *Paper Presented to the 27th Annual Conference on International Antitrust Law & Policy, Fordham Corporate Law Institute*.

¹⁷⁴ Dobson (n 65 above) 21.

¹⁷⁵ Dobson (n 65 above) 22.

¹⁷⁶ Kirsten (n 95 above) 8.

gains against anti-competitive effects. While economics has provided clear insights on the situations in which mergers and practices are likely to be pro- or anti-competitive, this unfortunately, has only really been applied to the establishment of guidelines on the diagnosis and treatment of seller power. There has been no similar movement towards developing equivalent guidelines on the treatment of buyer power.¹⁷⁷ For example, the European Commission's Merger Regulation (ECMR) concentrates foremost on output market considerations and seller power, while the EC's Vertical Restraints Guidelines focuses almost solely on vertical restraints rising from seller power, and has no clear precedent offered on buyer-induced abusive practices.¹⁷⁸ The current inadequacy of competition law is reinforced by the lack of agreement towards the economic significance of buyer power. Unlike seller power, where there is reinforced precedent on the situations where its abuse is likely to be found to be anti-competitive and against the public interest, buyer power has not reached a similar legal standard.¹⁷⁹

Thirdly, retailers have traditionally been developed on the national or sub-national (regional or local) level. These developments reflect the national culture and history of the state. As a result, national and local policy will only reflect a problem with buyer power where it has had a negative effect on supplier or producers.¹⁸⁰ As many of the developed nations subsidise their producers, especially in the farming sector – such as the corn and poultry farmers in the US, or where the producers are large-scale enterprises, the effects of buyer power are not as drastic as in those developing states that are unable to support their producers. In states where the emphasis is on consumer benefit, the plight of suppliers is not considered an issue unless it has a direct effect on prices or consumer welfare.¹⁸¹

4.3. Developments in competition law

Despite the above limitations, competition law does still hold use as an effective tool in addressing buyer power and protecting producers and small businesses in the market. Competition law, mostly in developing nations, has been adapted to address issues that are specific to their socio-economic needs, including the protection of small businesses and abusive practices by retailers.

The past decade has seen a number of attempts by legislative, judicial and quasi-judicial bodies across the globe attempt to tackle excessive buyer power in food supply chains.¹⁸² As mentioned above, the UK Competition Commission initiated two inter-linked investigations on the Groceries Market in 2000 and again in 2008. The investigations resulted in findings of 52 practices that were adopted by dominant retailers, 26 of which were concerned with 'practices that have the potential to create uncertainty for suppliers regarding their revenues or costs as a result of the transfer of excessive risks or unexpected costs to suppliers.'¹⁸³ The investigation resulted in a Groceries Supply Code of Practice (GSCOP), which aims to eliminate or at least regulate the practices found to be anticompetitive. The GSCOP required that the four top UK retailers with an annual turnover in excess of £1 billion comply with all of the provisions set out in the recommendations. The Code required that retailers:

¹⁷⁷ South Centre (n 79 above) 17.

¹⁷⁸ Competition Law Narrative (n 124 above) 5.

¹⁷⁹ Dobson (n 65 above) 22.

¹⁸⁰ Dobson (n 65 above) 23.

¹⁸¹ B Vorley *et al* 'Food Inc' (2004) *UK Food Group*.

¹⁸² De Schutter (n 13 above) 4.

¹⁸³ UK Competition Commission 'Groceries Market Investigation' (2008) 166.

refrain from retrospective changes to terms and conditions of supply; keep written records of all agreements with suppliers on terms and conditions of supply; have a dispute resolution mechanism with binding arbitration and compensation/liquidated damages; include procedures for retailers de-listing (or significantly reducing volumes) from a supplier; provide to the body monitoring and enforcing the GSCOP any information as it may reasonably require in pursuit of its functions, those functions to include the investigation of issues not the subject of the dispute, including complaints from primary producers.¹⁸⁴ Initially, the GSCOP was not particularly effective as suppliers still feared delisting should they raise complaints against their retailers. As a result, the UK Government approved plans for an ombudsman tasked with receiving complaints from suppliers. This process will be confidential in nature in order to prevent retributive action by retailers, allowing the abusive practices of dominant retailers to be investigated and corrected. The ombudsman is yet to be established, but once operational would provide an effective mechanism to redress abusive practices by dominant supermarkets.¹⁸⁵

Apart from this UK investigation, fair trade and competition authorities in South Korea, Taiwan and Thailand have also brought complaints against buyers abusing their market power.¹⁸⁶ From 1999 to 2001, the Korean Fair Trade Commission (KFTC) prosecuted Wal-Mart and Carrefour (both global retailers had substantial presences in the Korean market) for, amongst others, the unfair refusal to receive stock from suppliers, the unfair return of products causing profit loss to suppliers, the practice of unfair price reductions for requested stock, and an unfair passing-on of marketing fees to producers. The KFTC imposed fines on both Carrefour-Korea and Wal-Mart-Korea and also ordered both retailers to publish their abusive conduct publicly in advertisements in local newspapers.¹⁸⁷

The KFTC has a competition regime that is specifically tailored to addressing abuses of buyer power. When a retailer holds a dominant market position, KFTC regulates it more severely than its other retailers in the same sector. The criteria for the prohibition against abuse of market dominating positions are as follows:

- Unreasonably fix, maintain, or alter the price of a good or service fees.
- Unreasonably control the sale of goods or rendering of services.
- Unreasonably interfere with the business activities of other enterprises.
- Unreasonably hinder the entry of new competitors.
- Otherwise threaten to substantially restrain competition or harm the interests of consumers.¹⁸⁸

If any of the above abusive practices are found to have been committed, the KFTC can order the offending retailer to lower the price, prohibit the said activity, publish the violation of the law publicly, or take any other necessary corrective measures according to the prevailing legislation. The KFTC has found that ordering the public announcement of a violation of the Act has proven a very effective method to prevent retailers from abusing their market positions, due to the damage caused to the

¹⁸⁴ Davis & Reilly (n 168 above) 22.

¹⁸⁵ Dobson (n 86 above) 560.

¹⁸⁶ De Schutter (n 13 above) 4.

¹⁸⁷ SK Jhong 'Anti-competitive practices at the distribution sector in developing countries'(2003) *APEC Training Program on Competition Policy* 2.

¹⁸⁸ Jhong (n 187 above) 6.

public image and trust previously held.¹⁸⁹ These types of regulations are aimed at preventing the abusive practices illustrated in chapter two above, and act as an effective means of protecting producers against such conduct.

In Taiwan, competition authorities have identified a number of unfair retailer practices including: improperly charging suppliers additional fees (such as for category management); requiring suppliers to offer the most favourable prices in contracts to dominant firms; the unreasonable removal of products from their display isles (in favour of private or own store labels); ensuring responsibility for a supply delay and shortage is reasonably negotiated; and that the amount of penalties charged for shortages of supply is reasonable.¹⁹⁰ The Taiwanese Commission has published a set of guidelines for charging additional fees by retailers. The guidelines ensure that fees comply with the following requirements: they are not directly related to promoting the sale of the goods; they relate to contributions for equipment, research and development, or promotional activities, and this must have some tangible benefit that the supplier may reasonably expect to obtain from paying such contributions; the fees charged must be for the sole purpose of achieving target figures or other accounting measures; there are no unreasonable reductions in the purchase price demanded by the retailer for already-delivered goods; and fees are not charged in a manner that is contrary to normal trading principles or commercial ethics.¹⁹¹ Controlling the fees charged to suppliers is an effectual method of preventing an abuse of market power by dominant firms.

The Malaysian government has also responded to the growing dominance of foreign-owned retailers in the grocery market in Malaysia. The high number of foreign hypermarkets resulted many of the smaller locally-owned grocery stores and supermarkets being unable to compete with the new entrants, and many neighbourhood stores were forced to close down.¹⁹² In response, the government imposed policy guidelines that required: hypermarkets to include local product display requirements, conduct a preliminary 'sundry shop' impact survey before the entrance of a new hypermarket would be approved, implemented a restriction on operating hours - including a no 24-hour business policy, and set limits on the area where hypermarkets could be established. The guidelines resulted in a reduction in the flow of foreign direct investment into the hypermarket sector, but they did allow for the restructuring of retail trade and enhanced local up-stream competition in the hypermarket sector, increasing productivity levels for the country. The differentiation in the treatment of foreign firms was a decision that the Malaysia government felt was necessary to protect local business, but which did not come without damage to its reputation with foreign investment, including doubts shadowed on the country's WTO-GATTs commitment. Notwithstanding these effects, the Malaysian government's adoption of the guidelines indicates a move towards adopting industrial policy regulation, and although not directly part of a competition law regime, holds similar protective competitive market effects.¹⁹³

A recent example of a government intervening in competition-related arrangements can be found in the South African merger proceedings between Wal-Mart and local retailer giant Massmart. Riding on the public interest merger provisions in the South African Competition Act, the South African Government, in the form of the Minister for Economic Development, and a number of trade unions raised concerns regarding the procurement practices of Wal-Mart, fearing that following the merger

¹⁸⁹ Jhong (n 187 above) 7.

¹⁹⁰ G Lin 'Taiwan's competition law enforcement experience and cases in retailing business' (2003) *APEC Training Program on Competition Policy* 3.

¹⁹¹ Lin (n 190 above) 4.

¹⁹² Lee (n 118 above) 201.

¹⁹³ Lee (n 118 above) 202.

local producers would be replaced by cheaper foreign (most likely Chinese) imports.¹⁹⁴ Wal-Mart's reputation for an anti-union stance and poor employment practices was also raised as a reason to block the merger as the unions feared mass job losses following the acquisition of Massmart. This case was interesting to follow, not in the least because it was common cause among the competition authorities that there was no competition-related harm to the market as a result of the merger. In essence, the only obstacle to the merger being approved unconditionally was the public interest issues raised by the merger's opponents. In this regard, the Minister initially pushed for a procurement 'quota' that would require the retailer to purchase a certain number of goods from local sources.¹⁹⁵ This was firmly rejected by both the merging parties and the Competition Commission, which stated that such a condition would

contradict the major objective of competition regulation – to secure lower prices – the procurement conditions would likely affect the merged entity's ability to provide customers with the lowest possible prices. Competition authorities do not lightly impose conditions that contradict their primary mandate, unless there is overwhelming justification for doing so.¹⁹⁶

The case moved on for approval by the Competition Tribunal, who resolved the dispute by imposing what it termed a procompetitive 'investment remedy', ordering the merging parties to set up a fund of R100 million to assist in developing the competitiveness of its domestic suppliers. The Tribunal stressed that it may only consider public interest issues from the narrow scope that has been set out in section 12A(3) of the Act, and only issues that are related to the merger can be addressed:

[T]he Act recognises only a limited set of public interest concerns as specified in the Act. Second, the public interest concerns must be merger specific...unless the merger is the cause of the public interest concerns, we have no remit to do anything about them. Our job in merger control is not to make the world a better place, only to prevent it becoming worse as a result of a transaction.¹⁹⁷

The Competition Appeal Court, on the other hand, placed a much greater emphasis on the role the public interest analysis. Davis JA noted that:

[V]iewed holistically, there is merit in the argument that the Act should be read in terms of an economic perspective that extends beyond a standard consumer welfare approach. By virtue of an embrace of the goals of a free market and effective competition together with an incorporation of uniquely South African elements, including the need to address our exclusionary past, which need is reflected expressly in the preamble together with s2 of the Act, the legislature imposed ambitious goals upon the competition authorities created in terms of the Act.¹⁹⁸

The inherent difficulty in balancing the benefits to competition on the one hand with the negative effects on the broader public interest on the other was noted by the Court by saying:

¹⁹⁴ Lewis (n 126 above) 133.

¹⁹⁵ *Walmart Stores Inc / Massmart Holdings Ltd* [2011] 1 CPLR 145 (CT) 170.

¹⁹⁶ Lewis (n 126 above) 135.

¹⁹⁷ [2011] 1 CPLR 145 (CT) 170.

¹⁹⁸ [2011] 110/CAC/Jul11 60.

[A]n evaluation of whether societal welfare, as envisaged in the Act increases in circumstances where the price of a product reduces to realise a benefit for consumers but takes place at the expense of job losses is extremely difficult to determine.¹⁹⁹

It is precisely this difficulty that was noted by David Lewis in his recent book, and in a subsequent interview held with him on the subject. Lewis stressed the intrinsic battle that ensues from trying to ensure fair competition and consumer welfare together with the socio-economic needs of a society.²⁰⁰ He was unconvinced that a competition authority was the best placed entity to adopt a socio-economic evaluation, given the unpredictable effects such decisions could have on the economic market. Lewis's concerns reflect a common argument put forward in competition circles: that the traditional purpose of competition law is to promote consumer welfare in the form of lower prices and increased choice of products. This free market principle does not always sit easily with the requirements of socio-economic rights, such as the right to food, which may require that certain limitations are placed on the economic market to ensure that the smaller players in the sector are able to compete. Lewis cautioned against insertion of industrial policy aims into merger evaluations without clear guidelines for the process. He argued that businesses would not voluntarily destroy the downstream market to the point that it becomes ineffective, as this would also affect their own profitability. However, he conceded that it is possible for a government to have an over-arching socio-economic policy that promotes the protection of specific rights, but that such policy must be transparent and the public should be aware that it may mean the consumer ends up paying higher prices for goods and services, which may be justified in certain circumstances.²⁰¹

4.4. The effectiveness of competition law as a mechanism of protection

This is essentially the crux of the issue when analysing competition law as a mechanism for protection of the right to food. There will always be a need to balance the competing rights of a fair and open economic business market that allows the competition between firms to push out the weaker competitors and provide consumer benefits, and the socio-economic needs of a state to protect and support smaller businesses and producers to ensure that their rights to food and an adequate living are sustained. It is important to keep in mind, however, that the right to adequate food in international law is not simply concerned with ensuring that consumers are able to access food a low cost, but it also requires the protection of those individuals who depend on agriculture for their livelihood, and to safeguard their income to allow them to purchase food.²⁰²

As with all human rights, the right to food requires that states protect their citizen's rights against violation. Part of that protection involves implementing effective legal mechanisms to regulate the conduct of third parties to ensure that they do not use their positions of power in a manner that could abuse the rights of a state's citizens. In looking at whether competition law can act as this legal protection, three issues need to be made clear. Firstly, if an act by a commodity trader or retailer potentially constrains the right to food, competition authorities can examine this act to determine whether or not it is anticompetitive – that is, whether it is found to be an abuse of dominance or is an anticompetitive merger. If the authorities find that the act was in violation of competition law, then the matter is a straightforward issue of enforcement. In this first scenario, the implementation

¹⁹⁹ [2011] 110/CAC/Jul11 74.

²⁰⁰ Lewis (n 126 above) 118.

²⁰¹ D Lewis (2012) *Interview on 19 July 2012*.

²⁰² De Schutter (n 13 above) 5.

of competition law will remedy the breach of the right to food. Here, competition law is an effective method of protection for the right to food as it regulates the market against abusive practices by dominant firms which could potentially hinder the ability of smallholders to sustain their livelihood.

However, a second scenario may arise where the above act is found, after investigation by the competition authorities not to be anticompetitive. In this case the issue is that the competition authorities are not empowered to address problem, even if the right to food is constrained. In this instance, competition law is not an effective means of protecting the right to food. This second scenario is exactly what has been happening in competition regimes where the consumer benefit is placed in a position of higher importance over supplier competitiveness. In this case, if the competition authorities find that there is no damage to consumer welfare, then the act will not be seen as anticompetitive, regardless of whether producers are pushed out of the market and the right to food violated.

This brings the discussion to the third issue. This paper has examined the argument that competition law should be considered when interpreting the provisions of the right to food, but problems may crop up when the traditional purpose of competition law (being the efficiency objective) and the right to food clash. This last scenario is the reason why traditional competition authorities have been slow to adapt their competition regimes to address the growing concerns of buyer power. The inclusion of socio-economic rights into competition law often comes at the cost of a free economic market. If states were to regulate the market to the extent that TNCs in the commodity and retail market are not able to use buyer power to push the prices paid to producers to an unreasonably low price, then the right to food would be effectively protected. The corollary of this choice, however, is that consumers may end up having to pay more for their goods as the retailers and commodity traders are not obtaining their input goods for the same low price. It is this problem that many states have had to grapple with. It is this balance between human rights (in the form of the right to food) and economic freedom (in the form of pure unrestricted competition between businesses) needs to be balanced.

However, there are positive developments taking place that suggest competition authorities are starting to take note of the harm caused to producers. The competition law regimes in Taiwan, South Korea, and Malaysia are good examples of steps taken by those governments to protect their local businesses and producers from the abusive practices of large retailers. These developments in competition law show a move towards ensuring a more sustainable economic market, where dominance is kept in check by the state. Admittedly, this might come at the expense of direct foreign investment as was the case in Malaysia, however, it is possible for a government to prevent dominant firms from abusing their market power without having to apply such a heavy hand against foreign firms. Concentration of market power may be regulated through the public interest analysis of merger evaluations, as the recent Massmart / Wal-Mart merger in South Africa has proven, and dominant firms may be regulated by ensuring that buyer power is kept in check through regulations and guidelines specifically tailored to that effect.

Although not necessarily in line with the traditional scope of competition law, developing countries may adapt the provisions of competition law and merge them with their industrial policies, together providing an effective remedy for the protection of the right to food. It is the argument of this paper that competition law should be used to regulate the economic market against

abusive practices of buyer power, therein protecting the ability of smallholders to remain in the food supply chain and protecting the food security of the state. The right to food is particularly crucial for African states, where a huge portion of the populace depends on farming, especially in the rural areas, and where there are few alternatives for income generating activities should farming no longer be a sustainable option. Ensuring that people are able to economically access is an obligation that states are required progressively implement. Competition law allows for the regulation of the food market, and prevents abusive practices by dominant firms which potentially infringe the right of adequate food for many farmers, and for this reason should be adopted as a mechanism of protection.

5. CONCLUSION AND RECOMMENDATIONS

In order for states to ensure that the right to food is not abused by dominant firms, they need to firstly tackle the problems caused by the increasing concentration of businesses on a vertical and horizontal level in both the commodity and retailer markets, and secondly to ensure that companies occupying a dominant position in the market do not abuse their power, frustrating the ability of smaller producers to maintain their position in the food sector. In countries where the ability to access food is a daily struggle, competition control of buyer power must be elevated to more than a nuance or an exception to the general rule: it should be a fundamental aspect of a competition regime.²⁰³ The use of competition law as a mechanism for protection was presented as a potential solution to the progressive realisation of the right to food by the UN Special Rapporteur on the Right to Food for developing countries, and is particularly relevant for African states.²⁰⁴

This dissertation has researched the negative effects of buyer power in both the commodity market and in the retail sector, and set out how these abusive practices infringe on the right to food for many people who rely on agriculture for their livelihood. In unpacking the obligations of states under the right to food, it is clear that states are required to protect their citizens from abusive practices of third parties that threaten their ability to access adequate food. Competition law offers states a protection mechanism by regulating the food supply chain from abuse.²⁰⁵

The size and market power of commodity traders and retailers within the food supply chain means that it can be challenging to pressure them to change their conduct. There are few suppliers or producers of sufficient size and bargaining strength who would be able to compel commodity traders or retailers against abusive behaviour. Because commodity traders do not usually sell directly to the public in the same manner that retailers or even food processors do, the impact of public opinion on commodity traders is extremely low. There is, therefore, less pressure on them to change the way they operate their business negotiations with smallholders.²⁰⁶ Most large commodity traders are registered in western countries, as well as a growing number of trans-national retailers. Although theoretically some African states could extend their competition jurisdiction to impose competition law against US or EU companies, they would inevitably face practical difficulties in doing so.

First, it is challenging and expensive for host states to investigate and prosecute these foreign based firms, especially when this will have to be done on another jurisdiction. Secondly, even where a successful action can be taken, the enforcement of a judgment may be incredibly difficult for smaller host states to enforce, particularly against wealthy and global commodity traders or food processors. Moreover, because African states need to attract the investment and capital of commodity traders and food processors to boost their economy, there may be a lack of political will to investigate these firms out of fear that the prosecution might result in a loss of investment and capital. Additionally, smallholders are often too scared to bring complaints to the authorities, concerns that other competitors might shun or delist them serves as a deterrence factor.²⁰⁷

²⁰³ De Schutter (n 13 above) 5.

²⁰⁴ De Schutter (n 5 above).

²⁰⁵ Niada (n 33 above) 153.

²⁰⁶ Bloom (n 9 above) 26.

²⁰⁷ Bloom (n 9 above) 29.

Competition regimes should recognise that there is little direct consumer harm arising from excessive buyer concentration and what harm does exist may be difficult to prove without substantial evidence of competitive harm. However, this indeterminacy should not be the reason for a state to fail in its obligation to protect its smallholders and suppliers from such conduct.²⁰⁸ A more developed conception of the consumer welfare is what needed to address the effects of buyer power – one that takes cognisance of consumers’ interests in sustainability of the supplier market – rather than concentrating purely upon short-term price changes. It is recommended that African states adopt competition legislation that recognises the importance of keeping smallholders and suppliers in the food market, by incorporating aspects of competition law that protect the right to food against increased concentration and abuse of dominance.²⁰⁹

5.1. Recommended competition elements to be adopted by African States

First, African states should ensure that their competition legislation addresses the public interest and buyer power, rather than concentrating primarily on seller power. Competition authorities must be empowered to investigate and if necessary prosecute TNCs that apply anti-competitive behaviour, even where the anti-competitive conduct leads to lower prices for consumers. In addressing the abuse of buyer power, competition authorities must be aware of both horizontal and vertical concentration of firms in the food supply chain. It will be important that the threshold for buyer power is not set too high, as it is easier for a competitor to exert buyer power at a lower market share levels than for a seller. Although it might be difficult to enforce, African states should still extend their competition jurisdiction to prosecute anti-competitive action taken by national TNCs against foreign sellers, and at the same time make sure that the reach of their competition jurisdiction extends to opportunistic foreign buyers who may attempt to use their greater buyer power against local firms. Without trans-national jurisdiction, TNCs are uninhibited to practice abusive behaviour, cutting into smallholder’s income.²¹⁰

Governments should use South Africa’s competition laws as an example of legislation that efficiently protects the right to food. Like South Africa, governments must allow for the possibility of private suits, to provide for the possibility that the government might end an investigation for political reasons (arising out of foreign investment pressure).²¹¹ In addition, because the costs of litigation are generally outside of the capabilities of most smallholders, authorities should allow for wide rights of appearance in competition complaints, and it is recommended that farmers who wish to bring civil suits are adequately protected against retributive action. ActionAid has also recommended that civil society actors be empowered to bring claims on behalf of farmers who have suffered direct harm.²¹²

Secondly, African states should ensure that they include a public interest analysis into their merger regulatory proceedings. The public interest test should also incorporate an analysis of the concentration in the market, and how such concentration would affect the smallholders and producers ability to survive in the food supply chain.²¹³ This should be weighed against the efficiency gains offered by the merger, and if necessary competition law authorities should look at instituting remedies or

²⁰⁸ De Schutter (n 13 above) 4.

²⁰⁹ Bloom (n 9 above) 30.

²¹⁰ Bloom (n 9 above) 29.

²¹¹ Section 65 of the South African Competition Act.

²¹² ActionAid (n 8 above) 20.

²¹³ South Centre (n 79 above) 7.

conditions attached to the merger that mitigate its anti-competitive effects, such as the investment remedy instituted on the Wal-Mart/ Massmart merger in South Africa.²¹⁴

Thirdly, it is recommended that governments provide smallholders with the ability to access information regarding the average market prices paid to producers. The ability to receive a reasonable price for producers is crucial for their sustainability, and it is extremely helpful for them to know the prevailing market price of their crop.²¹⁵ In Bangladesh, for example, the government set up a telephone in a rural village that enabled farmers to call the nearest market town and discover their crop prices, which assisted in strengthening both towns' bargaining position. Better information on what other producers are receiving for their crops places farmers in a better position to negotiate higher prices for themselves. Although information sharing is usually seen as a form of cartel conduct, this relaxation of information sharing rules for the benefit of agriculture would protect the right to food for producers by ensuring that smallholders have adequate income to feed themselves and their families.²¹⁶

Finally, by identifying dominant buyer firms and imposing the following special legal duties upon them, states would be able to address the abusive practices that threaten the right to food. The Special Rapporteur on the Right to Food has suggested that the following duties be incorporated into the competition law regimes of developing countries. Many of these are similar to the protection mechanisms used in the competition law regimes of Malaysia and Taiwan, which could also be drawn on for inspiration. Accordingly, states should ensure that TNCs are not able to:²¹⁷

- a) directly or indirectly impose unfair purchasing or selling prices or other unfair trading conditions;
- b) limit production, markets or technical development to the prejudice of suppliers;
- c) apply dissimilar conditions to equivalent transactions with other trading parties, resulting in those parties being placed at a competitive disadvantage; and
- d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

If these abusive practices are regulated through competition law, smallholders will have a better chance of remaining in the market and competing in the food supply chain. This will ensure that foreign investment still flows into a state, but that the market power of such firms does not mean that local firms are immediately pushed out of the food sector, making food security a permanent problem. Although regulating the food market is just one step that needs to be taken in the fight against hunger, it will allow a state to regulate the economic accessibility of food for its poor, and hopefully improve the lives of those who depend on agriculture for their livelihood.

WORD COUNT: 19999

²¹⁴ Lewis (n 126 above) 134.

²¹⁵ Bloom (n 9 above) 62.

²¹⁶ S Murphy 'Concentrated market power and agriculture' (2006) *Heinrich Boll Foundation* 37.

²¹⁷ De Schutter (n 13 above) 4.

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